REPORTS

OF

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS.

CONTAINING THE CASES DECIDED AT THE NOVEMBER TERM, 1885, AND NOT REPORTED IN VOLUME 46,

AND

THE CASES DECIDED AT THE MAY TERM, 1886, AND PART OF THOSE DECIDED AT THE NOVEMBER TERM, 1886.

BY B. D. TURNER, REPORTER.

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ERRATA.

On page 74, fifth line from top, read "officer" for "omser."

On page 210, next to last line in Syllabus, read "purchasers" for "creditors."

On page 256, tenth line from top, read "Tiedman" for "Fielderman."

On page 281, fifteenth line from bottom, read "owner" for "owners."

On page 374, first line, third paragraph of Syllabus, read "conduct" for "consent."

OFFICERS

OF THE

SUPREME COURT OF 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

B. D. TURNER ..... REPORTER

*LUKE E. BARBER ..... CLERK

†WILLIAM P. CAMPBELL ..... CLERK

*Died, June 13, 1886.
†Appointed by the Court, June 19, 1886.

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	W. N. DYER.
4th Circuit	J. F. WILSON.
5th Circuit	J. G. WALLACE.
6th Circuit	ROBT. 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.

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CASES ARGUED AND DETERMINED

—IN THE—

SUPREME COURT

—OF THE—

STATE OF ARKANSAS

—AT THE—

NOVEMBER TERM, 1885.

CONTINUED FROM VOL. 46.

GREER v. TURNER.

47	17
57	275
47	17
76	537
47	17
80	387

1. APPROPRIATION OF PAYMENTS.

Where a debtor owes to the same creditor two distinct debts, one of which is secured by a mortgage of real estate, and the other by a mortgage upon a growing crop, the proceeds of the mortgaged crop that come to the creditor's hands must be applied to that debt which the crop mortgage was made to secure. No specific appropriation is required at the time such proceeds are received in order to fix the rights of the parties. By the terms of the mortgage they have agreed in advance how the proceeds shall be disposed of; and neither party can, without the consent of the other, change the appropriation.

2. BILL OF REVIEW: *Essentials of.*

A bill of review for newly discovered testimony should set forth the names of the witnesses, and the substance of what each witness will swear; also, how and when the plaintiff first came to a knowledge of the new matters alleged; the means, if any, that were used to keep him in ignorance, and that he was not negligent in failing to discover and produce the evidence at the former trial.

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

Clark & Williams and *W. R. Coody* for Appellant.

The history of this litigation appears in *31 Ark., 429*, and *36 Id., 17*. In the latter case this court reversed the decree and remanded the cause, with directions to refer it to a master to ascertain the value of the thirty-three bales of cotton, and whether Watkins owed Greer & Baucum any other debt except the Dougan debt; if so, what amount, and whether the parties or either of them had made any appropriation of the proceeds.

The question of Watkins' indebtedness to Greer & Baucum was not determined below, and this court is left to determine it for itself. The complaint alleges and the answer admits the receipt of the thirty-three bales, and the question is: Was there any debt due by Watkins to Greer & Baucum, and was this cotton appropriated by the parties to its payment?

Watkins himself admits that he was indebted to Greer & Baucum more than the cotton was worth, and his mortgage proves it in the most solemn manner. The mortgage itself was an appropriation to pay that particular debt, and neither party could change it without the consent of the other. The appropriation being complete, Greer & Baucum need not have made the application by actual credit at time of delivery, but might do so at any time before final settlement. *38 Ark., 196*. The law forced its appropriation to the mortgage debt, and would compel such appropriation if refused. *2 Jones on Mort., secs. 905–6–7–8–9–10.*

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

1. The decree is manifestly erroneous, because it is wholly based on a claim not made in the complaint. It was not rendered on either of the two items for which this suit was brought,

the allowance for taxes, repairs, etc., and the forty-one bales of the crop of 1874, but for the value of the thirty-three bales of cotton of the crop of 1873, which was not alluded to in the bill of review. *95 U. S., 283; 4 Saevy, 382.*

2. The demurrer to the complaint should have been sustained. A bill of review is only a petition for a new trial in chancery, and should set out the names of the witnesses and the facts to be proved; due diligence; that the facts newly discovered have come to his knowledge since the trial; that the evidence is not cumulative. *2 Ark., 33; Ib., 133; Ib., 346; 11 Id., 671; 17 Id., 100; 2 Wall., 94; Story Eq. Pl., sec. 414; 6 B. Mon., 340; 5 Lea, 170; 5 Id., 283; 1 Heisk., 754; Hand., 346, 455; 3 How. (Miss.), 293; 15 Ohio, 318; 2 Tenn. Chy., 705; 58 Ind., 418; 3 Johns. Chy., 126; 26 Ark., 603; etc., etc.*

J. W. House and *J. M. Moore* for Appellee.

Even if the bill be purely and only a bill of review, as contended by counsel, want of leave to file it appearing on its face is not cause for demurrer. There is no such cause of demurrer in our practice, and the objection can be made only by motion to strike the bill from the files. *Webster v. Diamond, 36 Ark., 539.*

The second, third and fourth assignments, want of diligence in discovering Greer's frauds, failure to file affidavit of witnesses in the newly discovered evidence, and that the evidence was cumulative, must also fall for the same reason, even if there were any merit in them. They are all only necessary in order to obtain leave to file the bill. *Story Eq. Pl., secs. 412, 413, 414; Adams Eq., 770, 771.*

And if the failure to show leave to file the bill can be availed of only by motion, *a fortiori* must the grounds for the leave fall within the same rule.

But if want of diligence be cause for demurrer in any case, what diligence could be claimed of the appellee in this case? The bill charges and the demurrer admits that the plaintiff had no knowledge, information, suspicion or belief that Greer had been paid the repairs and taxes which had been allowed to him in the decree, or that he had received and not credited to Watkins the proceeds of the crop of 1874, until after the affirmance of the decree by this court. And to require a party to use diligence in discovering facts of which he never heard and never conceived or suspected to exist, would be absurd. *Reed v. Harvey, 23 Ark., 44; Davis v. Tileston, 6 How. (U. S.), 114; Gardner v. Bowling, 12 Gill & John., 365; U. S. v. Samperyac, et al., Hemp., 118; 2 Pomeroy Eq. Jur., sec. 917 and note 3.*

In *United States v. Samperyac*, on page 131 the court says: "In the case of a bill of review for new matter recently discovered, no laches or neglect can, we think, be properly imputed to the party filing the bill."

"It is allowed only on the ground of his ignorance of the existence of the new matter before the decree."

In the case at bar the answer and demurrer not only admit the plaintiff's ignorance of the new matter, but the demurrer admits also the charge in the bill that the allowance was obtained by the fraud of Greer.

Counsel in their demurrer, and also in their argument on the facts, assimilate the new bill to a motion for a new trial, and insist that it is founded on cumulative evidence and therefore cannot be sustained.

Now it is manifest that the bill seeks no new trial of any issue that was ever in the case, and neither offered nor was supported by cumulative evidence. In the supplemental case the plaintiff had sued Greer & Baucum for the rents and profits of the lands. They, in effect, set off the taxes and repairs against the claim for rents. No replication or proof that they

had been repaid by Watkins was made to this claim, for the repayment, as is admitted by the demurrer and the answer, was unknown and never suspected by the plaintiff; and so the fact of repayment was never put in issue, nor a single word of testimony adduced on it. How then can this be a bill for new trial of a fact never in issue before, to be sustained by cumulative evidence of a fact to which no evidence was ever before adduced?

To the contrary, the bill seeks to make the issue which, from the plaintiff's admitted ignorance of the fact and the fraudulent concealment of it by Greer, he had not made before, and to prove it by evidence that, it is admitted, he never heard of until after the affirmance of the decree by this court.

The objection that the bill does not show that that part of the decree sought to be corrected was final, is untrue in fact. It does show it beyond doubt or cavil.

So far we have treated the bill as the counsel have, as a bill of review; but though called a bill of review, it is not so in the sense the counsel have regarded it—not so for the purpose of obtaining a rehearing on any fact ever before in issue; but it is an original bill in the nature of a bill of review, to impeach the allowance to Greer in the former decree for fraud, and needs no leave to file, and is not subject to either motion to dismiss, or demurrer, for any of the causes assigned by counsel. *Webster v. Diamond, supra; Story Eq. Pl., sec. 426; 2 Danl. Ch. Pl. & Pr., 1584; Mit. & Tyler Pl. & Pr., 190; Adams Eq., 775.*

This is a much stronger case than *Webster v. Diamond, supra,* for in that the parties had some suspicion and belief of the fraud before the decree, but in this there was none.

SMITH, J. In the original cause between these parties, reported in *31 Ark., 429,* under the style of *Turner v. Watkins, et al.,* it was determined that Turner, by virtue of his redemption as a judgment creditor from the purchaser at execution

sale, had become the owner of the equity of redemption in the Searcy Landing plantation, on Little Red river, subject to a debt secured thereon by deed of trust in favor of one Mrs. Dougan and afterwards assigned to Greer & Baucum; and that upon the payment of said debt, of which a tender had been previously made, Turner's title should be quieted; but that he was not entitled to the rents for the year 1873.

On the return of the mandate to the circuit court, Turner filed a supplemental bill, charging that, towards the end of 1873, Greer & Baucum had obtained possession and control of the lands, and had for several years taken the rents and profits, and had, moreover, received from Watkins a large amount of cotton and other produce which was applicable to the Dougan debt, and which if so applied would, with the aid of the annual rents, overpay that incumbrance. The prayer was, that, as mortgagees in possession, they might be held to an account.

In their answer to this bill Greer & Baucum admitted the receipt of thirty-three bales of cotton of the crop of 1873, but claimed to have appropriated the proceeds to another debt which Watkins owed them for advances and plantation supplies. The circuit court found that there was no other debt besides the Dougan debt to which the cotton might be lawfully appropriated. But as this finding was made before the reference to a master, who was directed to take and state an account between the parties, and as Greer & Baucum were thus cut off from proving their debt and the appropriation of the cotton to its payment, this court reversed the decree and remanded the case, with directions to refer it again to a master to ascertain and report the value of the cotton and whether or not Watkins then owed Greer & Baucum any other debt except the Dougan debt, and if so to what amount, and whether the parties, or either of them, had made any appropriation of the proceeds. Allowances were also made to the extent of $1473.31 to Greer & Baucum for taxes, repairs and improvements, to be deducted out of the rents. And other specific directions were given for

restating the account, leaving open nothing except so much of these thirty-three bales, less the taxes for 1872 and 1873, as Greer & Baucum might not rightfully have appropriated to some other debt. For a more particular statement of the matters and things involved in the supplemental suit and of the results arrived at, see *Greer v. Turner, 36 Ark., 17.*

Upon the remanding of the cause Turner filed a bill of review. It alleged that in 1869 Watkins had executed a deed of trust on the lands in controversy, conveying them to a trustee for the purpose of securing a debt due to Sallie E. Dougan. Plaintiff afterwards recovered a judgment against Watkins, under which he had the lands sold, buying them in himself, and getting a deed from the sheriff. In the meantime Mrs. Dougan had assigned the debt secured by the deed of trust, and Greer & Baucum had become the owners thereof. The trustee was about to sell, when the plaintiff tendered the amount due on the debt secured by the trust deed. Plaintiff then filed a bill in the court below, asking for an injunction to prevent the sale. On a final hearing in that suit the bill was dismissed, on the ground that after the making of the deed of trust Watkins had no such interest in the lands as was subject to execution; but that decree was reversed in this court. After that the plaintiff filed a supplemental bill in that cause, in which he charged that Greer & Baucum, claiming under the deed of trust, had had possession of the land for many years, during which they had received a large amount of cotton from Watkins, and were liable for rents of the lands, all of which should be credited on the debt secured by the trust deed. Greer & Baucum answered the supplemental bill, admitting that they had received thirty-three bales of cotton in 1873, but saying that they had applied their proceeds to the payment of other debts due them from Watkins; claiming also certain sums that they had paid for repairs, taxes and improvements. On a final hearing the court decreed to the plaintiff the sum of $2520.25. Both parties appealed, and the decree below was

reversed as to some of the matters in controversy; but it was affirmed as to the allowances made to the defendant. After stating these matters of inducement, the bill proceeds to show grounds for the review of so much of the former decree as was affirmed by this court. The bill asserts, on information and belief, that the charge for taxes, repairs and improvements had been settled by Watkins; that after Greer & Baucum took possession of the lands, they received from Watkins forty-one bales of cotton, of the value of $3000, which they had sold, and of which Greer had received the proceeds. This was in the fall and winter of 1874. The bill stated also, that these proceeds have never been applied to the Dougan debt, or to any other debt due from Watkins; that Watkins had paid off the entire debts due to Greer & Baucum, and to Greer, and that the latter had never accounted for the proceeds of the forty-one bales of cotton. Plaintiff had no knowledge, information or belief that Greer & Baucum had received and had not accounted for the forty-one bales; he had never heard that they had the cotton or its proceeds, and he had no knowledge, suspicion, or belief, that the items for repairs, taxes and cotton press had been charged to and wholly paid by Watkins until the final decree had been rendered in the supreme court affirming the allowances claimed by Greer: though Greer knew at the time of claiming them that they had been settled by Watkins. Prayer that the decree as to said allowances be reviewed, and that they be set aside; that an account be taken of said cotton, and of the payments made by Watkins, which should be credited on the Dougan debt; that the proceeds of the cotton, and all other produce and money delivered or paid by Watkins be credited on said debt; and for all other proper relief.

A demurrer was filed to the complaint, and was overruled.

Greer, in his answer to the bill of review, denies that the sums allowed in this court for taxes, repairs, etc., had been

previously paid by Watkins. He admits that Greer & Baucum received from Watkins forty-one bales of cotton, of the crop of 1874, but says that the proceeds were applied to the payment of debts due from Watkins to them, leaving a balance due them, after deducting the credit, of more than $6000—as shown by a final settlement between them, and evidenced by a memorandum in writing. He denies plaintiff's ignorance of the fact that Greer & Baucum had received Watkins' entire cotton crop for 1874; and denies that the plaintiff is in possession of any additional information on this or any other subject connected with the litigation, since the rendition of the decree which it is sought to re-open and re-investigate. He further alleges that he tendered to the plaintiff, on the 17th day of August, 1882, $1552, in full discharge of the decree rendered by this court, and upon its refusal he deposited the money in bank, with notice to the plaintiff, where it still remains, and he offers to pay the same into court. This answer was filed August 6, 1883.

After the court had decided that the allegations of the bill were sufficient to maintain a review upon, the two suits were properly treated by the court and by the parties and their counsel as one; the parties being the same, and the issues very similar. To prevent confusion, a formal order of consolidation should have been entered. *Mansf. Dig., sec. 5018.* The mandate of this court in the supplemental suit, and the bill of review, with the issues joined therein and the testimony in both cases, were submitted to the circuit court as one and the same case. The court disallowed the claim of the plaintiff as to the taxes and repairs, but found that Greer & Baucum, during the winter of 1874–5, had received from Watkins forty-one bales of cotton, the proceeds of which were never applied to the payment of any debt due from Watkins to them, or either of them. It therefore rendered an interlocutory decree against them for the cotton, and referred it to a master to ascertain the value thereof, and also the matters that still remained open

and unsettled in the supplemental suit. The master's report showed that the Dougan debt was nearly extinguished by the application of the proceeds of the thirty-three bales of cotton and rents of 1874; and that by the rents of 1875, 1876 and 1877, with interest computed thereon from the time they were received to the date of filing his report, the debt had been over-paid by the sum of $4454,04. Both parties alleged exceptions, Greer & Baucum insisting that the master had erroneously charged them with the thirty-three bales of cotton, and had failed to report the debt due by Watkins to them at the time the cotton was received; and Turner insisting that the cotton was undervalued. The circuit court overruled all exceptions and decreed in accordance with the findings of the master. And both parties have appealed.

The master and the court below having lost sight of the principal thing for which the supplemental cause was sent back to them, viz: the ascertainment of the existence and extent of any indebtedness which Watkins might have owed Greer & Baucum when the crop of 1873 was delivered, we are left to determine these facts for ourselves. But there can be no substantial controversy on this subject. Greer & Baucum were merchants, trading at Searcy, in 1873. Watkins was cultivating the Searcy Landing place, and drawing his plantation supplies from them. Watkins owed them about $2000 on this account, before any of the cotton was received. The master has found the value of the cotton, after deducting the taxes for 1872 and 1873, as directed by this court, to be less than $2000.

1. Appropriation of payments.

Then as to the actual appropriation: The account books of the firm have been destroyed by fire; and only three witnesses are produced who were in a situation to know anything of the transaction. Of these, Greer has always said that the appropriation was made to the supply debt. He was the bookkeeper, and kept up his dealings with Watkins after the disso-

lution of the firm, and was most likely to know and remember the circumstance. Moreover, it was the plain interest of the firm to make this application, for the Dougan debt was amply secured by the lands. Baucum also thinks that the cotton was applied to the supply debt, though, testifying at a long distance of time and his connection with the firm having been shortly afterwards severed, he will not undertake to swear that he has seen the entry of credit on the books. Such would have been the natural course of business and such was the habit of the firm. Watkins cannot say of his own knowledge whether or not the credit was placed on his supply account, but he evidently believes that it was not.

But in this matter we are not left to depend on the uncertain and fallible memory of witnesses, deposing to transactions which have almost faded from their minds. On the 4th of November, 1873, Watkins executed to Greer & Baucum a mortgage upon this identical crop of 1873. This instrument recites that Watkins is indebted to Greer & Baucum in a sum estimated at $2000; that Turner, claiming to stand to him in the relation of a landlord, has attached his crop for rents, and that in order for him to retain possession it was necessary to give bond; and it conveys to Greer & Baucum the whole of that crop, including eleven bales which had been already ginned and stored in the warehouse of Greer & Baucum, and it binds Watkins to deliver at their warehouse the residue of said cotton crop to secure the payment of his indebtedness to them and also to indemnify them as sureties upon his retention bond in the attachment proceedings. Watkins says that he delivered these thirty-three bales under that mortgage. The attachment suit was afterwards defeated.

Now, here was a specific appropriation, setting apart and designation by act of the parties. It was not necessary for Greer & Baucum to proclaim from the house-tops, as each bale of cotton was sold in the market, that they applied the pro-

ceeds to Watkins' mortgage for supplies, nor to do any other act in order to fix their rights. But the law would compel their application to the purposes to which the parties had destined them by their solemn agreement, and neither party could have changed the appropriation without the consent of the other.

Upon the bill of review the decree was against the plaintiff as to the allowances for taxes and repairs; but as he failed to except to the action of the master in charging Greer & Baucum with the net rents alone, after the deduction of these allowances, we are not called upon to scrutinize this part of the decree very closely. However, we desire to decide the case upon the merits. Let it be remembered that it is Turner who alleges that these items had been previously charged to and settled by Watkins. The burden is accordingly upon him to show it. Now his sole witness upon this point is Watkins, who thinks that he paid the taxes for 1872 and 1873, or that, if Greer & Baucum paid the same he refunded the money. But he admits his mistake in supposing that the taxes of the subsequent years were charged to him. He had once labored under a contrary impression. But an examination of his books and accounts had revealed the error. No taxes for those years appeared to have been charged up to him.

Then the double charge for the taxes of 1872 and 1873 is totally immaterial so far as Turner is concerned. We mean to say that it cannot possibly affect Turner whether Watkins, or Greer & Baucum, paid those taxes; nor whether if paid by the latter they have been twice repaid—once by Watkins and again by allowance of this court. For what is Turner's interest in the premises? Plainly this, and no more—that those taxes should be paid by those who were enjoying the current rents and profits, so that they might not become a charge upon his lands. But this is effectually provided for by the decree, which directs that they be paid out of the products of the farm in 1873—the thirty-three bales of cotton—a fund upon which he

has no claim. So it is difficult to see how Turner could have been injured by any dealings between Greer & Baucum and Watkins in regard to the taxes of 1874 and subsequent years, even if the facts had been as he alleged, which as we have seen they were not. Turner was then the owner and we have given him the rents for those years. It was his duty to pay the taxes and that duty the decree enforced by awarding him the net rents, after the taxes were deducted. He cannot complain that he has been required to pay the taxes upon his own lands. If Greer has been twice paid that is a matter between him and Watkins. Certainly Turner has only paid once.

The master took no testimony and made no report as to the value of the forty-one bales of cotton of the crop of 1874; nor did the court make any final decree against Greer & Baucum for its value. This item seems to have dropped out of the account by some sort of mutual understanding. Perhaps the claim to have the proceeds of this lot of cotton applied to the Dougan debt, in exoneration of the plaintiff's lands, was abandoned as untenable; the proof showing that Watkins was largely indebted to Greer & Baucum for advances and supplies during the year 1874. But in truth the bill of review should have been dismissed upon demurrer. Such a bill lies only for two causes—error apparent on the face of the decree, without regard to the evidence upon which it was rendered; and newly discovered testimony.

As no error of law was alleged, the object of the bill must have been to obtain a review of the decision upon a matter of fact, on new evidence which has come to light since the decree, and which could not possibly be had or used at the time when the decree passed. *Evans v. Parrott, 26 Ark., 600.*

Now the bill does not aver that any such evidence has been discovered. And certainly none has been produced of such a controlling and decisive character as to change the result upon a new hearing. But the new matter must be so stated in the

bill that the court may, upon demurrer, determine its character, and not be left to judge of its sufficiency upon consideration of the additional testimony, taken in connection with the evidence in the original cause. Some of the cases go to the extent of holding that the new evidence should be in writing, such as a release or a receipt. But undoubtedly, if it is oral evidence, the names of the witnesses should be stated, and what each one will swear; just as in an application for a new trial in an action at law, when it is based on this ground. The bill should also show how and when the plaintiff first came to a knowledge of the matters alleged, and the means that were used, if any, to keep him in ignorance, and that he has not been guilty of negligence in failing to discover and produce it at the former trial. No fact was alleged that the plaintiff might not have ascertained before by inquiry of Watkins, one of the defendants to the suit. The very same matters were in issue, or might have been proved at the former trial. The allowances for taxes and repairs were in fact contested; and the receipt and application of the forty-one bales of cotton might have been investigated under the averment in the supplemental bill that "Greer & Baucum had received a large amount of cotton and other produce from said Watkins which should be credited upon said mortgage debts," (meaning the debts secured by the Dougan trust deed.) Consequently, if the newly discovered facts were of any consequence to the plaintiff, he had shown no sort of diligence in the preparation of the former case for hearing.

The decree of the White circuit court is reversed; the bill of review is dismissed at the cost of the plaintiff; and a judgment will be entered here against Greer alone for $1790.93, the excess of the rents he has received over and above the Dougan debt, according to the account herewith stated. This includes interest down to date on the overpayments. There is no proof that Greer made the tender of $1552 on the 17th of August, 1882. The effect of such tender, if it had been proved, would

be to stop interest thereafter. Consequently the only tender is that by his answer of August 6, 1883, and the amount was too small by reason of the interest which had in the meantime accrued.

All costs, after the filing of the mandate in the circuit court, including the master's fee, must be taxed to Turner, all prior thereto to Greer.

G. B. GREER, IN ACCOUNT WITH B. D. TURNER.

To net rents, 1874	$1,229 32
To net rents, 1875	1,204 00
To net rents, 1876	1,544 53
	$3,977 85
CR., By Dougan debt	3,536 00
Dec. 31, 1876, Balance due	$ 441 85
Interest to February 20, 1886, at 6 per cent, 9 years, 1 month, 19 days	232 96
Rent warehouse and ferry for 1877	750 00
Interest to February 20, 1886, at 6 per cent, 8 years, 1 month, 19 days	366 12
	$1,790 93

SANNONER V. JACOBSON & CO., AND OTHER CASES AGAINST THE SAME APPELLEES.

47 31
57 545

47 31
58 451
58 527

47 31
60 449

47 31
62 179

47 31
63 168

47 31
65 469

47 31
f70 426

47 31
e74 181

47 31
f78 69

47 31
90 245

1. ATTACHMENTS: *Intervention by second attacher.*

A junior attaching creditor may intervene in a prior attachment suit, and there contest his rights with the plaintiff in that suit; but he can not be let in to defend the suit and dispute the grounds of the attachment in lieu of the defendant, nor to defeat the attachment for mere errors or irregularities in the proceedings; but only for imperfections which are unamendable and render the proceedings void.

2. SAME: *Complaint and affidavit.*

There can be no attachment without a complaint; and properly the affidavit for attachment should be distinct from the complaint, but both may be included in one paper; and if only the affidavit be filed it will be sufficient for both, if it contains all the essentials of both.

3. PLEADING: *Complaint omitting prayer for judgment.*

The omission from the complaint, of a prayer for judgment is not a fatal defect.

4. ATTACHMENT: *The affidavit on belief.*

An affidavit for an attachment must be positive. If made upon belief only, the attachment may be quashed. But it is amendable and not void, and therefore is not assailable by an intervenor in the action.

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

U. M. & G. B. Rose and *E. B. Henry* for Appellants.

The first question that strikes us in reading the transcript in this case is, by what right were the appellees, H. Aronson, Menken Bros., Berry, Jack & Co., and Hill, Fontaine & Co., allowed to intervene, and take advantage of informalities in the proceedings of the appellant? They were only subsequently attaching creditors. They had no equities superior to those of the appellant. They had no rights which were entitled to protection in preference to his. Their claims were no more meritorious; and if they are allowed to defeat his priority, it must be upon plain grounds.

Nothing is better settled than that one attaching creditor can not take advantage of formal defects in the proceedings of another.

Mr. Drake says: "As before remarked, whatever irregularities may exist in the proceedings of an attaching creditor, it is a well settled rule that other attaching creditors cannot make themselves parties to those proceedings for the purpose of defeating them on that account. Nor can a subsequently attaching creditor take advantage of any waiver made by the attaching defendant which causes no substantial injustice to such creditor." *Drake on Attachments, 5 ed., sec. 273.*

Mr. Kneeland says: "While it is true that subsequent attachment creditors can not take advantage of mere irregular-

ities existing in the practice of the senior attachment creditor, they may question all jurisdictional defects therein, or the *bona fides* of the levy, or the validity of the claim forming the cause of action under which the same issued." *Kneeland on Attachment, sec. 504.*

Mr. Waples says: "As a general rule, one attaching creditor can not intervene in the suit of another to defeat it for irregularities in the proceedings." *Waples on Attachment, p. 477.* See also *3 McCord, 201, 345; 2 Bailey, S. C., 209; 9 Missouri, 397; 5 Pick., 303; 13 Barb., 412.*

"Under the Code the sufficiency of the affidavit on which an attachment issued is no longer a jurisdictional question. Hence, an attachment will not be set aside on motion, upon the ground that the affidavits upon which the same were issued did not set forth facts sufficient to give the officer jurisdiction. It is now under the Code a mere question of regularity in issuing process, in the progress of an action, which none but a party to the action, injuriously affected by it, can take advantage of." *13 Barb., 412; 46 Barb., 43; 9 La. An., 8; 18 Cal., 152; 12 Ohio St., 158; 6 Nebraska, 163; 49 Ala., 575; 87 N. C., 103; 17 S. C., 116; Ib., 120; 15 Nevada, 215; 16 Nev., 388.*

These cases establish the principle beyond all question; and though it must be conceded that the affidavit in this case is insufficient, as being upon belief, it is perfectly settled that the intervenors were not entitled to profit thereby. Even if the objection had been taken by the defendant, the attachment ought not to have been quashed, but leave should have been given to amend the affidavit. *Rogers v. Cooper, 33 Ark., 406; Nolan v. Royston, 36 Id., 561; Tilton v. Cofield, 93 U. S., 163; Allen v. Clayton, 11 Fed. Rep., 73.*

The attachment and the summons were in one writ: but that was entirely proper, and has received the approval of this court. *Weil v. Kittay, 40 Ark., 529; Rice v. Dale, 45 Ark., 35.*

Under the common law, the question of the sufficiency of the affidavit for attachment was jurisdictional; and when, for any reason, it was set aside, the entire action fell with it. *Edmonson v. Carnall, 17 Ark., 284; Hellman v. Fowler, 24 Id., 235; McDonald v. Smith, Id., 614.* But as was decided in the New York case above referred to, and in *Holliday v. Cohen, 34 Ark., 712,* the attachment proceedings upon the adoption of the Code ceased to be of jurisdictional importance, and were relegated to the position of an ancillary remedy, defects in which were in no way fatal to the prosecution of the action.

The question is therefore simply reduced to this: Did the plaintiff have a suit in court in which a valid judgment could have been rendered? If he had, then the judgment in favor of the intervenors was erroneous, for they had no right to interfere. Let us then proceed to consider this question.

It is well settled that the affidavit and the complaint may be combined in one document.

"The requirement of an affidavit to be filed in the clerk's office before an attachment can issue, is sufficiently met by the filing of a petition, sworn to, and containing the allegations required to be made in an affidavit. The petition supplies the place of, and dispenses with, a separate affidavit." *Drake on Attachment, sec. 90 a.*

"A sworn petition may embrace both the character of a petition and of an affidavit." *Waples on Attachment, p. 81.*

This being true, we have to inquire whether the paper filed at the institution of this suit, and upon which the summons was issued, was a sufficient statement of facts to be regarded as a complaint in the action. As is clearly shown by the numerous authorities cited above, the complaint does not have to be perfectly regular. Junior attachment creditors cannot take advantage of mere informalities. If there is on file anything that can serve as the foundation of an action, however inartificial it may

be, it is enough as to them. They can complain only when they are injured by the substance of the transaction. If there is anything that can be amended into a good complaint, it is sufficient. The *omission of a prayer for judgment* is not fatal. *Mansf. Dig., secs. 5080, 5081, 5083; 27 Ark., 148; 15 Id., 555; Pom. Rem., sec. 580; 1 Estes Pl. & Pr., 252; Newm. Pl. & Pr., 664; 10 Cal., 193; 58 Ind., 575; 20 How. Pr., 191; 50 Ind., 447.*

A complaint showing merits, however inartificially drawn, should never be peremptorily dismissed, but leave should be given to amend. *27 Ark., 225; 30 Id., 771.*

Cohn & Cohn and *Carroll Armstrong* for Appellees.

1. Have we a right to intervene?

"Any person may . . . . before the payment to the plaintiff of the proceeds thereof, or of any attached debt, present his complaint, disputing the validity of the attachment, [and] an interest in or lien on it under any other attachment," etc. *Mansf. Dig., sec. 356.*

Whatever disputes may originally have existed, in the absence of legislation, or adequate legislation, as to the right of an attaching creditor to intervene at law, either because he had no lien until his attachment was served, or because law courts did not take cognizance of interventions, or because the proper proceeding was in chancery, it is now settled by the provisions of some of the Codes, and of the Code of this state, that a junior attaching creditor (there is no apparent occasion for a senior one doing so) may intervene in the proceeding of the senior creditor, and dispute the validity of the attachment.

Nor does the provision contain anything to indicate that the junior attaching creditor must have a judgment; it implies the contrary, for as the attacking attaching creditor is the junior one, and as the senior creditor is more apt to obtain a judgment

and distribution before the junior, it must be that the junior's right to attack must precede the judgment on the senior's attachment, as that judgment settles the question of validity. See *Speyer v. Ihmels, 20 Cal., 281.* Moreover, if the junior creditor must wait until he gets a judgment, it would be very easy for a senior creditor and a debtor to render the beneficial provisions mentioned abortive. In this very cause, the senior creditors, with the debtor's consent, endeavored to get a distribution before the junior creditors could do anything, on the first day of the term; though that fact does not appear. See *The Mary Anne, 1 Ware, 104; Waples Att., 475; Cooper v. Reynolds, 10 Wall., 308.*

That a judgment is not necessary, is not only clear from what has been said, but is equally indicated by the authorities cited herein, in which that seems to be regarded wholly immaterial, upon the hypothesis, no doubt, that if a senior attachment was warranted that of the junior was likewise warranted. See *Speyer v. Ihmels, 20 Cal., 280; Swift v. Crocker, 21 Pick., 241; Baird v. Williams, 19 Ib., 381; Carter v. Gregory, 8 Ib., 164; Peirce v. Partridge, 3 Met. (Mass.), 44; Bamberger v. Halberg, 78 Ky., 377; Cohn v. Hager, 30 Ark., 25; Young v. King, 33 Ib., 745; Fletcher v. Menkin, 37 Ib., 206, 215; Busch v. Hagenrich, 10 Neb., 415; Plow Co. v. Merois, 10 Ib., 317, 320; Short v. Stutsman, 81 Ind., 115, seq.; Hayman v. McBurney, 66 Ala., 511, 512, seq.* See also *Mansf. Dig., sec. 1310.*

But it is said that we have no right to object to defects that are mere irregularities, and it is said here mere irregularities are noted, and illustrations are attempted. Generally the question has been considered without reference to authorization, under some rule of practice created by a court, upon a theory not always consistently adhered to. It is doubtless true that mere irregularities are not objectionable, but substantial defects certainly are, as to a defendant, and more so as to an attaching creditor. Contrast *Kinney v. Heald, 17 Ark., 397,* with *Hellman*

v. Fowler, 24 Ib., 235. And see *Jacobs v. Hogan, 85 N. Y., 243; Steuben v. Alberger, 78 N. Y., 252; Ferguson v. Gilbert, 17 S. C., 26; Smith v. Goettinger, 3 Kelley (Ga.) 140; Swift v. Crocker, infra; Baird v. Williams, infra; Carter v. Gregory, infra.*

What is done by an intervention now is simply to give that creditor the right to attached goods who has complied with the law, there not being sufficient for all. See *2 Disney, 505.* That he does not occupy the same position as the defendant is manifest, when we reflect that a defendant is often estopped when a creditor would not be. *Tuffts v. Manlove, 14 Cal., 51.*

The defects complained of were collusion, fictitious claim, no complaint, no affidavit, and alteration of affidavit and order after service, and we asked that we be preferred in the distribution of the fund on this account. The court held there was no complaint or affidavit, not necessarily because of matters now on the face of the record; as already said, it might have been swayed thereto, and doubtless was, by the other points made which were not abandoned. Upon the whole it held that there was no complaint nor such an affidavit as is contemplated by law. Unsoundness or insufficiency of the reasons assigned by the court below for its decision is not ground of reversal. *McClung v. Silliman, 6 Wheat., p. 603; U. S. v. Buford, 3 Pet., pp. 31, 32; Silsby v. Foote, 14 How., 219.*

There being no complaint, and the affidavit being made on belief only, the attachment was void as to appellee. Review authorities cited by appellant, and cite *Drake Att., ch. 11; Waples Att., p. 70, 77, etc.; 110 U. S., 287; 8 Pick., 165; Drake Att., secs. 276, 282, 284, 287; Waples Att., p. 70–7–8; 85 N. Y., 244; 78 N. Y., 252; 3 Metc. (Mass.) 44; 2 Pick., 241; 19 Id., 381; 35 Ohio St., 661; 17 S. C., 26; 21 Cal., 280; 3 Kelley (Ga.) 140; 78 Ky., 377.*

That there was no affidavit in attachment is plain. *24 Ark., 235; 17 Ohio St., 648; 23 Id., 192; Waples Att., 93.*

Appellant cannot amend here at our expense. He did not ask to do so below. *Mansf. Dig., sec. 1310.* Nor can he do so as against our rights. *Drake, sec. 113; Waples, pp. 105, 107, 491, 492; 2 Duv., 288; 15 Wis., 61; 2 Disney (Ohio) 505.*

The federal courts have taken a liberal stand, but that is under a process of amendment peculiar to them. *22 Fed. Rep., 61.*

COCKRILL, C. J. These cases are submitted together. It is conceded they are alike, and that the decision of one will control all. The appeals grew out of contests between attaching creditors of a common debtor, for priority of attachment liens. J. Jacobson & Co. were indebted to each of the appellants, and, acting through the same attorney, these creditors severally sued out attachments and caused them to be levied simultaneously upon the property of Jacobson & Co.

The proceedings in each case being similar to those in Sannoner's action, it will be sufficient to consider his case alone. The only attempt at a complaint or affidavit filed by him is the following:

"IN PERRY CIRCUIT COURT.

"J. H. SANNONER, Plaintiff,

v. *Affidavit for Attachment.*

"J. JACOBSON and D. HERSTEIN, Partners under the firm name and style of Jacobson & Herstein and J. Jacobson & Co.

"The plaintiff, J. H. Sannoner, states and avers that the defendants, J. Jacobson and D. Herstein, are indebted to him for money advanced to them to carry on their business; that said claim is just, and plaintiff believes he ought to recover thereon the sum of two thousand five hundred and twenty-eight and 12-100th dollars; that the defendants, J. Jacobson and D. Herstein, have sold and disposed of their property and are selling and disposing of their property, with the fraudulent

intent to cheat, hinder and delay their creditors; and affiant therefore prays an attachment against their property.

"HENRY, *for Plaintiff.*

"Eugene B. Henry avers that the plaintiff, J. H. Sannoner, is now absent from Perry county; that he is the attorney of said J. H. Sannoner, and he verily believes the facts set forth in the foregoing affidavit to be true. EUGENE B. HENRY.

"Sworn to before me, this 31st day of December, 1884.

"J. A. MCBATH, Clerk."

An attachment bond, in regular form, was filed, and thereupon an order of attachment and summons in one writ was issued. The defendants were personally served with process, and their stock of merchandise was seized and held by the sheriff under the writs. Then upon the application of Sannoner and his co-attachers, an order was made for the sale of the attached property. Before there was any attempt to distribute the proceeds of sale, H. Aronson intervened, and filed a complaint setting up that he had an attachment against the defendants, subsequent to that of the plaintiff, and levied upon the same property, and asked that the plaintiff's attachment be discharged, because: 1. No complaint had been filed before the issue of the attachment. 2. No proper affidavit for attachment had been filed. 3. Plaintiff's attachment had been issued upon fictitious claims and in collusion with the defendants, with the intent of defeating the intervenor's claim. Similar interventions were made by Berry, Jack & Co., and Menken Bros.

No attempt appears to have been made to sustain the last ground alleged in the complaint, but the court found from an inspection of the record, as the judgment entry recites, that no complaint having been filed, nor a sufficient affidavit made, before the order of attachment issued, the plaintiff had no action pending; and his attachment was accordingly discharged, and the fund arising from the sale was ordered to be distributed among the second attachers. The court also refused to enter-

tain a motion for judgment *in personam* against the defendants, upon the theory that the plaintiff had no standing in court and was entitled to no relief, and the proceeding was dismissed. From this judgment an appeal was prayed.

1. Intervening by second attacher.

The effort of the subsequent attaching creditors to contest the validity of the appellant's attachments is based upon the following provisions of the statute:

"Any person may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, ... present his complaint, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property, or an interest in or a lien on it under any other attachment or otherwise, and setting forth the facts on which such claim is founded, and his claim shall be investigated." *Sec. 356, Mansf. Dig.*

"The court may hear the proof, or may order a reference to a commissioner, or may impanel a jury to inquire into the facts. If it is found that the claimant has a title to, or a lien on, or any interest in, such property, the court shall make such order as may be necessary to protect his rights. The costs of this proceeding shall be paid by either party, at the discretion of the court." *Ib., Sec. 358.*

The mode of procedure to be pursued by one claiming a lien or interest which does not give the right of possession is not definitely pointed out by the statute. One who claims title to attached property is permitted to intervene in the first attachment suit and there contest his rights with the plaintiff in that proceeding. *Mansf. Dig., sec. 390 et seq.; Neal v. Newland, 4 Ark., 459; Hershy v. Clarksville Ins. Co., 15 Ark., 128; Bloom v. McGehee, 38 Ib., 329.* As no distinction is made in the matter of procedure, in the provisions quoted, whether the claimant asserts title to the attached property, or only an interest by way of a subsequent attachment lien, the right of the second attacher to intervene and become a party to the first

proceeding, follows. The intervening suit is a separate and distinct one, however, and the issues are made between the plaintiffs in the two attachment suits without regard to the common defendant. *Cases supra.* It is nevertheless a proceeding in the cause in which the disputed attachment is made, and follows it when transferred to this court by appeal from the final judgment in the case, just as the action of the court on the motion of the defendant to dissolve an attachment does. *Holliday v. Cohen, 34 Ark., 718; Baird v. Williams, 19 Pick., 381.*

The object of letting the second attacher into the suit of the first is declared, in *Section 358, supra,* to be to enable him to procure "such order as may be necessary to protect his rights." No new right is conferred upon him by the statute, but only a privilege granted of availing himself of the new and expeditious *remedy* provided for the protection of whatever right he may have acquired by suing out his attachment. It cannot with propriety be contended that the intervenor is let in for the purpose of defending the suit and disputing the grounds of attachment in lieu of the defendant, although that might be an efficacious method of invalidating the attachment. That would involve the practice in manifold difficulties, and even in legal absurdities, without any nearer approach to substantial justice. Such a practice prevailed at an early day in Massachusetts under a statute expressly conferring upon the intervenor the right to defend for the defendant, whether the latter desired it or not, but it was abolished a long time ago, after condemnation by the courts in severe terms. *Baird v. Williams, 19 Pick., supra.* The intention to entail like evils upon our practice cannot be found in any of the provisions of the statute, and it would require a clearly expressed intention to induce us to conclude that such was the legislative design.

An examination of the authorities shows that it is an almost universal rule where the statutes permit a second attacher to

intervene in the suit of the first, to confine the scope of his inquiry to such matters as might be inquired into in a collateral attack upon the attachment proceedings in the same or a different court. The intervenor is treated as a stranger to the attachment proceeding, as much so as though he had gone into a court of equity to attack the proceeding upon some established equitable principle. *Darby v. Shannon, 19 S. C., 531.*

It is only a matter of convenience that he is let into the suit of the first attacher. As Mr. Freeman appropriately says: "Every litigant, if an adult, is presumed to understand his own interests and to be fully competent to protect them in the courts. He has the right to waive all irregularities in proceedings by which he is affected, and is entitled to exclusively decide upon the propriety of such waiver. To allow disinterested third persons to interpose in his behalf and to undertake the management of his business, according to their judgment, would create intolerable confusion and annoyance and produce no desirable result." *Freeman on Judgments, sec. 91.*

Following this general principle, the authorities, with common consent, assert that one attaching creditor, unless specially authorized by statute, cannot intervene in the suit of another to defeat it for irregularities in the proceedings against the attaching debtor. *Drake on Att., secs. 262, 273, et seq.; Waples on Att., pp. 486–7, and cases cited.*

But the decisions are by no means harmonious in drawing the distinction between imperfections which are irregularities or errors in procedure only, and those which render the proceedings void. The former, though erroneous and capable of avoiding the process in a proper proceeding for that purpose, may be cured by the liberality of the statute of amendments, and so by relation the proceedings may be made whole from the first. The latter render the proceedings, even after judgment, open to attack by any one whose interest is injuriously affected.

If we continue to treat the intervening attacher as a stranger to the first attacher's suit, except for the purpose of facilitating the adjudication of his rights, and treat his attack upon the proceedings as collateral, we avoid some of the difficulties that the courts have found in this class of cases.

Guided by this general rule, our inquiry is directed to the defects in the proceedings in the cases at bar.

2. Complaint and affidavit.

The complaint has so important a relation to the ancillary proceeding by attachment, that the latter cannot exist without it or its equivalent. Properly, the affidavit for attachment should be distinct from the complaint. The statute contemplates it, and, as the issues in the main suit and upon the attachment may be determined in separate trials, orderly proceeding and good pleading demand it. But if either the affidavit or the complaint contains all the essentials of both, to refuse to permit one to perform a double function and serve the purpose of both, would be to look more to form than to the ends of justice. It has accordingly been ruled by this court, that in a proceeding before a justice of the peace, where an affidavit is required as in the circuit court, and also a written statement of the account sued on in lieu of the complaint, that an affidavit which contained a statement of the account dispensed with the necessity of filing a separate statement, and answered the double purpose of affidavit and complaint. *Tignor v. Bradley, 32 Ark., 781; Kurtz v. Dunn, 36 Id., 648; Allen v. Brown, 4 Metc., 347; Scott v. Doneghy, 17 B. Mon., 324.*

In the case under consideration, the paper filed and called an affidavit for attachment, gives the style of the court; entitles the case as in ordinary actions, giving the names of the parties plaintiff and defendant; the relation under which defendants are sued; the character of the indebtedness and the amount, and is sworn to. The allegation of the complaint as to the amount of the debt sued for is not positive and direct, as it should be, but no one will contend that the defect could

3. Complaint omitting prayer for judgment.

not be cured by amendment at any time. The affidavit may be treated then as containing everything necessary to a perfect complaint except a prayer for judgment. The question then is narrowed to this: Is the omission of the prayer for judgment so grave a matter as to be fatal to the action? If it is not fatal to the action the intervenor cannot be heard to complain. The statute declares that "the court *must*, in every stage of action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party." *Ib., 5083.*

In a suit upon account for money advanced, like the one under consideration, the only relief to which the plaintiff can be entitled is at once apparent from the allegations of the complaint, and the omission of the demand for judgment cannot be said to affect the substantial right of any adversary. A party is entitled to the relief which the facts shown clearly warrant, whether he has prayed much or little. *Pomeroy's Rem., sec. 580; Newman Pl. & Pr., 664; 1 Estes Pl. & Pr., 252; Louisville Ry. v. Smith, 58 Ind., 575; Acker v. McCulloch, 50 Ib., 447; Jones v. Butler, 20 How Pr., 191; Tuolumne Water Co. v. Columbia Water Co., 10 Cal., 193.*

It was then only a question of the regularity of proceeding, whether the complaint and affidavit were embodied in one paper, and whether the complaint was itself sufficient in form; but these matters did not concern the second attacher. If the defendant chose to waive the objection in favor of the first creditor, he could do so without giving any cause of complaint to his other creditors. *Drake Att., secs. 90a, 262, 273; Waples Ib., 486–7, and numerous cases cited.*

4. Affidavit on belief insufficient.

But the affidavit for attachment is made upon belief only, and this presents a more serious question. It was ruled by this court in *Hellman v. Fowler, 24 Ark., 235*, that the grounds for attachment laid down by the statute are not the belief of facts but facts themselves, and an attachment sued out upon an affidavit upon

belief alone was quashed in that case. The statute in that respect has not been changed and the rule is consequently unaltered. If the affidavit is not positive the attachment may be quashed, but the question in this case is, does the defect avoid the writ or is it an irregularity merely? If the former, the second attacher can have the benefit of it; if the latter, it concerns the defendant alone, and the intervenor cannot raise the question for him. It has been frequently held that the omission of any statutory prerequisite in suing out an attachment renders the process void, and subjects the judgment that follows it to a successful collateral attack. *Waples Att., p. 321, and cases cited.* We are cited to the case of *Steuben Co. Bank v. Alberger, 78 N. Y., 252,* as authority for holding that attachment proceedings, based upon an affidavit which states the ground of attachment upon belief only, are in this category, and consequently open to the assault of a second attacher. The case sustains the position, but so long as the statutes permit the amendment of the affidavit for attachment, and the previous decisions of this court construing them as broad enough to cover a defect by relation that would otherwise be fatal, are adhered to, this and analogous cases cannot be regarded as authority by us. The strict construction that is applied to the remedy by attachment in these cases, and in many to be found in the early decisions of this court, is, as the court say in *Childress v. Fowler, 9 Ark., 163-4,* "in furtherance of the views of the legislature in placing unusual restraints upon its use." The intention of the legislature to make void a proceeding not in conformity to the statute for any reason, being ascertained, the courts of course declare the law so to be; but when a different intention is apparent the courts again follow the legislative will. In most of the cases cited by counsel where substantial defects in the affidavit have been ruled to render the process void, the affidavit is said to be jurisdictional, and the defect consequently fatal. But it cannot be understood that such is the meaning of our legislation on this subject, for otherwise, as

was said by Justice Matthews in *Erstein v. Rothschild, 22 Fed. Rep., 61,* in delivering the opinion of the court in an attachment case, the affidavit would not have been made capable of amendment, and the defect cured by relation to its date. If the attachment was a nullity, no jurisdiction could be acquired under it by subsequent amendment. The amendment would merely make a case which would authorize proceedings to acquire jurisdiction. It could not quicken that which was without legal validity. *Pope v. Hibernia Ins. Co., 24 Ohio St., 481.* No amendment could aid a void affidavit, and it could not therefore be allowed. *Allen v. Brown, 4 Metc. (Ky.), 346.* "The very fact that the court can make the amendment shows, *ex vi termini,* that the proceedings are merely erroneous or irregular, and that the court has jurisdiction." *Hardin v. Lee, 51 Mo., 241; Moore v. Mauck, 79 Ill., 391; Toland v. Sprague, 12 Pet., 329–30.*

Now the statutes of amendments in this state apply as well to attachment proceedings as to proceedings in an ordinary action. The case of *Rogers v. Cooper, 33 Ark., 406,* is the leading case on this subject, and carries the rule farther than it is necessary to go in this case. There an attachment was issued by a justice of the peace, upon an affidavit which stated none of the grounds for attachment prescribed by the statute. Upon a motion to quash the attachment by the defendant the justice allowed the plaintiff to amend his affidavit, but the amendment made did not in fact perfect the affidavit. The attachment, however, was sustained by the justice, and the defendant appealed to the circuit court and there renewed his motion to quash the attachment, among other grounds, because of the insufficiency of the affidavit. The court refused to permit the plaintiff to amend, and quashed the attachment; but upon appeal to this court it was ruled, after a review of the statute in question, that the right of amendment existed and that the circuit court erred in refusing to permit it. It is apparent from

the ruling in the case that the validity of the attachment did not date from the time of the amendment only, because the circuit court acquired no jurisdiction except by appeal and could try no case save such as the justice had jurisdiction of prior to the appeal. The case has been since approved and followed from time to time. *Nolen v. Royston, 36 Ark., 565; Fletcher v. Menken, 37 Id., 206; Sherill v. Bunch, Ib. 560.*

The same rule prevails in Kentucky, where the provisions of the statute as to amendments are similar to our own, and it is there expressly ruled that the statute does not make jurisdiction in attachment depend upon the affidavit filed with the clerk, and irregularities in the affidavit are held to be mere errors in procedure. *Allen v. Brown, supra; Bailey v. Beadles, 7 Bush., 383.*

This is the rule followed also in the federal courts. *Erstein v. Rothschild, supra; Matthews v. Densmore, 109 U. S., 216.* In *Tilton v. Cofield, 93 U. S., 163,* the supreme court of the United States say: "Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Usually, to permit or refuse rests in the discretion of the court. . . . It has been held, upon full consideration, that the courts have the power to amend their process and records notwithstanding such amendment may affect existing rights. Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others. Cases of this kind, too numerous to be cited, may be found, in which amendments in the most important particulars were permitted to be made."

We are aware that in Kentucky the right to amend has been denied as against a second attacher, (*Bell v. Hall, 2 Duval, 288,*) but we are unable to reconcile this ruling with the principle that a stranger to a judicial proceeding can take no benefit from mere irregularities committed in procedure in a court having jurisdiction of the person of the defendant and the sub-

ject matter in dispute, as the circuit court has in attachment by service of process upon the defendant and the seizure of the attached property under the writ. *Hershy v. Clarksville Ins. Co., supra; Matthews v. Densmore, 109 U. S., 216.*

We fail to perceive that the second attacher has rights which are entitled to protection in preference to those of the first. He has not been misled into taking any steps to his prejudice or otherwise by the prior proceeding, for he must be presumed to act with the knowledge that the courts can, and in cases deemed proper by them will, amend their records so as to promote the ends of justice. *Green v. Cole, 13 Ired., 425; Tilton v. Cofield, supra.*

To prevent the sacrifice of substance for the sake of form is the design of the statutes of amendments. To give preference to one who has been dilatory in the race of diligence and whose position, in the absence of fraud or collusion between the debtor and the first attacher, is no more favorable as against the more diligent creditor than that of the debtor himself, would not tend to promote the aim of these statutes.

The case of *Lowenstein v. Monroe, 52 Iowa, 231,* is one in which the verification of the grounds of attachment having been made upon belief only, was amended, against the protest of an intervenor; and this, by the vast preponderance of authority, is the rule whenever any defect complained of is regarded as an irregularity merely.

It is further urged that no offer to amend was made in the circuit court. A complete answer to this objection is that the court dissolved the attachment prematurely at the instance of a stranger who had no right to raise objection, and refused to hear the plaintiff for any purpose, upon the ground that he had never obtained a foothold in court.

The plaintiffs should have embraced the earliest opportunity to correct the gross improprieties in practice that the haste of

suing out the attachment had doubtless caused them to fall into, upon such terms as the court might have seen fit to impose without waiting to be moved to do so, but the neglect to do this was not fatal to their right to amend.

It is unfortunate that courts of record should be called upon at any time to sanction proceedings had upon the loose and disorderly pleadings that these records disclose, but as "the substantial rights of the parties" is the object to be attained by courts, rather than orderly proceedings, the plaintiffs should be afforded the opportunity of presenting their causes to the consideration of the court, and the judgments must be reversed and the cases remanded for further proceedings.

FORTENHEIM v. CLAFLIN, ALLEN & CO.

47 49
67 132

1. ATTACHMENT: *Affidavit not signed.*

An affidavit for attachment made by one of a firm, thus, "I, Robert Powell, state," etc., and signed, "Forrester & Powell," is sufficient; but if not signed at all it would be cured by amendment.

2. AFFIDAVIT; *Without jurat, amendable.*

An affidavit is not a nullity for the omission of the jurat of the officer administering the oath, but is amendable.

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

Cohn & Cohn for Appellants:

We submit that the ruling of the lower court was wrong, for the following reasons:

1. Because there was no relevant testimony before the court going to sustain the interplea. The affidavit they intro-

duced was directly against them. And the testimony of the deputy clerk, if competent, was worthless, it being a mere opinion as to matters that could not be proved by opinion. On their own testimony, the decision should have been against them. There was not even a scintilla of what could be regarded testimony, to sustain the interplea, introduced by the interpleaders. Unquestionably, then, the evidence of F. & W. should have been regarded. Really this decision shocks sound principles of justice.

2. Moreover Stalcup's testimony was incompetent to contradict his own certification—his record entry. It would be extremely dangerous to allow officers to destroy the effect of their certifications by subsequently, sometimes a long period afterwards, calling them in question through the operations of an unreliable and treacherous memory; a memory which can easily be worked upon by the artifice of contentious attorneys, especially if the official be venal or weak-minded. *State v. Montgomery, 35 Miss., 105; Allen v. Lenoir, 53 Miss., 321; Haskel v. Haven, 3 Pick., p. 404; Bartlett v. Gale, 4 Paige, 503 esp. 509; note p., 257 Phillips Ev., (C. & H. notes); Ferguson v. Harwood, 7 Cr., 408; Greenleaf Ev., vol. 1, note 4 to sec. 506.* We do not see why a clerk should any more be entitled to contradict his certificate than a sheriff or constable his return.

3. An affidavit in attachment is not void because it is not subscribed, if it was duly sworn to. *Agricultural Assn v. Madison, 9 Lea (Tenn.), 407.*

4. The failure of the clerk to attest the fact that the affidavit was sworn to is not fatal to an attachment. *Willy v. Bennett, 9 Baxter, 581.* See *Kahn v. Kuhn, 44 Ark., 410.*

Claflin, Allen & Co.'s amended petition was filed and tried after a judgment had been rendered sustaining the claim and attachment of Furstenheim & Welford. Now, though the judgment could not oust a claimant of the property attached, (see *Brown v. McGehee, 38 Ark., 329;*) because he does not

stand in the shoes of the defendant, it could another attaching creditor, except where there was collusion between the debtor and judgment creditor. *Cooper v. Reynolds, 10 Wall, 308, 315, seq.; Waples, p. 478 note 3; Erwin v. Lowry, 7 How. (U. S.), 172.*

In any event the interpleaders had no standing in court, for they did not show that their attachment was good, by allegation or proof. *Islam v. Ketchum, 46 Barb., 43; Tim v. Smith, 93 N. Y., 87; Waples, p. 478 note 3.*

Sanders & Husbands for Appellees.

The proper affidavit was not made, and the attachment was void. This is clearly shown by the evidence, to the introduction of which *neither party objected.* The court found *as a fact* that no affidavit was made, and this court will not reverse unless clearly contrary to the evidence.

That parol evidence may be introduced to contradict an officer's return or certificate see *43 Ark., 232; 32 Id., 390.*

COCKRILL C. J. Both parties to this appeal sued out an attachment against the same debtor, and caused them to be levied upon the same property. Judgment was rendered in appellants' favor and their attachment sustained. On the same day, whether before or after judgment does not appear, the appellees, whose attachment had been obtained in another tribunal, intervened in the appellants' suit, set up their subsequent attachment lien, and sought to obtain priority over the appellants' attachment by alleging that no affidavit had been made by the appellants or by any one for them before the order of attachment was sued out in their case.

There was what purported to be an affidavit for attachment of record in the case, conforming substantially to the require-

ments of the statute, and bearing the same date and file mark of the order of attachment. An effort was made, however, to show by the deputy clerk who issued the attachment and certified that he had duly administered the oath to the affiant in the attachment affidavit, that the certificate was false and that no oath had been in fact administered. The deputy was not positive, in his testimony, whether he had administered the oath or not, but his impression was that he had not done so. No other person was called to prove the fact. The affiant, who was one of the attorneys in the case, testified positively that he had been duly sworn by the deputy before the writ issued, and his co-counsel, who was present when the papers were filed, heard him announce to the deputy his readiness to be sworn to the truth of the statements in the affidavit, and thought the oath was then administered. All agreed that the officer's certificate to the affidavit was not attached until several days after the writ issued. In the hurry of preparing the papers it had been overlooked by all parties, but when the deputy's attention was subsequently called to this fact, and he was reminded that the affidavit had been regularly made, he readily acceded to the request to certify the fact, and then attached this certificate to it: "Sworn to by R. T. Powell, before me, Dec. 4, 1883," and signed it officially. December 4th was the day the affidavit was filed and the date of the order of attachment.

The affidavit was signed "Forrester & Powell," but Powell's full name was written in the body of it, and he testified that he had called the deputy's attention to that fact before being sworn. Upon this showing the court found that "no affidavit was made in the manner required by law before the writ of attachment was issued," and declared the law to be that "in making affidavits they must be made in some one of the ways prescribed by the statute," and quashed the appellants' attachment.

The findings are not drawn with precision. They were doubtless prepared under the pressure of other business, and facts and conclusions of law are not plainly discernable from each other; but as both seem to presuppose that an affidavit had been made, but not "in the manner required by law," or in the "way prescribed by statute," it is apparent that the court tried the case upon the theory that the want of the formalities ordinarily and properly used in making affidavits vitiated the affidavit in this case and avoided the proceedings based upon it.

Whether it is competent, after judgment sustaining the prior attachment, for a second attacher, in the absence of fraud, to show that no oath had in fact been administered before the first attachment issued, when the process is regular and is based upon what appears to be a valid affidavit, it is not now necessary to determine, as no objection in any form was made to the effort to do so in this case. No objection was interposed to the introduction of any testimony. The exceptions are confined to the finding of facts and the conclusions deduced therefrom, and we need consider nothing more. The conclusions drawn by the court from the evidence are to be treated in the nature of a special rather than a general finding, and the finding when reduced to precision in this case is that the name of the affiant was not subscribed and the jurat of the officer was not affixed to the affidavit when the process issued.

1. Attachment affidavit not signed.

Now, as the body of the affidavit ran, "I, Robert Powell, state," etc., and was signed "Powell" and another, this would seem to be a sufficient signing to satisfy a very rigid rule, but if the affidavit had not been signed at all the defect might have been cured by amendment. *Agricultural Assn. v. Madison*, 9 *Lea* (*Tenn.*), 407.

2. Without jurat amendable.

The same is true as to the jurat of the officer. Swearing the affiant was the essential fact, and if this was done and the officer administering the oath neglected to attest the fact, that would not render the affidavit a nullity. *Wiley v. Bennett*, 9

Baxt., 581; Stout v. Folger, 34 Iowa, 71; Kruse v. Wilson, 79 Ill., 233; Bergesch v. Keevil, 19 Mo., 127.

The officer subsequently cured this defect by amendment, and the defendant in the action could not have taken advantage of the irregularity after that.

Applying then the rule laid down in the case of *Sannoner v. Jacobson, ante, p. 31,* the second attacher was not in a position to complain, whether his attachment was sued out before or after the amendment.

Let the judgment be reversed, and the case remanded for further proceedings.

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MATTHEWS V. PAINE, AD., ETC.

1. STATE COMITY: *Contract made in another state.*
The courts of this state will adjudicate the rights of parties in contracts made and to be performed in another state precisely as they would be adjudicated in the courts of that state.

2. USURY: *Actually paid, how recoverable.*
Where a statute provides for the recovery by suit of illegal interest which has been paid, that remedy is exclusive, and in an action for the principal debt the excessive interest can not be recouped.

3. SAME: *Statute of Limitations against suit to recover.*
Where more than three years has elapsed since the payment of excessive interest any claim to recover this excess is barred.

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

Greer & Adams for Appellant.

The original note, out of which the two notes sued on grew, was made in the state of Tennessee, and by the laws of that state it was illegal, and subjected the taker, appellee's intestate,

to indictment and fine under the criminal laws of the state of Tennessee. *Thompson & Steger's Dig. Tenn. Stat., sec. 1944a et seq.; Agreement of Counsel; Bill of Exceptions.*

And if a contract is illegal by the law of the place where made it is illegal and void everywhere, and state comity will not enforce it against the maker. *Daniel on Neg. Inst., vol. 1, pp. 658–660, 1 ed.; 16 N. H., 102; 30 Ill., 164; 2 Mass., 84; 2 Johns Cas., 355; 7 Ohio St., 134; 2 Barr, 1077.*

The original note is dated at Memphis, Tennessee, and in the absence of a stipulation in the note as to where it was payable, and no proof to the contrary, *prima facie* it was payable at the place where made. *Daniel on Neg. Inst., pp. 472–3–4, 1st vol.; Parsons on Notes and Bills, 1st vol., 424.*

It is true that at the date of making and delivery of said original note, the laws of the state of Arkansas authorized the taking of any rate of interest that might be contracted for. But if suit had been brought in Arkansas on the original note *before* the adoption of the *Constitution of 1874*, the laws of the state of Tennessee, by reason of state comity, would prevail in its enforcement in the courts of the State of Arkansas. *De Peau v. Humphries, 20 Mart. (La.), 1; Andrews v. Pond, 13 Pet., 65; Chapman v. Robertson, 6 Paige, 627; Miller v. Tiffany, 1 Wall., 310.*

However, the notes sued on bear date "Osceola, Ark., July 12, 1877," and the amount for which they were given was arrived at by calculating interest at the rate of twelve per cent. per annum at Osceola, in Arkansas, on an amount of money claimed to be due to appellee's intestate from appellant. The lower court so found as a fact, without exceptions or objections on the part of appellee, which is conclusive in this case, and this honorable court will not disturb the facts so found by the lower court sitting as a jury. *Woodruff v. McDonald, 33 Ark., 97–100; Obermier & Co. v. Core, Thompson & Co., 25 Ark., 562; Saulet v. Shepherd, 4 Wall. (U. S.), 502.*

It is an attempt to collect interest on a promissory note at the rate of twelve per cent. per annum, which is usury, and in conflict with the constitution and laws of the state of Arkansas. *Art. 19, sec. 13, Const. 1874; Mansf. Dig., sec. 4732; German Bank v. Deshon, 41 Ark., 331.*

SMITH, J. The administratrix of the estate of J. F. Davies, deceased, brought an action against Mathews on two promissory notes, made at Osceola, in this state, July 12, 1877, for $627.62 and $500, respectively, and due and payable to her intestate on the 1st day of January, in the years 1878 and 1879, with interest from date at ten per cent. per annum. The defendant admitted the execution of the notes, but alleged that they were given for an alleged balance due Davies on a certain other promissory note, dated Memphis, Tenn., April 17, 1873, for the sum of $3402, made by J. H. Edrington & Co., of which he was a member, with twelve per cent. interest from date, and payable on the 15th day of November, 1873; that said note was illegal by the laws of the state of Tennessee where it was made; that the notes sued on and given for said alleged balance were executed in Arkansas after the adoption of the constitution of 1874; that they included interest at a greater rate than ten per cent. per annum, and by the laws of Arkansas were absolutely void for *usury;* that he had more than paid said original note with six per cent interest thereon, and denied that he was indebted to Davies in any sum whatever.

It was agreed the cause might be tried before the court without a jury. The defendant introduced the original note made by J. H. Edrington & Co., with the indorsements thereon, showing partial payments made at various times and amounting in the aggregate to $3025.42. Blackwood, a witness for him, testified: That he recognized said original note; that some of the credits thereon were in his handwriting; that he made the calculation of interest thereon at the rate of twelve per cent per annum; that the other credits on the back of said note, except two,

are in the handwriting of J. F. Davies; that the last two credits are in the handwriting of J. W. Clapp, Jr., who was the bookkeeper of J. H. Edrington & Co.; that at the time the note for $3402 was made he was in the employment of J. H. Edrington & Co., and he knew John Mathews was a member of said firm; and that the words "Paid by new notes July 12, 1877," indorsed across the face of said original note, are in the handwriting of John Mathews.

The defendant then introduced the Statutes of Tennessee, which it was agreed was the law at the date of the making of said original note.

The substance of this legislation is, that six per cent is established as the legal rate of interest when no other rate is specified, but parties may contract in writing for the payment of as much as ten per cent. per annum. The taking or reservation of more than ten per cent. is declared to be usury; but the effect is not to avoid the contract *in toto*, but only to forfeit the interest in excess of six per cent., and to entitle the debtor if he has paid usurious interest to recover the same by suit, and to subject the usurer to a criminal prosecution.

The court found, as a fact, that said two notes sued on were given for the balance due on the note of J. H. Edrington & Co., and to arrive at the amount of the notes sued on interest was calculated on said original note at twelve per cent. per annum; but, as a question of law, said two notes became an executed contract, and a plea of usury in defense thereto was bad; and rendered judgment for the plaintiff for the full amount of the notes sued on. The defendant thereupon filed his motion for a new trial, which was by the court overruled. The defendant excepted and prayed an appeal to this court.

1. STATE COMITY: Contracts made in another State.

At the date of the making of the original note, the laws of Arkansas authorized the taking of any rate of interest for the loan or forbearance of money that the parties might agree

upon. Section 13 of Article 19, Constitution of 1874, avoids all contracts for a higher rate than ten per centum per annum, both as to principal and interest. But the several notes, which are the foundation of this action, do not violate this provision. The parties had a settlement in 1877, and found that, computing the interest at twelve per cent., there remained due of the principal $1127.62. For this balance one of the debtors made his two notes carrying interest until maturity at the rate of ten per cent. and thereafter only six per cent.

So that whatever of usury there was in the transaction must inhere in it by virtue of the laws of Tennessee, where the original contract was made, and where, presumably, it was to be performed. And exercising that comity which exists between courts of the different states, we adjudicate the rights of the parties precisely as we understand they would be adjudicated if they were in a court of Tennessee.

2. USURY:—Actually paid, how recoverable.

The answer avers the payment of usurious interest, and seeks to apply it by way of payment to the note in suit. But illegal interest actually paid cannot be applied to the discharge of the principal debt. The statute confers the right of reclamation, and prescribes the remedy, viz., by suit to recover it back; and that remedy is exclusive. Such is the construction placed upon analogous provisions contained in the national currency act of congress, of June 3, 1864. *Barnet v. National Bank, 98 U. S., 555; Cook v. Lillo, 103 U. S., 792; Driesbach v. National Bank, 104 Id., 52; Walsh v. Mayer, 111 U. S., 31; Carter v. Carusi, 112 Id., 478.*

3. SAME:—Statute of Limitations.

But if we are mistaken in this construction of the Tennessee statute, and regarding this effort at recoupment as a suit to recover usury, yet we find it decided in *McFerrin v. Woods, 59 Tenn., 3 Jere Baxter, 242,* that neither before nor after the dissolution of a firm can one member of a firm maintain such a suit, when the money was borrowed by the firm. Mathews was only a partner in the firm of J. H. Edrington & Co.; and

according to this decision, all the partners, if living, or the survivors, if some are dead, must unite in the action. And again, more than three years having elapsed since such payments, before any claim to recover the excess is made, relief is barred.

Affirmed.

ST. L., I. M. AND S. RY. v. BRIGGS.

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JURISDICTION: *Of J. P. for damages to personal property.*

Justices of the peace have concurrent jurisdiction in all matters of damage resulting from the loss, conversion or destruction of personal property, as well as from injury to it, when the amount in controversy does not exceed one hundred dollars.

APPEAL from *Craighead* Circuit Court.
Hon. W. H. CATE, Circuit Judge.

Dodge & Johnson for Appellant.

The justice had no jurisdiction. Section 40, Article 7, Constitution of 1874, provides that justices of the peace "shall have original jurisdiction in the following matters:" 1. Exclusive of the circuit court in all matters of *contract* up to $100. 2. Concurrent, in all matters of damages to personal property not in excess of $100.

This not being an action on contract, express or implied, cannot therefore come under the first clause of the above section; nor can it come under the second clause, for the action is not for damages to personal property, but is for a tortious conversion of the same. *Bowman v. Browning, 17 Ark., 600; 31 Ark., 159; 2 Greenl. Ev., sec. 108; 34 Ark., 427; 36 Id., 272; 1 Taunt., 112; 5 Pick., 290.*

The evidence in this case shows clearly that Crawford & Co. had bought this wood and defendant company had used it.

Crawford & Co. owed the plaintiff the $2 per cord, under his contract. How then could he recover from this defendant?

We may assume that the defendant did use the wood, but the evidence shows they got it from Crawford & Co., their contractors, and Crawford & Co. bought it from plaintiff.

His action should have been against Crawford & Co. Hence there was no evidence to sustain the verdict.

BATTLE, J. P. D. Briggs sued the St. Louis, Iron Mountain and Southern Railway Company before a justice of the peace of Craighead county, upon an account for thirty-three cords of wood at two dollars per cord. Judgment by default was rendered in favor of plaintiff against the defendant by the justice of the peace, for the full amount of the account, and defendant appealed to the circuit court.

In the trial in the circuit court, plaintiff testified that he delivered thirty-three cords of wood on the right of way of defendant, at two dollars a cord, amounting to sixty-six dollars; that defendant used the wood by burning it in its engines on the road; that he contracted to deliver the wood to W. D. Crawford, and he, Crawford, agreed to pay two dollars a cord therefor; that he supposed Crawford was a contractor; that he never had a contract about wood with any one else; and that he has never been paid for the wood.

W. D. Altman testified that Crawford was and is not an agent or officer of defendant.

The court instructed the jury, among other things, that if they found that Crawford was not an agent or officer of defendant, but was an independent contractor, buying wood from plaintiff and selling it to defendant, they should find for defendant.

The jury returned a verdict in favor of plaintiff against defendant for sixty-six dollars.

The defendant filed a motion for new trial which was overruled, and it appealed.

1. JURISDICTION: Of J. P. for damages to personal property.

The appellant insists that the justice of the peace had no jurisdiction of the subject matter of the action, "because the evidence disclosed the fact that there was no contract, express or implied, between plaintiff and defendant, and admitting that there is evidence tending to show a taking of the wood by defendant, such taking was a tortious taking, and the justice having no jurisdiction the circuit court could acquire none by appeal."

By the present constitution of this state, justices of the peace have concurrent jurisdiction "in all matters of damage to personal property where the amount in controversy does not exceed the sum of one hundred dollars." This court in construing this clause of the constitution, in *St. Louis, Iron Mountain and Southern Railway Company v. Heath, 41 Ark., 478*, said: "By 'matters of damage to personal property' we understand all injuries which one may sustain in respect to his ownership of personal estate." This construction is undoubtedly correct. It follows, then, that justices of the peace have concurrent jurisdiction in all matters of damage suffered by reason of the loss, conversion or destruction of personal property, as well as injury thereto, where the amount in controversy does not exceed one hundred dollars.

It is wholly immaterial whether this suit be regarded as an action upon a contract, or for a tort, as in either event the justice of the peace had jurisdiction. Appellant does not complain that it was taken by surprise by the evidence introduced, or that it was not fully apprised of the cause of action before the trial, but, on the contrary, it appears was well prepared to defend.

The verdict was contrary to the instructions of the court and the evidence, and should be set aside.

The judgment of the court below is reversed, and this cause is remanded with directions to the court to grant defendant a new trial.

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KEMP v. COSSART.

BETTERMENTS: *Taxes and improvements.*

Caruthers purchased land in the name of his son and had it conveyed to him, but took possession himself and occupied and made improvements on it and then sold it to Joseph Cossart. Afterwards the son sold and conveyed it to Kemp. While Caruthers was in possession he represented the land to be his son's, and it was so regarded. After Cossart's purchase he sold to Nancy J. Cossart, who assessed the land and paid taxes on it as her own, and being sued for it by Kemp she asserted title as *bona fide* purchaser, and also claimed reimbursement for the improvements and taxes paid by herself and Caruthers. Held: That the purchase and improvements by Caruthers were an advancement to the son; that he did not hold under any color of title, and therefore Mrs. Cossart could not reclaim the value of the improvements, but could recover the taxes paid by herself. They were a necessary charge upon the land, and paid by her as owner and not officiously, and it was for Kemp's benefit and should be made a lien on the land.

APPEAL from *Clark* Circuit Court in Chancery.

Hon. H. B. STUART, Circuit Judge.

Crawford & Crawford for Appellant.

The mortgage executed December 2, 1867, and recorded December 12, 1867, from F. M. Caruthers to Charles Cargile, recites the fact that a deed conveying the lands in controversy had that day been made from said Cargile to said F. M. Caruthers, which deed has been lost and was not recorded, but

still conveyed the title to F. M. Caruthers. *Gilbert v. Bulkly, 5 Conn., 262; Strawn v. Norris, 21 Ark., 80; Neal v. Speikle, 33 Ark., 64.*

If A. B. bought the land for himself and took the title in his son's name, it was to defraud his creditors, as he stated to witness Cargile. (Tr. p. 29.) His creditors might attack F. M. Caruthers' title, but A. B. Caruthers and his privies can derive no advantage from his own wrong. *Randall v. Howard, 2 Black. (U. S.), 585; Clemens v. Clemens, 28 Wis., 637; Payne v. Bruton, 10 Ark., 53; Britt v. Aylett, 11 Ark., 475; Anderson v. Dunn, 19 Ark., 659; Noble v. Noble, 26 Ark., 318.*

A purchase by a father in the name of his child is regarded *prima facie*, as an advancement, and not as a resulting trust for the father. *James v. James, 41 Ark., 301.*

The taxes and betterments claimed by appellee were mere voluntary payments, made, at most, under a mistake of law. As such they can not be recovered, where the persons making the payments were not in possession under color of title and had no interest to be protected. It is a familiar principle that every one is estopped from pleading ignorance of the law. *Chitty on Contracts, 6 Am. ed., 672; 2 Kent's Com., 2 ed., 616 and 617.*

To derive any benefit under the "betterment act" a party must hold under color of title. She does not allege that the sale from Jos. Cossart to herself was in writing, and no deed to her was exhibited with her complaint or referred to in any way at the trial. The above act contemplates possession (before and during the litigation), by the unsuccessful party, and provides that the successful party shall pay to the occupant the taxes and betterments before the court shall cause possession to be delivered. The act furnishes no other remedy. In this case the successful party (within the meaning of the act and in so far as holding the land is concerned), was the appellant; he is already in possession, and the court could not, we submit,

under that act render a decree for taxes and betterments applicable to him. The act under consideration is in derogation of the common law, and must be strictly construed.

BATTLE, J. On the 2d day of December, 1867, A. B. Caruthers, representing himself as the agent of his son, F. M. Caruthers, purchased of Charles Cargile, for and in the name of his son, the land in controversy. Cargile conveyed the land to F. M. Caruthers, and he, F. M. Caruthers, gave his notes for the purchase money payable in the future, and executed a mortgage on the land to Cargile to secure the payment thereof. A. B. Caruthers thereupon took possession of the land, and cleared and fenced ten acres of it and cultivated and controlled it for many years and until his death. As the agent of his son he paid the most of the purchase money, his son paying the residue. While he used the land he paid no rent, and for the rents he collected he never accounted to any one. He also paid taxes on the land. The value of the improvements he made is one hundred and twenty dollars. While in the possession of the land he represented it as the land of his son, and it was generally so regarded. On the 7th day of April, 1872, he, A. B. Caruthers, in consideration of one thousand dollars, pretended to convey this land, together with other lands, to Joseph Cossart, but, notwithstanding this conveyance, he still remained in possession of the land in controversy and controlled and cultivated it as before. Nancy J. Cossart, the plaintiff, purchased it of Joseph Cossart, and, thereafter claiming it as her own property, caused it to be assessed for taxation in her own name, and paid taxes thereon amounting in the aggregate to the sum of nine dollars and forty-four cents.

Meredith Kemp, one of the defendants, being informed and believing that the land was the property of F. M. Caruthers, purchased it of him, and on the 8th day of April, 1876, F. M.

Caruthers conveyed it to him. In the fall of 1878 Kemp took possession of the land, and at all times since has held it.

The court below found that the land in controversy was the property of Kemp, but that Nancy J. Cossart, the plaintiff, and her grantors, had paid forty-seven dollars and thirty-six cents taxes thereon, and that A. B. Caruthers had made improvements thereon of the value of one hundred and twenty dollars; and rendered a decree in favor of Kemp, forever quieting his title to the land in controversy as against all parties to the action, except as to a lien declared by the court, and rendered a judgment *in personam* in favor of plaintiff against Kemp for one hundred and sixty-seven dollars and thirty-six cents, the amount of taxes paid and value of improvements, and all the costs of the action, and declared that this amount was a lien and charge on the land. Both parties have appealed.

1. BETTERMENTS: Taxes and improvements.

If it be true that this land was purchased and paid for by A. B. Caruthers, and that the same was conveyed, at his request, to F. M. Caruthers, his son, the presumption, in the absence of other evidence, is that the conveyance was intended as an advancement. If such be the fact, there was no evidence introduced in the hearing of this action sufficient to overcome this presumption. *Robinson v. Robinson, 45 Ark., 481.*

According to any view which can be properly taken of the evidence in this case, Kemp is entitled to the land in controversy.

A. B. Caruthers, or those holding under him, are not entitled to any compensation for improvements made by him. He was not in possession under color of title. During the time he was making these improvements he represented that the land was his son's. The natural and legal presumption is, the improvements were made by him as an advancement to his son. While he made the improvements and remained in possession he used the land, or enjoyed the rents and profits arising therefrom, free of charge.

Plaintiff, Nancy J. Cossart, claiming the land as her own, paid nine dollars and forty-four cents taxes thereon. These taxes were a paramount lien on the land. Their legality is not disputed. It was the duty of the owner to pay them. This was necessary to protect his interest. She did not act officiously in paying them, but presumably in good faith, and for the purpose of protecting and saving property she claimed. Kemp received the benefit of the payments made without any return thereof. She is entitled by subrogation to reimbursement out of the land to the extent of nine dollars and forty-four cents.

The court erred in rendering judgment against Kemp for one hundred and sixty-seven dollars and thirty-six cents, and declaring the same a lien on the land. Plaintiff was only entitled to a lien for the nine dollars and forty-four cents for taxes paid.

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 directions to that court to enter a decree herein in accordance with this opinion.

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JOHNSON ET AL., v. LEWIS ET AL.

RIGHT OF WAY: *Acquired by prescription.*

A right of way cannot be acquired by one across another's land by use for any length of time unless the use be confined to a definite line, and be open, notorious and adverse to the owner, and continuous for the whole period.

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

Dan W. Jones for Appellant.

The question involved is, whether the right of way over appellee's land, as claimed by appellants, had ripened into an easement by prescription at the time of the alleged trespass by appellees? If so, then appellees could not rightfully obstruct the way; but in doing so committed a trespass, and became liable in damages for the tort; and the proposition is plain that if appellants had already acquired an easement, no matter how acquired, it was not necessary to pursue the statutory method of obtaining a private road under the provisions of *secs. 5944 and 5945 of Mansf. Dig.* Also see: *Pernan v. Wead, 12 Mass., 203; Taylor v. Townsend, 8 Mass., 411; Watson v. Bioren, 1 Sergt. R. 227; Lawton v. Rivers, 2 McCord, 445; Parks v. Doyle, 75 Va., 258; Washb. on Easements, 72–81; Washb. on Real Prop., 3 ed., vol. 2, p. 275, et seq; Wood's Law of Nuisances, chap. 18, p. 654, et seq., etc.*

The rule of the common law as to the length of time necessary to gain a right by prescription has long since been abolished by the courts, and the period of limitation adopted by each state as a bar to the claim of land itself is now the rule. *Wash. on Real Prop., 3 ed., vol. 2, p. 293, et seq.* The period in this state is seven years. *Mansf. Dig., sec. 4471.*

Geo. W. Williams for Appellees.

The appellants do not claim to have purchased from the appellees. The complaint alleges a right of way in general terms, no line or course being named, nor any point for beginning and ending. "A way imports a right of passing in a particular line." *Wash. Eas., 160, star page.* The legal conclusions of the complaint are insufficient to sustain the action where facts should be averred.

Title was claimed by prescription on account of use for twelve years. But no allegation was made that the use was "adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner."

It was therefore fatally defective. *Wash. Eas., 124.* Usage for any number of years, unless under these conditions, gives no title. Twenty years is the well known and recognized period of prescription. Our statute of limitation was not intended to apply to an incorporeal hereditament of this kind.

But *secs. 5944–5, Mansf. Dig.*, have conclusively setted the method of obtaining a way when a person shall object to the extension of one over his land. The first section is explicit that the manner indicated shall be pursued when the refusal is made. It is imperative and is the only course left. Certainly the appellants had no right of eminent domain. Having failed to allege any order of the court granting the way, appellants had no basis whatever on which to found a suit or to stand in court and the demurrer was properly sustained.

Hon. SOL. F. CLARK, *Special Judge.* The appellant, Johnson, filed his complaint against appellees, Thos. and Wm. Lewis, alleging that he was in possession, and had been for some time, of a small tract of land which is surrounded by the farm of the defendants in such manner as that there is no mode of egress from it to any public highway, or ingress from any public highway, except across and upon the land of the defendants. He further alleges that he and those under whom he claimed had been in the habit of crossing the lands of defendants, to and from the surrounded premises for more than twelve years, whereby a right of way had accrued to him as an easement to his said lands by prescription. But he alleges that defendants had wrongfully and unjustly enclosed their said lands, stopped up the way where he had been crossing, and refused to permit the plaintiff to cross the same in any manner to or from his said premises; that he had planted on his said lands, twelve acres of cotton and ten of corn, which were lost to him on account of such unjust proceeding of defendants and he claimed damages in that amount.

To this complaint the defendants filed a general demurrer. Subsequently this demurrer was conceded and the complaint was amended by interlineation, but the record does not disclose what this interlineation was. To the complaint as amended, however, the defendants filed a general demurrer. At this stage of the proceedings Wm. H. Bizzell petitioned the court to be made a party plaintiff, alleging that he was the owner of the lands described in plaintiff's complaint, and that the said plaintiff Johnson was his tenant. That the right of way across the defendants' lands claimed by his co-plaintiff Johnson was an easement incident to his said lands, which had existed and been enjoyed in behalf of himself and those under whom he claimed for more than twelve years, and was a right implied in the grant of said lands from the government. That being such owner and in possession of said lands and right of way appurtenant thereto, he had rented the same to said Johnson for the year 1879, at the yearly rent of $75, which Johnson had agreed to pay him out of the crop to be raised thereon, whereby, and by reason of the statute in such cases provided, he had acquired a lien upon the crop of cotton and corn so planted thereon for the payment of such rent; but by reason of such unlawful conduct and doings of the defendants, said crop was wholly lost, and, Johnson being insolvent, he was wholly unable to collect his said rent, and that by reason of such wrongful acts he was deprived of the use of his lands, etc.

Bizzell was made a party plaintiff upon his petition. His petition was taken as a part of the complaint and defendants' general demurrer extended to the petition as well as to the original complaint.

The court after consideration sustained the demurrer and dismissed the whole proceeding.

The plaintiffs appealed to this court.

It is insisted by the appellants that the allegations in the complaint sufficiently state that the plaintiffs have been in the

actual enjoyment of a right of way across defendants' lands for a length of time which would clothe them with a vested right in such way, and the demurrer, admitting the truth of these allegations, should have been overruled.

It is further insisted that seven years, or the period of our statute of limitations for the recovery of real property, is the period in which the enjoyment of such way would ripen into a vested right of way which could not be taken away.

We are of the opinion, however, that the pleadings do not raise or present the question of a right of way across these defendants' lands by prescription.

2. Right of way by prescription.

A right of way across another's land, where it exists, is an incorporeal hereditament, which may be appurtenant to adjoining lands, or in gross, but such hereditament does not come within the statute of limitations applicable to land or real estate.

A vested right to such way may be acquired by use for a sufficient length of time; but for any length of time to ripen into an independent right the way should be confined to a definite line. Its use should not only be open and notorious but continuous for the whole period. It should be occupied and used as a right, and not merely as a favor or privilege granted by the owner of the servient lands. In other words, the right of way should be definite, continuous, and adverse to the owner.

A right thus acquired was by the common law called a right by prescription, which term was peculiar to incorporeal hereditaments. The right was founded upon the presumption of a grant, and no one could prescribe for an easement in another's lands except where it had been used time out of mind, or, in the quaint language of the old authors, "for a time whereof the memory of man runneth not to the contrary." See *Washburne Easements and Servitudes, sec. 4, p. 108; 2 Tucker's Blackstone, 31; Mayor of Hull v. Homer, Cowp., 109.*

It was sufficient to defeat a claim for such an easement, that there was a time when the exercise or enjoyment of the same did not exist. No presumption of a lost grant of a right of way or other easement would be tolerated at common law so long as a time could be shown when such easement was not in use. In subsequent times, however, and especially in this country, the law has been much changed, and the length of time within which such right may be established has been much shortened. In Massachusetts and other states, by repeated decisions, the time has been held to twenty years in analogy to the statute limiting an entry into lands. See *Sibley v. Ellis, 11 Gray, 417.* And other states have adopted by analogy the same rule. See *Washburne Easements and Serv., sec. 4, pp. 111, 112;* see also *Parker v. Foote, 19 Wend., 309; Curtis v. Keesler, 14 Barb., 511; Cooper v. Smith, 19 Serg. & R., 26; Tracy v. Atherton, 36 Verm., 503; Washburne Easements, etc., 116.*

In *Wynne v. Garland, 20 Ark., 23,* this court held that "an easement is a liberty, privilege or advantage, which one man may have in the lands of another without profit, and must be under a deed *or by prescription.*" It further held that "though the grant of an easement is within the statute of frauds, and must be in writing, yet a parol grant executed will be upheld under the same circumstances and on the same principles that a parol contract for the sale of lands would be; as where the grantee made improvements in good faith under the grant, or expended money or capital in its enjoyment."

We are not aware that it has ever been determined in this state as to what length of time the enjoyment of such an easement would create a vested right by prescription, nor is it necessary to determine the question here.

We do not think the plaintiff's complaint sufficiently defines such a right of way across the defendants' lands as would at any time ripen into a vested right. It fails to define any par-

ticular way by metes and bounds, but merely alleges a habit of crossing defendants' lands to and from their premises, without stating whether such crossing was even confined to any particular route or line. It fails to state whether such crossing was by right on the part of plaintiff or by mere license by the defendants; nor is it stated whether such way had been open and continuous for the whole period alleged. It is not alleged from whom either party derived title to their lands, and no state of facts is alleged from which an obligation on the part of defendants could arise to permit the plaintiff to have a way across their lands.

The plaintiffs, however, were not without remedy. We have a statute which prescribes the mode by which parties so circumstanced can have relief. See *Mansf. Dig., secs. 5944, 5945.* By proceeding under this statute the plaintiffs could have had a right of way established, and we think they should have pursued this remedy.

Affirmed.

Hon. B. B. BATTLE did not sit in this case.

BAGLEY V. SHOPPACH, AS SHERIFF, ETC.

FEES: *For certificate of tax sale.*

If a collector of revenue for his own convenience includes several different tracts of land in one certificate, he can collect of the purchaser the fee of one certificate only; but if he does so at the request of the purchaser he is entitled to the aggregate fees of a certificate for each separate tract.

APPEAL from *Saline* Circuit Court.

Hon. J. B. WOOD, Circuit Judge.

Paul Bagley pro se.

COCKRILL, C. J. This is an action against the sheriff and ex officio collector of taxes to recover what the complaint alleged to be illegal fees demanded and received by him of the plaintiff, and also the statutory penalty for receiving illegal fees. *Mansf. Dig., sec. 3295.*

This is the second appearance of the case in this court. See *43 Ark., 375.* On the trial, after it was remanded, the proof showed that Bagley became the purchaser of sixty-one tracts of land at the collector's sale for non-payment of taxes. The collector offered to execute and deliver to him a certificate of purchase for each tract upon the payment of the fee for each several certificate, but Bagley wanted all the tracts embraced in one certificate, and was unwilling to pay the fees demanded for sixty-one certificates. The collector then, at Bagley's request, and solely for his accommodation, executed a single certificate of purchase describing the sixty-one tracts, and demanded $15.25 therefor—the full amount of the fees allowed for sixty-one certificates. Bagley paid the amount to prevent a resale of the lands, and then sued for the excess over twenty-five cents, as well as for five dollars as a penalty.

It was determined upon the former appeal, and it is the law of this case, that a collector can not be required to include in one certificate a number of tracts of land which have been separately sold for the non-payment of taxes. The statute contemplates an immediate settlement by the purchaser when the land is struck off by the collector, and upon a failure by the bidder to comply with the terms of his bid, it is the collector's duty to re-offer the land. *Mansf. Dig., sec. 5766.*

If for convenience he defer the settlement until a number of tracts are sold, and then for his own convenience elects to include several tracts in one certificate, he is permitted to collect the fee for a single certificate only. *43 Ark., supra.* The purchaser can not, however, deprive the officer of the

right to demand the fees allowed him by statute merely by refusing to accept what the officer after each sale might have legally tendered—that is, a separate certificate of purchase for each tract. It can not, therefore, be said to be extortion in the omcer to demand the aggregate of all the fees he might have legally demanded as the several sales were made, if he accedes to the purchaser's wish to have two or more tracts embraced in one certificate.

The only conclusion to be reached from a consideration of the evidence in this case is, that the collector did not attempt to shirk any labor or responsibility about the execution of the certificates of purchase, and that the single certificate was made to embrace a number of tracts of land that had been separately sold, at the request and solely for the accommodation of the plaintiff, who was the purchaser. It follows that nothing was illegally demanded, and the judgment in favor of the collector is affiirmed.

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St. L., I. M. and S. Ry. v. Atchison.

1. Railroads: *Trains cannot stop at forbidden stations.*

The taking up of a passenger's ticket to a station at which the train is forbidden to stop by the regulations of the company, does not make it the duty of the conductor to stop the train there.

2. Same: *Same.*

It is the duty of a passenger to inquire before embarking on a train whether it will stop at the station of his destination; and if he does so, and is misled by an agent authorized to speak for the company, he has his action against the company for the misdirections, but not for the refusal of the conductor to stop there if it be a station at which the train is forbidden to stop by the regulations of the company.

APPEAL from *Lafayette* Circuit Court.
Hon. O. D. Scott, Special Judge.

Dodge & Johnson for Appellant.

There are three patent facts apparent in this evidence, which we think conclusive of the case.

1. That the train passed Emmett without slacking its speed, and was running at the rate of ten or twelve miles an hour.

2. That the conductor gave no orders, used no threats or compulsion to plaintiff, or any of the passengers, to risk their lives in jumping from the train.

3. That the jumping from the train was wholly voluntary on plaintiff's part, rather than to be carried past his home, and thus by his own wilful and voluntary act he assumed the risks incident to the leap, and took all the risks liable to occur while the train was running at this obviously dangerous rate of speed.

We submit, that it may have been ever so negligent in the conductor of the train to refuse to slow up or stop his train at Emmett, but the accident to plaintiff did not occur by reason of his negligence.

The proximate cause of the injury was the voluntary act of plaintiff in jumping from the train at the rate of speed at which it was at the time running.

The only thing that can take this case out of the rule that contributory negligence on the part of plaintiff is a bar to the action, is, that either the conductor commanded and ordered plaintiff to jump off, or that the acts of the conductor in charge of the train were such as to lead plaintiff to believe that it was safer to jump than to remain on the train and go by his home. Now do the facts show this?

But, suppose the conductor did tell plaintiff to jump, and that the train was running at an obviously dangerous rate of speed, was he compelled by this to do so? It will not do to plead any such excuse as this, for it is a rule of law, that where one is ordered to do an act, which it is apparent is in its nature

dangerous, and he does it and is injured, the fact that another ordered it or advised it, without using any compelling force, or compulsion, or threats, will not justify the injured party in doing the act, and he cannot, therefore, throw the blame upon another.

But such is not this case. There were no orders given to plaintiff by the conductor, to jump from the train, no threats, insults or violence were offered plaintiff by this appellant's servants, and there was nothing on earth to justify him in carelessly and with recklessness taking this leap at the rate of speed at which this train was running. That he was not killed is a wonder. That he was so slightly injured, was a streak of marvelous good fortune.

Where the risk or danger of alighting from a moving train is not apparent to a passenger, and he is urged to take the hazard by the company's employe whose duty it is to know the danger, his conduct will not be regarded as negligent. Where the danger is obvious, but slight, he has the right to rely upon the judgment of the conductor, whose duty and experience, he may presume, give a superior knowledge of such matters, and so justify an act which would otherwise be negligent. The case of *St. Louis, Iron Mountain & Southern Railroad v. Cantrell, 37 Ark.*, and *Memphis & Little Rock Railroad v. Stringfellow, 44 Ib., 322,* are illustrations of this in our own reports. *Files v. N. Y. Cent. R. R., 49 N. Y., 47,* was a case of a passenger attempting to alight while the train was in motion, in obedience to instructions of a brakeman. In disposing of the case the court says: "That it was culpable negligence on the part of the defendant to induce or permit the plaintiff to leave the train while in motion, and a gross disregard of duty not to stop the train entirely and give her ample time to pass off with her luggage, is not disputed; notwithstanding this, if the plaintiff did not exercise ordinary care, and might, with ordinary care and prudence, have avoided the injury, she is precluded from recov-

ering." See *St. L., I. M. & S. Ry. v. Rosenberry, 45 Ark., 256; 66 N. C., 494; 23 Penn. St., 147; 30 Ohio St., 222; 95 U. S., 439; 68 Mo., 593; 13 Pet., 181.*

COCKRILL, C. J. The main features of this case are similar to those of Rosenberry's case, reported in *45 Ark., 256.* The appellee boarded a through freight train at Prescott to be transported to Emmett. Emmett was not one of the usual stopping places for the train and it made no halt there on the trip in question, but the appellee alighted nevertheless, and in doing so injured his toe and received a shock which prevented him from engaging in active out-of-door labor for a few weeks. He sued the company to recover damages for the personal injury, and a jury awarded him $5000. His contention was that the conductor had compelled him to leave the train while it was in motion.

Rosenberry was the appellee's fellow passenger and took the leap with him, but the facts in the two cases are not identical.

The points of difference are that the appellee in this case testified that the station agent at Prescott advised him to board the freight train, suggesting that it would stop on that trip at Emmett; and there was more evidence of overbearing conduct on the part of the conductor toward this appellee than toward Rosenberry. While there is a little evidence to the contrary, it seems apparent that the appellee leaped from the train under a preconceived intention to do so rather than from any fear of the conductor. But it is not necessary to weigh the evidence to determine whether the verdict should be sustained. The judgment must, in any event, be reversed for misdirection of the jury. For the guidance of the court in another trial it is sufficient to advert simply to what is said in the Rosenberry case about the advice or command or compulsion of the conductor, excusing or not excusing the conduct of a passenger

in exposing his person to obvious danger. The charge of the court in this respect is less obnoxious than in the Rosenberry case. But the court in this case charged the jury as follows as to the duty of the railroad to stop its train at Emmett to let the appellee off.

1. RAILROAD: Train can't stop at forbidden stations.

"If you find from the preponderance of the testimony that the conductor of the train upon which plaintiff was traveling took up his ticket for Emmett, then it became the duty of said conductor to stop said train at Emmett so as to enable plaintiff to get off said train, notwithstanding any regulation or custom of the company to the contrary. The acceptance of a ticket by the company's conductor makes a contract for the carriage of the passenger to the station named on said ticket, and the company cannot excuse themselves for any wilful, wanton or malicious acts of the conductor toward such passenger, by any rule or regulation as to the running of their through freight trains."

The refusal of the trial court to give the converse of this instruction, in so far as it relates to the company's obligation to stop at the passenger's destination, was held to be reversible error by the supreme court of Illinois, in a case closely analogous to this. See *C. & A. R. R. Co. v. Randolph, 53 Ill., 510.* In that case, as in this, the appellee purchased a ticket of the station agent and boarded a through freight train headed to his destination. The conductor took up his ticket, and refused to stop the train at his station, but upon arrival there, and when the train from an up grade was not going at full speed, told him then was his time to get off. The appellee leaped, was injured, and sued the company. The trial court refused to instruct the jury that the taking of the plaintiff's ticket by the conductor did not constitute a contract binding upon the company to stop the train at the point of destination mentioned in the ticket; but on appeal it was ruled that the jury should have been instructed as asked. We reached a similar conclusion as

to the company's duty in regard to this same train in Rosenberry's case.

2. SAME.

Railroad companies sometimes run trains that stop only at principal stations on their roads, and the propriety of so regulating their business cannot be challenged, when they furnish a reasonable number of other trains which stop regularly at intermediate stations to accommodate the traveling public. It is the duty of a passenger to ascertain whether the station of his destination is one of the stopping places of the train he wishes to board before embarking, and if he attempts to do so and is misled by an agent whose employment authorizes him to speak for the company, he has his action against the company for the misdirection; but such misdirection does not alter the duty of the conductor. He must run his train according to the regulations of the company; otherwise in lieu of that precision and regularity which are required in the management of trains to insure safety, we should have only uncertainty, irregularity and insecurity. The station agent cannot thus legally throw upon the conductor the blind hazard of injury to his master and the passengers committed to his care. *Marshall v. St. L., K. C. & N. Ry., 78 Mo., 610.*

But in this case the mistake of the station agent, if there was a mistake, was not communicated to the conductor at all. The jury were told, however, that it was the company's duty to stop for the accommodation of the appellee, and the instruction was in all likelihood understood to mean that a failure to do so was "wanton, wilful and malicious conduct," on the part of the company, which, as they were told in another part of the charge, would warrant the infliction of punitory damages. How far this error went toward making up the verdict we are unable to determine.

Let the judgment be reversed and the case remanded for a new trial.

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CHICOT COUNTY v. KRUSE.

1. JURISDICTION: *Of county court over county expenses.*
The county court has original exclusive jurisdiction to audit, settle and direct the payment of all demands against the county, including contingent expenses in the circuit court.

2. COUNTY COURT: *Certificate of circuit judge not conclusive as to expenses.*
The certificate of the circuit judge of expenses of the circuit court to be paid by the county is not conclusive upon the county court as to the amount of compensation to be allowed where the fees for the services rendered are not fixed by law.

3. MANDAMUS: *None to compel unlawful acts.*
Mandamus never lies to compel the officers of a county to do an act which is forbidden, or not authorized, by the laws of the state.

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

D. H. Reynolds for Appellant.

The circuit judge allowed and ordered paid a bill for $1174 for feeding jury 587 meals.

The county court refused to pay it.

Claimant applied for mandamus to compel payment, setting up allowance by circuit judge and refusal of county court, and that county scrip was worth twenty-five cents on the dollar and that meals were worth fifty cents in currency, and that the account was made accordingly.

County judge answered that the claim was not verified; that the account was excessive and based on depreciated scrip, and that the county court had no authority to pay such a bill, but was willing to pay the bill at fair price in currency.

The claimant demurred and the demurrer was sustained and mandamus awarded, and the county appealed.

The appellant submits that the court below erred in sustaining the demurrer and in awarding the mandamus.

Sections 601 and 602 of Gantt's Digest and the amendments thereto prohibit the county court from allowing claims against the county for a sum in excess of the cash value of the services or articles furnished; and the fact that scrip is depreciated does not warrant an additional issue of it. *Goyne v. Ashley county, 31 Ark., 552; Union county v. Smith, 34 Ark., 684; Shirk v. Pulaski county, 4 Dillon, 209.*

These cases are decisive of this case, unless the proviso in the act of March 21, 1881, (*Acts of 1881, p. 131*), takes this class of cases out of the general rule as to claims against the county, and it is submitted that such is not the effect of the proviso.

The county court was right in refusing to allow the claim, or even to consider it, until the affidavit was made to it as required by law, and it can not be forced by mandamus to allow the claim.

As the petition and answer showed the amount due, and as the county judge was willing to allow that amount, the court below should either have denied the mandamus entirely or have allowed it only for the amount due; and it is submitted that it should have been denied, as mandamus should not issue if the thing to be done may be done without it.

In the case before us there is an attempt to obtain a demand in violation of the plain letter of the law, on the certificate of the circuit judge, by the extraordinary process of mandamus.

C. H. Carlton for Appellee.

The only authorities relied on by the appellant are the decisions of this court in *Goyne v. Ashley county, in 31 Ark., 552,*

and *Union county v. Smith, in 34 Ark., 684*, and in support of these cases he cites the case of *Shirk v. Pulaski county, in 4 Dillon, 209*.

Both the case of *Goyne v. Ashley county, supra*, and *Union county v. Smith*, as well as the case from *4 Dillon*, seem to be alone an effort to construe and give force and effect to *Sections 601–602, et sequiter, of Gantt's Digest*, and the amendatory act of 1875, which only gives the manner and form of procedure in such cases as originate in the county court, and in which such court was invested with the authority to audit and determine the amount that ought to be paid, and these sections and the opinions relied on by the appellants all seem to be predicated on *Section 1176 of Gantt's Digest*, which was passed as far back as 1838; and appellant's counsel ask in that connection if the county court has no discretion. We think not, in matters of this kind, notwithstanding the opinion in *Union county v. Smith, supra*.

In the construction of these laws we take it that the court will give only such as was clearly the intention of the legislature, or such as the nature of the case and the interest of the public, conformable to such intention, demand. Now, if the legislature intended that no special provision should be made for extraordinary expenses attending the administration of the laws in the circuit court why did they pass the acts as recited in *Sections 624, 625 and 1204 of Gantt's Digest*, and are these acts repealed by anything contained in the Acts of 1875 or of any subsequent act now in force? We hold that the act of *Sections 624–625 of Gantt's Digest* is still in force and obligatory on the county courts; that they are not inconsistent with any act passed subsequent thereto, and that in conformity therewith the county is bound to provide for the extraordinary expenses of the circuit court, and that the sole arbiter of such expense is the circuit judge; and *Section 1204* is only a reiteration of that authority.

In *Union county v. Smith* the court seems to have based its opinion on public policy alone, without attempting to reconcile the conflicting sections of the law we have referred to, and although that case seems closely analogous to this in respect to the actual facts involved, it is not exactly similar in situation. In that case the account was originally presented to the county court for allowance, whereas in this case we ask to invoke the power of the circuit court to enforce one of its own orders or judgments, as we think it is fully authorized to do by *Section 1204, supra.* But we differ with the court in that case as to what is the true public policy in such matters, and submit that the tendency of such policy is the reverse of that laid down in that case. The legislatures have enacted certain laws, appointed courts and officers to enforce them, and required them to enforce them a certain way. Now, it would be a farce to say that such laws are in force and at the same time to give such construction to subsequent acts as to take away from such officers the power to enforce them. It is a great constitutional privilege that you can not take private property for public use without proper compensation.

The penal laws of the land require in certain cases that extraordinary expenses may be incurred in their administration; that juries shall be kept together, prisoners guarded, etc., and under that constitutional protection you can not make one man bear the burden. The courts of the country, we take it, are powerless to evoke or avoid fluctuations in the value of the scrip of the several counties; it always has been so, and, we presume, always will be so.

The laws of the land say that when a citizen contributes his means or his services for the public, in such cases he shall be paid in warrants on the treasurer. Now, if these warrants are depreciated, you must give him enough to make him adequate compensation. The effect of the construction in the Union county case will be to tie up the hands of the courts in

the enforcement of the laws, or to send every criminal case to this court, to be returned and ground over in the same mill.

But outside of the cases cited and the reason given by appellants, we take it that the act of March 21, 1881, which is subsequent to all the cases where the question has been before the court, by its express reservation saves and provides for just such cases as this, and that the same was a re-enactment and reiteration of *Sections 625 and 1204 of Gantt's Digest*, as referred to, and that the county court has no discretion in such matters.

If force or effect is given to the several sections referred to, and to the act of 1881, there can be no question of the right of the circuit judge to use the writ of mandamus to enforce the payment of the claim.

SMITH, J. Kruse applied to the circuit court for a mandamus to compel the county court to pay his bill of $1174 for 587 meals furnished to the jury which tried the case of State v. Maclin, on an indictment for murder. The petitioner represented that he had fed the jury under the directions of the circuit court in which said trial took place; that his account had been approved by the circuit judge and certified down as extraordinary expenses incurred in holding the court, and payment thereof had been ordered; but the county court had refused to audit or pay his claim; that the value of the meals so furnished by him was fifty cents each, estimated in currency, but Chicot county scrip was worth only twenty-five cents in the dollar.

An alternative writ was issued, and in response the county judge showed for cause that the claim was not properly verified under *Section 1412 of Mansfield's Digest*, which requires the exhibitor of every such claim to swear, among other things, that his demand has not been enlarged, or enhanced, or made

greater in consequence of any depreciation in the value of county warrants; that the amount charged was exorbitant, being based on the depreciated condition of county scrip, and there was no authority for allowing such amount in depreciated scrip as would be the equivalent of the usual charges in currency, but only such an amount as would in currency be a fair and customary price for the meals furnished.

To this answer a demurrer was sustained and a peremptory mandamus was awarded.

1. JURISDICTION: Of county court over county expenses

By virtue of our constitution and laws, the county court is invested with exclusive original jurisdiction to audit, settle, and direct the payment of all demands against the county. *Constitution of 1874, art. 7, sec. 28; Mansf. Dig., sec. 1407.*

Contingent expenses accruing in the circuit court form no exception to this rule. *Ib., sec. 1488.*

2. Certificate of circuit judge not conclusive.

The certificate of the circuit judge is not conclusive upon the county court as to the amount of compensation to be allowed where the fees for the services rendered are not fixed by law. *Jefferson County v. Hudson, 22 Ark., 595; Union County v. Smith, 34 Id., 684.*

And the county court is expressly prohibited from allowing any greater sum against the county than is actually due in money. *Mansf. Dig., sec. 1411; Barton v. Swepston, 44 Ark., 437;* and cases there cited.

As was said by Chief Justice English, in *Union County v. Smith, supra.:* "All who serve the public must receive such compensation for their service as the law provides."

3. MANDAMUS: None to do an unlawful act.

Now, the writ of mandamus never lies to compel the officers of a county to do an act which is forbidden, or not authorized by the law of the State. *Supervisors v. United States, 18 Wallace, 77; United States v. County of Clark, 95 U. S., 769; United States v. Labette County, 2 McCrary, 25; S. C., 12 Cent. L. Jour., 36; State ex rel. Watkins v. Macon*

County Court, 68 Mo., 29; S. C., sub nomine State v. Walker, 7 Cent. L. Jour., 390.

The judgment is reversed and cause remanded to the circuit court, with directions to dismiss the petition at the costs of the petitioner.

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HERSHY v. DUVAL & CRAVENS.

ATTORNEY AND CLIENT: *Attorney's lien for fees.*

A solicitor has no lien upon his client's land for his fee for services rendered in removing a cloud from his title to it. The lien provided by *sec. 3937, Mansf. Dig.*, is limited to cases where there has been an actual recovery and can not be extended to professional services which merely protect an existing title or right to property.

APPEAL from *Sebastian* Circuit Court in Chancery.
Hon. J. L. HENDRICK, Special Judge.

Sanders & Husband for Appellant.

We insist that appellees never had a lien on the property. The suit they brought for appellant was not for the recovery of property, but simply to have title of appellant declared and quieted. We insist that the statute gives a lien only in cases for recovery, and that the suit appellees brought was not of that nature. See *Garner v. Garner, 1 Lea. (Tenn.), p. 29; Chapline v. Holmes, 27 Ark., p. 416.*

We further insist that the motions for change of venue and transfer to the common law docket should have been sustained. The rule, as we understand it, ever has been that where the very foundation of and the right to maintain the suit at all

depends upon a question of fact, then the cause should go to the common law docket, and the party be given a trial by jury, and for error in this respect the higher courts will reverse. *Daniels Chy. Pl. and Pr., vol. 2, p. 1285; Story's Eq. Jur., vol. 1, sec. 72; Greenl. on Ev., vol. 3, sec. 266; Marston v. Brockett, 9 N. H., 337; Charles River Bridge Co. v. Warren Bridge, 7 Pick., p. 364, et seq; Maddox Chy. Pr., vol. 2, p. 474.*

We insist that the court erred in refusing to set aside the sale on the ground of inadequacy of price. While mere inadequacy is not sufficient, yet when the inadequacy is not only gross, but shamefully and shockingly so, then we insist that the rule is different, and while it is a matter of discretion, it will be corrected on appeal. *Sowards v. Pritchell, 37 Ill., 524; Henderson v. Herod, 23 Miss., 453; Boyd v. Ellis, 11 Iowa, 97; Blight's heirs v. Tobin, 7 Mon. (Ky.), 616; Hannibal & St. Jo. R. R. Co. v. Brown, 43 Mo., 294; Price v. Whitely, 50 Mo., 438; Berry v. Hardin, 2 B. Mon. (Ky.), 407; Taylor v. Gilpin, 3 Metc. (Ky.), 545; West, Oliver & Co. v. Davis, 4 McLean, C. C. R., 242; Hebern v. Hebern, 67 Ill., 255; Stump v. Martin, 9 Bert. (Ky.), 289; Hughes v. Hamilton, 19 W. Va., 366; American Oil Co. v. Oakley, 9 Paige., 259; Tripp v. Cook, 26 Wend., 145; People v. Bond St. Savings Bk., 53 N. Y., How. Pr., 336; Walker v. Derby, 5 Biss., C. C. R., 148; Durfin v. Moran, 57 Mo., 379; Phillips v. Stuart, 59 Mo., 492; Sinnott v. Crabbe, 4 W. Va., 603; Fry v. Street, 44 Ark., 502; Hershy v. Latham, 42 Ark., 307; Wells, et al., v. Rice, 34 Ark., 352; Sessions v. Peay, 23 Ark., 41; Thomasson v. Craighead, 32 Ark., 392; Perrin, ad., v. Tolleson, 20 Ark., 652; Deadrick v. Smith, 6 Humph., 138; Tooley v. Kane, 1 S. and M. Chy. N., 518.*

Here we have property worth $15,000 sold for $511 without redemption. The act of the legislature of this state of March 4, 1875, declaring that it was the true intent of *secs. 2696, 2607, 2698, 2699* and *2700* of the Digest, should apply to all sales, judicial as well as execution sales, is, we think, uncon-

stitutional. The legislature did not enact that such was or should be the law, but only undertook to construe an existing law. *Cooley's Con. Lien, 3 ed., pp. 85 to 96; Wayman v. Southard, 10 Wheat., 46.*

DuVal & Cravens, Appellees, *pro se se.*

The first point of the appellant, we think, is not well taken.

Chapline v. Holmes, cited by counsel, has no resemblance to the case in question; in that a bill was filed to cancel a certain tax deed which the plaintiff claimed to be illegal and void, but a cloud upon her title. In considering an objection to the complaint, raised by demurrer, that she had not filed before the commencement of the suit the affidavit of a tender, as required by the statutes in cases for the recovery of land sold at tax sales, the court said that the suit was not for the possession of the land but simply to clear the title from doubts and clouds.

This case was entirely different—the appellee had bid off an interest in certain property at execution sale, and had taken deeds therefor. It was an undivided interest and was claimed by Stryker, one of the defendants, who with the other tenants in common had partitioned the property among themselves by deed, and utterly repudiated the title of Hershy. The action was really for the recovery of the property, and the judgment of the court vacated the deed of partition, canceled the deed under which Stryker claimed the property, and declared Hershy's title therein to be good, etc.

Under this decree the property was subsequently partitioned by the court, and that part upon which the court in this case declared a lien to exist in favor of the appellees was partitioned and set off to appellant in severalty.

The effect of the judgment was the recovery of the identical real estate upon which this suit was brought to enforce the lien of the appellants as the attorneys for the appellee.

Justice EAKIN in *Porter Taylor, etc., v. Hanson, et al.*, says: "Both by statute and upon general principles of equity practice, the attorneys of Farrow in the foreclosure suit might assert a lien upon the fund thereby recovered for services therein rendered.

"The object of the suit had not been to recover land or establish title, but to recover money by foreclosure, and as the complainant had taken land in place of money it would have been just . . . to have transferred the lien to the land.

"It is useless, however, at this time, to discuss the extent of the attorney's lien as the whole matter has been settled by the Code." *Secs. 3935, 3939.*

He says the necessity of filing with the clerk a statement of the lien in writing, as prescribed therein, and having the same noted in the margin of the record book near the judgment, extends only to protect those who in good faith and without notice make payment on the judgment, or he might have added and those who should purchase the property recovered.

Sec. 3935 says: "When any judgment is recovered in a court of record by or in favor of any party . . . . attorneys who upon contract, expressed or implied, have rendered service for or in behalf of such party . . . . shall . . have a lien upon and an interest in such judgment" . . each attorney to the amount to which he is entitled by contract, or, if no amount is fixed, a reasonable compensation for his services rendered.

Sec. 3637, reads: When the judgment is for the recovery of real or personal property the lien should amount to an interest on such property to the extent of such lien. See *Lane et al., v. Hallum et al., 38 Ark., 385.*

This court, in *McCain v. Partee et al., 42 Ark., 402*, say: "Our statute is remedial on the subject of attorney's lien and cumulative. . . . . It provides that an attorney shall have a lien on any judgment recovered in a court of record."

The property involved in the suit prosecuted by the appellees for appellant was stated to be vacant, and not in the actual possession of anybody.

But Stryker claimed it under deeds from W. B. Rogers, and Latham, through whom appellant claimed by his purchase at sale under execution against Latham, and his title had been recognized by the other tenants in common who had with him executed a deed of partition of the real estate among them. The learned counsel for appellant insist that the judgment was not for the "recovery of the property, but simply to have the title of the appellee declared and quieted." The suit was as much for the recovery of the property as if the proceeding had been in ejectment, and the result was practically the same. Recovery is defined to be the restoration of a former right by the solemn judgment of the court. *Bouvier Dict., 427.*

The statute gives the attorney a lien on the judgment recovered.

When such judgment is for the recovery of real or personal property the lien shall amount to an interest on such property to the extent of such lien. *Sec. 3937.*

For the amount of such lien he is to be deemed an equitable assignee of the judgment or of their recovery. *Marshall v. Much, 51 N. Y., 140.*

The fruit of the judgment was the real estate upon which the appellee claimed a lien, and as between them and appellant their lien is unquestionable. A perusal of the record will show that the appellant had through the skill and labor of the appellees come into the possession of an estate which he claimed was worth $15,000.

That he had purchased this princely estate for a mere trifle at sale under an execution issued upon a judgment for six or seven hundred dollars of which he himself was the owner.

That for the services so rendered by the appellees he had never paid a cent.

Under these circumstances the denial by appellant of the lien, or quibbling over words, is contemptible. It certainly does not commend him to the favorable consideration of the court. If under such circumstances the law could be so construed, that the attorneys were not entitled to a lien upon the fruits of their labor in the hands of the party for whom the services were rendered, it would be a protection to the dishonest client instead of the attorneys. There are no questions of hardships arising here in favor of a purchaser who might lose his property under the harsh rule of constructive notice of an equity of which he was in fact ignorant; but simply, whether a man can enjoy the fruits of the labor of others without making a reasonable compensation, an act which is equally in conflict with human and divine law.

The appellant insists the court erred in refusing to set aside the sale on the ground of inadequacy of price.

We differ with our learned brothers as to the action of the court; we say there was no error and that inadequacy of price was not shown.

The appellant filed, December 30, 1884, in open court, "additional exceptions to the report of the sale by the commissioner," in which he says that the court ought not to confirm the sale, because there were at the date of the sale several liens existing upon the lands, lots, and parcels of real estate sold, all claiming priority each over the other; and that by reason of the unsettled and unascertained amounts and priorities of said liens the purchasers of the land would not pay the value of said property.

The affidavit of James A. Yantis, which was filed on 6th February, 1885, was read before the trial, and showed that the sale was largely attended; that it was made at the court house door, and that the competition was about as usual; that the appellant, Hershy, was present and attempted to prevent bidding, by announcing that the decree under which the sale was

made was worthless; that he had conveyed the property to his wife; that he had no interest in it; that it had been sold under judgment in favor of McGreevy & Yantis, and that there was a mortgage on it. This affidavit may have been omitted erroneously from the transcript. It is on file among the papers in the office of the clerk.

The affidavits in support of appellant's exceptions are vague, no reference is made in them to the existence of any incumbrance upon the property. This court cannot say, in view of the appellant's own statements that there were liens, that the bid of the purchaser was grossly inadequate; in fact, this court can tell nothing about it. We think our friends have wasted their time in the citation of a vast number of irrelevant authorities, the weight of which in a proper case we would cheerfully concede. Whether the property was worth one dollar or fifteen thousand dollars this court cannot ascertain from the record. As it brought $571 at a public sale, where many persons were present, which had been advertised according to law, the presumption would be that it was sold for its full value, unless the conduct of the appellant at the sale, as shown by Yantis, deterred parties from bidding. If so, he has no right to complain. No unfairness or misconduct on the part of the appellees, or the commissioner, is hinted at.

Fry v. Street, 44 Ark., 502, is decisive here. This court says: "No offer is made to advance the bidding, nor is there even a suggestion that the property will bring a better price if a resale is ordered. But if it be conceded that the property has been sacrificed, this result is attributable to the defendant's own inattention and negligence." In this case it is worse, the appellant was active at the sale in endeavoring to prevent the property bringing a fair price.

And in the absence of fraud, or unfairness in the conduct of the sale, mere inadequacy of price does not invalidate a judicial sale. *Britton v. Handy, 20 Ark., 381; 2 Jones Mortg., secs. 1672–6.*

SMITH, J. In March, 1883, DuVal & Cravens filed their bill in equity against Hershy, alleging that he had, in 1878, employed them as solicitors to institute a certain suit, the object of which was to have Hershy's title to an undivided one-sixth part of certain lands declared and quieted; that they had conducted the suit to a successful termination, having obtained a decree in favor of their client in the circuit court, which was by this court affirmed on appeal, (*Striker v. Hershy, 38 Ark., 264*); that the lands had been subsequently divided between the parties in interest, and Hershy's share had been set out to him in severalty; that the plaintiffs' services in and about said suit were reasonably worth $1500, and that by the statute law of this state they hold a lien for their fees upon the lands which were the subject of litigation. They pray for a personal judgment against Hershy, and that the amount thereof may be charged on the lands.

Hershy, in his answer, denied the alleged employment by him of the plaintiffs, the value of the services rendered, and the alleged lien upon the property for these services. But the court rendered judgment against him for the sum demanded, declared the same to be a subsisting lien on the lands, and decreed a sale. The lands were accordingly sold in separate parcels, to Richard T. Kerr, producing in all $511. Hershy resisted the confirmation of the sale, upon the grounds that the price was shockingly inadequate, the lands being worth as he said $15,000. He appended the affidavits of disinterested persons, to the effect that the lands were of the value of $8000 to $10,000. But his exceptions were overruled, the report of sale was approved, and the master was directed to execute a conveyance to the purchaser. Hershy has appealed.

Under the rule established in *Brittin v. Handy, 26 Ark., 381*, and followed in *Fry v. Street, 44 Id., 502*, mere inadequacy of price, in the absence of all fraud or unfairness, does not inval-

idate a judicial sale. Hershy's exceptions to the confirmation of the sale show that the property was incumbered by judgment and mortgage liens to the amount of several thousand dollars. This perhaps explains why so valuable an estate produced such a small sum.

Upon the main question, whether DuVal & Cravens had any lien, and whether the decree condemning the lands to be sold was such an one as should have been pronounced: This court, in *Hanger v. Fowler, 20 Ark., 667,* held that a solicitor had no lien for his fee upon the land recovered for his client in a chancery suit. That case relies upon *Smalley v. Clark, 22 Vt., 598,* which was a suit of the same nature as that in which the present plaintiffs were employed, viz., to remove a cloud on the title to lands. The house of lords, in 1858, decided that an attorney or solicitor has no lien upon an estate recovered for a client in respect of the costs and expenses incurred in recovering it, but only a lien on the papers in his hands. *Shaw v. Neale, 6 H. L. Cases, 581;* overruling *Barnesly v. Powell, Ambler, 102.* Soon after that decision, and probably in consequence of it, the statute of *23 and 24 Victoria, chap. 127, sec. 28,* was passed. This enacts that in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any court of justice, it shall be lawful for the court or judge, before whom it has been heard or is pending, to declare the attorney or solicitor entitled to a charge upon the property recovered or preserved through his instrumentality, and a right of payment out of it, for the taxed costs, charges and expenses. And the court or judge is further authorized to make appropriate orders for the taxation, raising or payment of such costs, charges and expenses. Under this act it has been held a solicitor is entitled to a charge for his costs on property the subject of a successful suit conducted by him against an incumbrancer, although the incumbrance be entirely valueless, provided it formed a cloud upon

the title. *Jones v. Frost, L. R. 7 chap. app., 273; S. C. 3 Moak, Eng. Rep., 622.*

But independently of statute, a solicitor, who has performed services and expended moneys, in prosecuting or defending a suit involving the title to or possession of real estate, cannot sustain a claim to obtain compensation and reimbursement out of that specific property. *Cozzens v. Whitney, 3 R. I., 79; Newbaker v. Alricks, 5 Watts, 183; Hnmphry v. Browniug, 46 Ill., 476; Forsyth v. Beveridge, 52 Id., 268; S. C. 4 Am. Rep., 612.*

Since the case of *Hanger v. Fowler, supra,* was decided, our legislature has adopted a Civil Code, which enacts that when any judgment is recovered in a court of record by any party, every attorney who upon contract, express or implied, has rendered service in behalf of such party, shall have a lien upon, and interest in, such judgment to the amount to which he is entitled, or, if no amount is fixed, a reasonable compensation for his services. And when the judgment is for the recovery of real or personal property, the lien shall amount to an interest in the property to the extent of the fee. *Mansf. Dig., secs. 3935–3937.*

Gist v. Hanly, 33 Ark., 233, was a case of an attorney's lien upon securities belonging to his client but in his possession. *Porter v. Hanson, 36 Id., 592; Compton v. State, 38 Id., 601;* and *McCain v. Portis, 42 Id., 402,* were cases of liens upon a fund in court. In *Lane v. Hallum, 38 Id., 385,* this court was first brought face to face with the charging lien of the attorney, which is the creation of the statute; and it was there decided that as the statute gives him an interest in the property recovered to the extent of his lien, he is to be deemed, *pro tanto,* an equitable assignee of the judgment. He has a claim to the equitable interference of the court to have the judgment held as security for his debt.

Our statutory provisions on this subject were not derived from the Code of Kentucky. But in 1871 the legislature of that state passed an act which provides that when an attorney shall be employed by either party to an action, and shall prosecute the same to recovery, he shall have a lien upon any property, either personal or real, which may be recovered therein, for the amount of his fee. The court of appeals construe this to mean that where nothing is recovered for the client, there is nothing to which the lien can attach. *Wilson v. House, 10 Bush., 406.*

The lien on the specific property recovered, provided by *Sec. 3937 of Mansfield's Digest*, is limited to cases where there has been an actual recovery, and can not be extended to professional services which merely protect an existing title or right to property. Thus in Tennessee, where the solicitor's lien on land recovered for his client seems to be recognized, a plaintiff sought to establish a resulting trust in land, but he was defeated. And it was held the defendant's solicitor could not assert a lien on the land thus successfully defended. *Garner v. Garner, 1 Lea., 29;* per Cooper, J. Compare also *Huison v. Garble, 65 Ala., 605.*

Our statute is not so broad as the English act. It does not give the attorney a lien on the estate he has rescued from an unjust claim, and saved for his client, but only on the property he has actually recovered.

Now a bill to remove a cloud from the title to land, is not, in any sense, an action for the recovery of land, or for the possession thereof. It is not instituted for such a purpose, nor can the plaintiff have that relief, for he must be already in possession to entitle him to maintain the suit. The object is simply to clear the title from doubt. *Chapline v. Holmes, 27 Ark., 414.*

The decree, so far as it awards a personal judgment against Hershy, is affirmed, but so far as it subjects the lands that were

the subject of litigation in the former suit to the payment of such judgment, is reversed and vacated at the costs of the appellees.

L. R., M. R. & T. Ry., v. Talbot & Co.

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1. Common Carriers: *Exemption from liability for losses.*

In the absence of a contract limiting his liability, a common carrier is liable for all losses except those caused by the act of God, by the public enemy, by the inherent defect, quality or vice of the thing carried, by their seizure under legal process, or by some act or omission of the owner of the goods. He may, however, contract for exemption for unavoidable accidents, but not for exemption from liability for losses occurring from his, or his servant's negligence, or for any other exemption not just and reasonable in the eyes of the law.

2. Railroads: *Common carriers; Exemption from liability for fire.*

When a common carrier contracts for exemption from liability for injury from fire he is bound to exercise ordinary diligence to prevent such injury; that is, such care and diligence as a reasonable, prudent and honest man would exercise in respect to his own concerns under all the circumstances of the particular case; and if he uses this diligence he is not guilty of culpable negligence and not liable for the loss.

APPEAL from *Jefferson* Circuit Court.
Hon. W. M. Harrison, Special Judge.

J. M. Moore for Appellant.

The law of this case was settled on the former appeal, *39 Ark., 527.*

This case is within the ruling of this court in *L. R., M. R. & T. Ry. v. Harper & Wilson, 44 Ark., 209.* The court there reversed the judgment against the appellant, on the ground that there was no evidence tending to prove negligence on its part.

The goods, for the value of which this suit was brought, were destroyed at the same time as were the goods involved in the case cited, and the evidence as to the origin of the fire is substantially the same in both cases. We therefore insist that the judgment should be reversed on that ground, even if the rulings of the court below of which we complain, and to which we will presently direct the attention of the court, shall be held not to have been erroneous.

Appellees contend that the carrier is held to extraordinary care and diligence. This is not the law.

Any deviation from the duty, or relaxation of the vigilance, imposed by the law on a bailee, whether slight or gross, is negligence.

It is in the foregoing sense that the language relied on by the appellees must be understood. By any negligence, the courts mean any failure to exercise that degree of diligence which the law imposes on the carrier, which is, as we will now proceed to show by the authorities, ordinary and reasonable diligence. See *60 Mo., 199; 20 Penn. St., 177; 10 Wall., 191; 6 How., 344; 14 Bush., 590; 46 N. Y., 278; Story on Bailment, 8 ed., secs. 570–1, and notes 8 and 3.*

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

At common law a common carrier is liable as an insurer of the goods entrusted to his care, except as to acts of God and the public enemy. *Angell on Carriers, 67; 39 Ark. Rep., 157.*

In the United States it is well settled that while a common carrier may contract against liability for losses occurring from unavoidable accident, they are not permitted to contract for exemption from liability for losses occasioned by the negligence of themselves or their servants. *R. R. Co., v. Lockwood, 17 Wall., 357; Taylor & Co., v. R. R., 32 Ark., 398; N. J. Steam Nav. Co., v. Merchants Bank, 6 How., 344; Empire Trans. Co.,*

v. Wamsutta Oil Co., 63 Pa. St., 14; Grace v. Adams, 100 Mass., 505; School Dist., v. B. H. & E. R. R., 102 Mass., 552; Christensen v. Am. Express Co., 15 Minn., 270.

We have examined a large number of cases and have been unable to find a single case in which, under a similar contract, the defendant's liability has been held to depend upon the degree of negligence proved. In all the cases the rule is either conceded, or it is expressly decided, that common carriers must adopt every reasonable means, and use every reasonable precaution, to preserve the goods in their charge, and that any degree of negligence, however slight, will render them liable. To this effect see *Talbot v. L. R., M. R. & T. Ry., 39 Ark., 529; Steinway v. Eric R. R. Co., 43 N. Y., and authorities cited; Grey's Ex'r., v. Mobile Trade Co., 55 Ala., 387; M. S. & M. J. R. R., v. Heaton, 37 Ind., 448; 20 Minn., 125; 24 Minn., 506; 3 Colo., 280; 115 Mass., 304.*

Many other authorities on this point are cited and reviewed in the case of *N. O., St. L. & C. R. R. Co., v. Falcr & Co., 58 Miss., 911*, a case to which we respectfully ask particular attention. In that case the court said: "Whenever a loss of goods being transported by a railroad company results from a cause against which the company has, by special contract, stipulated for immunity, the company is still liable, notwithstanding the special contract, unless it can be acquitted of all blame for the loss."

In *Graham v. Davis, 4 Ohio St., 362*, it was held that negligence, whether gross or slight, could not be the subject of contract.

In *Michigan Southern Railroad v. Heaton, supra*, the court said: "That a carrier could no more contract for a slight degree of negligence than for gross negligence."

In *Steinway v. Erie Railway Co., supra*, the court holds the carrier liable if there was any negligence on his part "without regard to any supposed distinctions or degrees of negligence."

And, as conclusive on this point, see *Hutch. on Carriers, sec. 260, and cases cited.*

In the case at bar, the question as to the fact of negligence was properly submitted to the jury; they found against appellant, and the judgment should be affirmed.

BATTLE, J. This is the second appeal taken to this court in this action. The substance of the complaint and answer is stated in the opinion of this court delivered when it was here before, as appears in *39 Ark., 526.* By reference to that opinion it will be seen that it is an action for the value of goods received by the Little Rock, Mississippi River and Texas Railway Company, at Arkansas City, under three bills of lading, for transportation to plaintiffs, John H. Talbot & Co., at Pine Bluff; that two of these bills of lading contain clauses which exempt defendant from liability for loss of the goods by fire; that the other, which only covered tobacco, did not; that the goods were destroyed by fire; that this court held it was necessary for plaintiffs to prove that the loss resulted from the negligence of defendant or its agents, before they could recover anything on account of the goods described in the bills of lading containing the clauses exempting defendant from liability for losses by fire; and that this cause was remanded for new trial.

After the cause was remanded the defendant paid to plaintiffs the value of the tobacco covered by one of the bills of lading. The only question now in the case is, was the loss of the other goods destroyed by fire the result of the culpable negligence of the defendant or its agents.

The facts proven in the second trial are these: On the 20th of June, 1880, about 7 a.m., the wharf-boat in which the goods were, and which was used as defendant's warehouse or depot, was discovered to be on fire, and the same with its contents, including the goods sued for, were destroyed. The

wharf-boat was fully manned, with mate and watchmen, both night and day. At the time of the fire the clerk and mate were absent, eating their breakfasts, but the day watchman was on duty. Just before discovering the fire he went all over the lower deck of the wharf-boat; went to the forward part and made an examination, and returned to the rear; stepped on the stage plank leading to the shore, stopped and looked forward; saw the fire near the staircase in front, and immediately went forward and gave the alarm. There was a lamp-room under the stair-steps in front, which was used to fill and trim lamps on the wharf-boat. He did not examine this room, because it was in charge of the night watchman and he supposed it was locked. From under these stair-steps, where the lamp-room was, witnesses saw dense smoke coming soon after the commencement of the fire. The wharf-boat was so dry and the fire so rapid that only a small portion of freight and a portion of defendant's books were saved. An investigation was immediately made, but the origin of the fire could not be ascertained. There was no boat at the wharf-boat at the time, and had been none since 12 o'clock of the night previous. There was no water on the wharf-boat except ten or twelve buckets on the hurricane roof. The wharf-boat cost the defendant $6500 at Memphis, and $7500 to tow it down, and was insured for $6000. The defendant had been recently offered $10,000 for it. The value of the goods sued for, exclusive of the tobacco paid for, was admitted to be $425.

Plaintiff asked the following instructions, which the court gave, against defendant's objection, to the giving of each of which the defendant at the time excepted:

"1. The plaintiffs are entitled to recover the value of the goods, with six per cent. per annum interest thereon from the 20th of June, 1880, if the jury find from the evidence that they were destroyed by fire by reason of the negligence of the defendant or its agents.

"2. It is against public policy to permit common carriers to contract for exemption from liability for loss and damages happening from the negligence of themselves or their servants, and if the jury believe from the evidence that the loss of the goods in this case was occasioned by the negligence of the defendant or its servants, then the plaintiff is entitled to recover notwithstanding the exemption contained in the bills of lading."

Defendant asked the following instructions, which the court gave:

"1. Under the bills of lading in this case it devolves on the plaintiff, Talbot, to prove that the goods were burned through the negligence of defendant's employes.

"5. The plaintiff has the burden of proof in showing that the burning occurred through negligence, and the mere burning is not sufficient proof of negligence."

The defendant asked the following instructions, which the court refused to give, and to which refusal to give each of said instructions the defendant at the time excepted:

"2. The defendant's employes were required to exercise ordinary diligence, but not extraordinary diligence, to keep the fire from breaking out and burning the goods.

"3. The ordinary diligence which they were required to use was that diligence which a person of ordinary care and prudence exercises in preserving his own property.

"4. Absence of employes from the boat would not necessarily be negligence, unless the burning would not likely have occurred, or they might reasonably expect this to give rise to the burning.

"6. If the jury are left in ignorance by the testimony, as to how the fire occurred, or what caused it, they must find for the defendant.

"7. Though the jury believe that the fire occurred in or near the lamp-room, this is not sufficient proof of negligence.

"8. There is not sufficient evidence of negligence in this case, and the jury should find for the defendant.

"9. The railroad employes were only required to exercise ordinary diligence in preventing the goods from burning."

A verdict was returned and judgment was rendered in favor of plaintiffs against defendant for $539.37.

Defendants filed a motion for a new trial, which was overruled, saved exceptions, and appealed.

The facts in this case are substantially the same as those in *L. R., M. R. & T. Ry Co. v. Harper & Wilson, 44 Ark., 208.* In that case, Mr. Justice SMITH, in delivering the opinion of this court said, as we say in this case: "The carrier having contracted for exemption from responsibility for losses occurring by fire, the plaintiff could not recover without affirmative proof that the fire was the result of negligence. The testimony has no tendency to prove the issue, and this is not a case where it can be said, *res ipsa loquitur.* For fires, of whose cause no intelligent explanation can be given, are not of such unusual occurrence that the jury might infer negligence in the defendant's servants from the mere happening of the accident."

But inasmuch as this cause will have to be remanded for a new trial, it is necessary to notice the question of law raised by the instructions given and excepted to and those asked and refused.

1. COMMON CARRIERS: Exemption from liability for losses.

In the absence of a contract limiting the liability of a common carrier, he is liable for all losses except those caused by the act of God, by the public enemy, by the inherent defect, quality or vice of the thing carried, by the seizure of goods or chattels in his hands under legal process, or by some act or omission of the owner of the goods. He may, however, contract for exemption from liability for injuries occurring from unavoidable accidents, but not for exemption from liability for losses occurring from the negligence of himself or his serv-

ants, or any other exemption not just and reasonable in the eye of the law.

2. RAILROAD: Exemption from losses by fire.

The question here is, having contracted for exemption from liability for losses by fire, to what extent was the defendant bound to be diligent in protecting, preserving and saving from loss and injury by fire the goods entrusted to its care for shipment?

Wyld v. Pickford et al., 8 Mees. & Wels., 442, was an action against common carriers for the value of goods delivered to them for the purpose of carriage. At the time of the delivery of the goods, the carriers, the defendants, gave notice to plaintiff, the shipper, that they would not be responsible for the loss of or damage done to the goods, unless the same were insured according to their value and paid for at the time of their delivery. The goods were not insured, at the time of the delivery, according to their value, or paid for, and were lost. Mr. Baron Park, after saying that the effect of the notice, according to the English rule, was that the carrier would not, unless they had been paid a premium, be responsible for all events (other than the act of God and the queen's enemies), by which loss or damage to the owner might have arisen, against which events, by common law, a carrier is a sort of insurer, said: "But still, he undertakes to carry from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage."

In *Nugent v. Smith, 17 Moak's Eng. Rep., 343,* which was the case of a ship at sea caught in a storm, and the question being as to the degree of care which was required of the carrier in respect to the goods in his charge to protect him from a loss arising from the act of God, it was said by Cockburn, C. J., that "if he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that

can be reasonably required of him, and if, under such circumstances, he is overpowered by the storm or other natural agency, he is within the rule which gives immunity from such *vis major* as the act of God."

In *Railroad Company v. Reeves, 10 Wall., 190,* Mr. Justice Miller, in delivering the opinion of the court said: "The second instruction given by the court says that if while the cars were so standing at Chattanooga they were submerged by a freshet which no human care, skill and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and defendant would be liable." The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff.

In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country.

In *Morrison v. Davis & Co., 20 Penn. St., 171,* goods being transported on a canal were injured by the wrecking of the boat, caused by the extraordinary flood. It was shown that a lame horse used by defendant delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, *causa proxima, non remota spectatur,* applied as well to contracts of common carriers as to others. The court further held that "when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill and foresight, which it defines to be the common prudence which men of

business and heads of families usually exhibit in matters that are interesting to them. . . . Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case."

In *L. & N. R. R. Co. v. Brownlee, 14 Bush., 590,* the appellant received tobacco for shipment under a contract inserted in the bill of lading that the company "shall not be liable for loss or damage by fire or other casualty while in transit or while in depot or landings at point of delivery." The tobacco was burned while in the depot of appellant awaiting shipment. The court said: "We think the appellant was only bound to use ordinary care and prudence in providing a depository for appellee's tobacco, and also such care and prudence in shipping it. . . . If appellant could, by the use of ordinary diligence, and in the regular course of its freight business, have shipped the tobacco before its consumption by the fire, it is responsible for its failure to do so, or if it failed to use ordinary precaution and vigilance in storing appellee's freight, or in avoiding the fire which consumed it, it is responsible for the consequences."

In *Story on Bailments, 544,* after quoting the conflicting authorities, it is said: "The question may, however, be now considered at rest by an adjudication entirely satisfactory in its reasoning and turning upon the very point, in which it was held that in notices (special contracts) the carrier is liable for losses and injuries occasioned not only by gross negligence, but by ordinary negligence. In other words, the carrier is bound to use ordinary diligence."

As in cases where the law exempts the common carrier from liability for losses caused by the acts of God or the public enemy, so in cases where he is exempt by contract from liability for losses arising from fire and like causes, he is bound to use ordinary diligence in protecting goods entrusted to his care for shipment, and saving them from loss and injury, which may be

defined to be that care or degree of diligence which a reasonable, prudent and honest man would take, exercise and exhibit in respect to his own concerns, under all the circumstances surrounding each particular case. If, in such cases, he uses this diligence he is not guilty of culpable negligence and not liable for losses.

Reversed and remanded for new trial.

CASES ARGUED AND DETERMINED

—IN THE—

SUPREME COURT

—OF THE—

STATE OF ARKANSAS

—AT THE—

MAY TERM, 1886.

MOGLER v. STATE.

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1. LIQUOR: *Indictment; Selling to minor without consent.*

An indictment for selling liquor to a minor "without the written consent" of his parents or guardian is sufficient without including the words " or order." To negative consent is to negative the order. An oral order will not justify the sale.

2. SAME: *Sale by bar-tender.*

The absence of a saloon-keeper when a sale of liquor is made by his bar-tender and his directions not to sell to a minor will not exempt him from liability for the sale.

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

Stephenson & Trieber for Appellant.

1. The indictment does not negative an order in writing from the parent or guardian. *35 Ark., 324; 37 Id., 407.* In construing a statute effect must be given to every word, and none are to be treated as surplusage, etc. *35 Cal., 576; 14 Md., 184; 11 Ark., 44; 22 Pick., 571.*

2. The appellant was not present when the sale was made, nor did he consent to it in any manner, but it was against his positive instructions and orders. A person cannot be criminally punished for the act of another. *36 Ark., 153. Robinson v. State, 38 Ark., 641,* is not applicable to this case.

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

The appellant was indicted for selling liquor to a minor without the written consent of the parent or guardian. The indictment is in the language of the statute. *Sec. 1878, Mansf. Dig.,* and cases there cited. The sale by the bartender contrary to the directions of the appellant was no defense. *Robinson & Warren v. State, 38 Ark., 641; Edgar v. State, 45 Ark., 356.* Every question raised herein has been settled in the cases above cited and the judgment of the lower court should not be disturbed.

COCKRILL, C. J. It is a misdemeanor to be *interested in* a sale of liquor to a minor "without the written consent or order of the parent or guardian." *Mansf. Dig., sec. 1878.* The appellant was indicted and convicted of this offense. The charge was in the language of the statute except in this particular, viz: the words "or order" were omitted from the indictment. There was a demurrer and a motion in arrest of judgment on this account, which the court overruled.

The existence of an order from the parent or guardian for the sale of the liquor was negatived by the allegation that the sale was made without written consent. An oral order is not

sufficient to justify the sale (*Hill v. State, 37 Ark., 395; Pounders v. State, Ib., 399*), and a written order is necessarily a written consent to the making of the sale, so that if there was no consent there was no order from the parent or guardian.

The appellant's absence from his saloon when the bar-tender sold the liquor to the minor affords him no defense to the charge. *Robinson v. State, 38 Ark., 641; Waller v. State, Ib., 656; Edgar v. State, 45 Id., 356.* It was to cover just such cases as this that the prohibition against the sale of liquor to minors was extended to the person who entrusts the business to another, but himself enjoys the profits. *Cloud v. State, 36 Ark., 151.*

The fact that he had given directions to his bar-tender to refuse to make sales to minors could not aid him further than to commend a mitigation of the punishment the law imposes. "The offense is of that class where knowledge or guilty intent is not an essential ingredient in its commission." *Redmond v. State, 36 Ark., 58.*

There is no error in the judgment and it must be affirmed.

KLINE, AD., V. RAGLAND.

1. TRUSTS: *Husband and wife; Purchase with funds of wife.*

Where the purchase money for land conveyed to the husband is paid in whole or in part by the wife, she has an equity to have a trust declared and enforced against him to the extent of her payment. But when the consideration is paid by the husband, and the deed taken to the wife, it is presumed a gift by him. and no trust arises in his favor unless he overcome the presumption by evidence of a different intention.

2. SAME: *Mortgage; Land paid for in part by wife.*

When part of the consideration for land conveyed to the husband is paid by his wife and part by himself, he has an interest in the land to the extent of his payment, which may be subjected to the payment of his debts, and will be bound by his mortgage of the land and subject to foreclosure for payment of the mortgage debt.

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3. ESTATE IN ENTIRETY: *Deed to husband and wife.*
A deed to husband and wife vests in the grantees an estate in entirety.

4. MORTGAGE: *Title acquired after mortgage.*
Title acquired by a mortgagor after his mortgage, enures under our statute to the benefit of the mortgagee, without any warranty of title expressed in the mortgage.

5. SUBROGATION: *Paying lien on land.*
One who lends money to pay off a lien on land is not subrogated to the rights of the lien-holder when the money is so applied.

6. APPROPRIATION OF PAYMENTS: *Running account.*
When, in the absence of appropriation by a debtor, the creditor appropriates payments from him to a running account, the law will apply them to the items of the account in the order of their dates.

7. SAME: *Debts not due.*
A creditor cannot appropriate payments to debts not due without the consent of the debtor.

APPEAL from *Yell* Circuit Court.
Hon. B. D. GRANGER, Special Judge.

Jacoway & Jacoway for Appellant.

Appellees having acknowledged in writing that the notes were given to secure purchase money are estopped from denying it. *2 Parsons Cont., 6 ed., pp. 786 to 794 and notes; 31 Ark., 728; 30 Id., 177.*

The mortgage having been executed while W. M. Ragland held the title bond, and before the execution of the deed to him and wife, bound whatever interest he had, and no subsequent act could affect this security.

As to the payments, three of the notes were not due when the last payment was made by Ragland. No appropriation having been made by the debtor, the creditor had the right to appropriate the payments. *2 Parsons on Cont., 6 ed., pp. 629 to 635 and notes; Jones on Mortg., secs. 904 to 907.*

A general payment may be applied by the creditor to a claim against the debtor for which he has no security, or among

several claims to that for which he has the least security. *6 Cranch., 8; 7 Cranch, 572; 18 Kans., 345; 9 Cow. (N. Y.), 409; 78 N. Y., 293.* So a general payment must be applied to a debt due rather than to one not yet due. *10 Walls., —; 1 Bibb., 334; 15 Wind., 19; 5 Mason, 11; 9 Cowan, 420.*

A payment cannot be applied to a debt not yet due, except by express agreement of the creditor and debtor. *22 Pick., 305.*

Where a debtor has omitted to make any specific application of the money he has paid, but has left it to be applied as the creditor may see fit, he cannot afterwards go back and make an appropriation of it himself. See *Wilkinson v. Sterne, 9 Mod., 427,* per Lord Hardiwicke; *Mills v. Fowkes, 5 Bing., N. C., 455.*

Geo. B. Denison for Appellees.

The proof clearly shows that the notes included individual indebtedness of the husband, and that they were given for the purchase money of the land alone, and appellees are not estopped from showing their true consideration.

The purchase money notes were paid. They were charged to Ragland's account on the books, and were extinguished by payments. Where a portion of the indebtedness is secured, payments made and not applied by the debtor, or by the creditor when received without direction, will be applied by the law to the secured debt as the most burdensome. *2 Pars. Cont., 6 ed., p. 632; 2 Jones Mortg., sec. 907.* Where there is a running account, payments will be applied as made to the earliest items on the debit side. *30 Ark., 745; 34 Id., 285; 38 Id., 285; 39 Id., 248; 9 N. W. Rep., 591, (Minn., 1881).*

Plaintiff cannot enforce the mortgage beyond the interest of the husband. It cannot matter that the title bond was to the

husband, or that the deed was to husband and wife. As between husband and wife the lots belonged to the wife, and upon proof the court should so decree. The firm were not innocent purchasers, they knew all about the wife's interest. The mortgage does not convey any interest of the wife, only her dower.

1. TRUSTS:—Husband and wife: Purchase with wife's funds.

COCKRILL, C. J. At the time the mortgage which the bill in this case seeks to foreclose was executed, the mortgagor was not the owner of the fee in the mortgaged premises. He had contracted by bond for title with the person who was seized of the fee to purchase the lands upon the payment of $800. Of this sum $600 had been paid by his wife to the vendor, out of money given her by her father for the avowed purpose of purchasing a home for her and her children. It was in pursuance of this purpose that the purchase was made and the money paid. The bond for title, however, bound the vendor, by its terms, to execute a deed to the husband, upon the payment of the residue of the purchase money, and he executed his notes for the deferred payments.

By this arrangement the husband became the apparent equitable owner of the land, subject to the vendor's lien for the unpaid purchase money; but in fact an equity arose in favor of the wife to the extent of the purchase money paid by her, and would have arisen *in toto* on full payment, to have a trust declared and enforced in her favor against the husband and the vendor. This is the established equitable rule, where an estate is purchased in the name of one person and the consideration paid by another. *Tiederman on Real Prop., sec. 500* The whole question in such cases is one of intention. And so when the husband pays the purchase money and takes the conveyance in the name of his wife, the presumption that he *intended* it as a gift is raised from his obligation to provide for her, and there is, therefore, no presumption of a trust. *Milner v. Freeman, 40 Ark., 62; Ward v. Estate of Ward, 36 Ark.,*

586; Gainus v. Cannon, 42 Ib., 503. On the other hand, where the deed is taken in the name of the husband, the purchase money being paid by the wife, no presumption of an intention to make a gift arises, but there is a resulting trust in favor of the wife, and the husband holds the property thus acquired as trustee for her benefit, unless he is able to overcome the presumption by establishing a different intention. *Cunningham v. Bell, 83 N. C., 328; Thomas v. Standiford, 49 Md., 181; Loftin v. Whitboard, 92 Ill., 461; Moss v. Moss, 95 Ib., 449; Catherwood v. Watson, 65 Ind., 576.*

When it is shown that she intended the purchase for herself, and made the cash payment of the purchase money from her separate means, the fact that the husband takes the conveyance to himself, and executes his individual notes for the unpaid purchase money, does not defeat the trust that arises in her favor to the extent of the payment made by her. *Cunningham v. Bell, supra; Keller v. Keller, 45 Md., 269; Hopkins v. Carey, 23 Miss., 58.* The burden is still upon the husband to repel the presumption of the trust. *Wales v. Newbould, 9 Mich., 45–64; Keller v. Keller, supra.*

2. MORTGAGE: By husband, of land paid for in part by wife.

This was the wife's attitude toward the premises in question when the husband executed the mortgage in this case. It is not even shown that she knew that her husband was the obligee in the title bond. The mortgagees were cognizant of all the facts. The money which had been paid upon the execution of the title bond was paid by them to the vendor of the land in behalf of the wife. It had been deposited with them by her father with instructions that it should be paid out on her order for the purpose of providing a home for her and her children, and they knew that was the object of the purchase. The money was paid to the vendor in the wife's presence and by her direction, and the title bond was at that time or shortly thereafter placed in the mortgagees' safe for safe keeping. They are not, then, in the attitude of innocent purchasers, but

took the premises subject to the wife's equity. *Harris v. Brown, 30 Ala., 401.* The wife appears, however, to have abandoned the intention, if she ever entertained it, of causing the purchase to be completed by payment out of her separate estate. The residue of the purchase money was paid by the husband out of his own means. Money was advanced to him by the mortgagees for that purpose. The amount paid in discharge of the notes executed by him at the time of purchase was one-fourth of the purchase price. To the extent, then, of a one-fourth interest the wife's equity did not attach. The husband's creditors could have subjected the interest thus acquired by him to the payment of his debts, (*Hill v. Bugg, 52 Miss., 397; Heam v. Lander, 11 Bush. (Ky.), 669; Thompson v. Tharp, 3 Metc. (Ky.), 372,*) and a mortgage made by him while the title was in the condition described, bound his interest and vested in the mortgagees the right to subject it, upon foreclosure, to the payment of the mortgage debt.

3. DEED to husband and wife—Effect of.

Before the bill was filed, however, to foreclose the mortgage, the vendor of the land, who held the naked legal title, executed a deed to the husband and wife jointly, in pursuance of instructions received from them to that end. What led to the apparent change of ownership to the husband and wife jointly, we are not informed, and the wife has not complained of the character of the conveyance. The effect of it, according to the case of *Robinson v. Eagle, 29 Ark., 202,* was to vest in the grantees an estate in entirety. But the mortgagees' rights had become fixed by the mortgage before the execution of the deed, and it could not have the effect of discharging the lien that bound the husband's interest. The parties to that deed could do nothing that would deprive the mortgagees of recourse on that interest. As between themselves the husband and wife were seized of an estate in entirety in the whole property, but the wife acquired no interest superior to the mortgage in that part of the premises of which the husband was the

true owner. The husband, however, acquired a new interest in so much of the land as he had previously held in trust only. That, as we have seen, was a three-fourths interest in the whole. Title acquired to lands by the grantor after his conveyance, passes to the vendee, by virtue of the statute in this state, in all respects as if the same title had been in the grantor at the time of the conveyance. *Crittenden v. Jordan, 14 Ark., 463; Jones v. Green, 41 Ib., 369; Horsly v. Hilburn, 44 Ib., 458.*

4. MORTGAGE: After acquired title enures to.

We have no reported case in which the statute has been held to apply to a mortgage, but as the mortgage is, with us, as at common law, the conveyance of a conditional estate, and the statute by its terms applies to any conveyance purporting to convey a fee simple or any less estate, (*Mansf. Dig. sec. 642,*) the provisions must be held to apply to mortgages equally as to conveyances absolute in form. *Clark v. Baker, 14 Cal., 612; Vallejo Land Assn. v. Viera, 48 Ib., 572.*

The prevailing doctrine of the after acquired title enuring to strengthen the mortgage lien, in the absence of a statutory provision, is that in order to have that effect the conveyance must contain a covenant of warranty or something nearly akin to it. The usual covenant of warranty is not found in the mortgage in this case, but in the *habendum* clause it is recited that the land shall be held by the mortgagees, their heirs and assigns "against the lawful claims and demands of all persons whomsoever." If this is not a specific warranty, it is at least a declaration that the mortgagor purports to convey an estate in fee simple, of which he is seized, subject only to be defeated by payment of the amount named.

Without the aid of the statute referred to, which, as we have heretofore held, modified the rule as to the character of deed required to enable the grantee to take the after acquired title, this conveyance appears to be sufficient to have that effect, but under the statute there can be no doubt of it. *Crittenden v.*

Johnson, supra; Bigelow Estoppel, 296, n. 1; Clark v. Baker, supra.

So that when the bill was filed the mortgage bound a one-fourth interest in the land (in which the wife relinquished her right of dower) and also whatever right the husband took in the other three-fourths by the deed to himself and wife.

5. SUBROGATION: Paying lien on land.

When the notes were executed the mortgagor and his wife signed a written declaration that the entire mortgage debt was for money advanced to the husband to pay off the purchase money due on the lands. It is admitted that this statement is true in part only, a portion of the mortgage debt having accrued upon a store account contracted by the husband; but it is argued that the parties are estopped from denying the truth of the statement, and that the mortgagees are subrogated to the rights and remedies of the vendor of the land whose lien was paid with their money. The position is not tenable upon either ground. Without considering the effect of the coverture of Mrs. Ragland upon the operation of the doctrine of estoppel, it is sufficient to say that the declaration was not an inducement to the lending of the money or the execution of the mortgage, (*Franklin v. Meyer, 36 Ark., 114; Jowers v. Phelps, Ib., 465; Shields v. Smith, 37 Id., 47,*) and was procured by the mortgagees with the full knowledge of its falsity. But if the statement were literally true it would not aid the cause, because the mere advancing or lending money to one to enable him to pay off a lien does not subrogate the lender to the rights of the lien holder when the money is so applied. *Rodman v. Sanders, 44 Ark., 504.*

It does not appear from the written declaration or the proof that there was any agreement or intention at the time the money was advanced or paid to the vendor that these mortgagees should be subrogated to his lien, or that they looked to the land for security. The advance appears to have been made solely upon the personal security of the husband, with whom

the lenders had numerous dealings, and upon a final settlement of accounts the mortgage was taken to secure the balance due them.

6. APPROPRIATION OF PAYMENTS: Running account.

But it is claimed that the mortgage has been discharged by payment, and the special judge who tried the case actually so found and caused a decree to be entered upon this ground for the defendants.

The facts upon this branch of the case are these: Ragland, the mortgagor, was in the employ of the mortgagees and received a monthly salary from them. He had a running store account with the firm. Before either of the notes fell due the partnership between Freed & Block, the mortgagees, was dissolved, and Block became the sole owner of the mortgage notes and the account subsequently contracted by Ragland. He continued the firm business and permitted Ragland's store account to run and increase from month to month. Ragland's monthly salary and certain cash payments made by him were credited on this account as the salary fell due or the payments were made. It appears from the exhibits of the annual accounts stated, that Block charged in the accounts the notes with the interest against Ragland as they matured, just as other items of money advanced or goods furnished, and that the balance of the account so stated, after allowing credits, was carried forward and charged in the next account. If the payments made by Ragland are applied to the items of the account in the order of their dates, the mortgage notes which have been carried into the account will be extinguished and something less than $100 will remain due upon the account, which is not secured by the mortgage. This method of appropriation of payments, as was ruled in *Price v. Dowdy, 34 Ark., 285,* under a like state of facts, will be presumed to have been the intention of the creditor in the absence of countervailing proof. There is no satisfactory proof of any agreement between the parties, at the time of payment or at any time, to show how the payments should be ap-

plied, and the only proof of the actual appropriation is made by the statements of account taken from the mortgagees' books. Block died in July, 1883, soon after the last payment was made. At the time of that payment only two notes were due, and the amount due upon these notes had been entered upon the running account in the manner indicated. Under the circumstances the law made the appropriation of payments to the items in the order of their dates and these two notes were extinguished. *Price v. Dowdy, supra.* The remaining notes had not matured when the last payment was made, and without agreement with his debtor the creditor could not and the law does not appropriate payments to debts not due. *Gates v. Burkett, 44 Ark.*

7 SAME:— Debts not due.

The mortgage lien to the extent of these notes remains, and the decree must be reversed and the case remanded, with instructions to enter a decree for the plaintiff for the amount of the three notes maturing last, and interest from date till paid, and if the sum thus found due is not paid, to cause to be sold for its payment, first, a one-fourth undivided interest in the mortgaged premises, and then if necessary whatever interest the husband can convey in the remaining three-fourths.

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HALLUM V. DICKINSON.

1. EVIDENCE: *Action on judgments; Plea, nul tiel record.*

To maintain an action on a judgment against a plea of *nul tiel record*, a certified copy of the judgment alone is not sufficient, but all the pleadings and proceedings on which the judgment is founded, and to which as matter of record it necessarily refers, must be produced.

2. STATUTE OF LIMITATIONS: *Commencement of suit.*

The filing of a complaint is not, alone, the commencement of an action. Process on it must also be issued, and until then the running of the statute of limitations is not arrested.

3. SAME: *Issuing of summons; Proof of.*

Upon proof of the loss or destruction of a writ, the date of its issue and its contents may be proved by secondary evidence.

4. RES JUDICATA: *Effect of nonsuit.*

A nonsuit, whether voluntary or involuntary, is not a judgment upon the merits and will not prevent another suit on the same cause of action; or, if it has that effect in the state where taken, it will not in other jurisdictions where such a rule does not exist.

5. PRACTICE: *Judgment; Adding interest to verdict.*

The court has no power to add interest to the verdict of a jury in rendering judgment.

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

Jno. Hallum, pro se.

1. No sufficient transcript of the Tennessee judgment was filed; the pretended transcript of the judgment was fatally defective.

2. The suit is barred by the statute of limitations of ten years. The complaint was filed in time but it does not appear that a summons was issued until after the ten years had expired; nor was a copy of the judgment filed until after ten years.

3. The nonsuit in Colorado was a bar to any subsequent action.

4. The court erred in rendering judgment for more than the verdict of the jury.

R. J. Lea, for Appellee.

The complaint was filed within less than ten years after the judgment. The fact of the issuance of a summons was made a point for the *first time* in this court. No objection was made in the court below. It was the clerk's duty to issue the summons when the complaint was filed, and in the absence of proof

to the contrary, the law presumes the clerk did his duty. *Secs. 4968 and 4974 Mansf. Dig.; 25 Ark., 314; 24 Id., 402; 2 Id., 26; 30 Id., 69; 24 Id., 359.*

As to the nonsuit, see *Freeman on Judg., p. 261; Rev. St. Col., sec. 29, p. 510; 2 Scam., 262; 17 Ill., 494; 24 Ill., 464; 34 Id., 435.*

The judgment sued on was regular on its face, and discloses the fact that the court pronouncing the same had jurisdiction. *22 Ark., 389; 14 Id., 360; 13 Id., 33.*

SMITH, J. This is an action by Dickinson upon a judgment which, it was alleged, he had recovered against Hallum, on the 6th of April, 1872, by the consideration of the Supreme Court of Tennessee. The defenses were: 1. *Nul tiel record.* 2. The statute of limitations of ten years. 3. *Res judicata;* the plaintiff having impleaded the defendant in May, 1875, in a court of general jurisdiction in the Territory of Colorado, where he was met by pleas of *nul tiel record*, and the territorial statute limiting actions upon foreign judgments to three years after rendition of the same; which said pleas were adjudged good upon demurrer, whereupon the plaintiff interposed a frivolous replication and afterwards took a voluntary nonsuit. 4. Fraud in procuring the judgment declared upon.

The first plea was, upon an inspection of the record relied upon, determined in favor of the plaintiff, and the remaining issues were submitted to a jury, who found a verdict against Hallum for $1896.39. Judgment was entered for this sum and for the further sum of $202.83, by way of interest since the commencement of the action.

Hallum moved for a new trial, alleging misdirection of the jury, error of the court in giving judgment against him on the first plea, and that the verdict was contrary to law and evidence. His motion being denied, he excepted and appealed.

As the charge of the court is not incorporated, nor even referred to, in the bill of exceptions, we take no notice of his assignments of error upon that head.

1. EVIDENCE: On plea of *nul tiel record.*

The plea of *nul tiel record* puts in issue the existence of any record of the supposed recovery against the defendant. To prove that such a judgment had been rendered, the plaintiff offered the following transcript:

"THE STATE OF TENNESSEE.

"Pleas before the Supreme Court of said State, for the western division thereof, at Jackson, on the —— Monday of April, A. D. 1872. Present the Hon. A. O. P. Nicholson, Chief Justice, and Robert McFarland, Thos. J. Freeman, James W. Deadrich, Peter Turney and John L. T. Sneed, Associate Judges, to-wit:

Saturday, April 6, 1872.

"John A. Onley, trustee, and John Hallum,
vs.
"E. Fejan, trustee, and John A. Dickinson.

33—1st Cir. Ct., Shelby County.

"Came the parties, by their attorneys, and thereupon the record, proceedings and judgment of the court below, in this cause, being seen and fully understood by the court, and it appearing that in the same there is no error, it is therefore considered by the court that the judgment aforesaid be and the same is in all things confirmed, and that the defendant in error, John A. Dickinson, recover of the plaintiff in error the sum of sixteen hundred and eighty-seven 12-100th dollars ($1687.12), the amount of the judgment below; and of said plaintiff in error and C. W. Frazer, his surety on appeal bond, the further sum of two hundred and nine 27-100th dollars ($209.27), interest on said judgment from the 11th day of March, 1870, the date of its rendition, to the present time, and also the costs of this cause in this court and the court below—for all which let execution issue."

This is certified by the clerk of said court to be a true, perfect and complete copy of the judgment pronounced in said case; and his certificate is duly authenticated by the Chief Justice. The previous pleadings and proceedings in the court, whose judgment was affirmed, were not attached, nor the process by which the cause was removed from that court to the appellate court.

From this imperfect record it cannot be discovered what was the nature of the original action, nor who were the plaintiffs in error against whom judgment is rendered, nor indeed, except by inference, that any writ of error was sued out. Moreover, the judgment appears to have been against two or more persons, whereas it is here declared upon as a judgment against Hallum alone. There are no averments in the complaint to cure this apparent variance; nor are the ambiguities in the final judgment removed, as probably they would be, by the production of the whole record.

"By the judgment," says Mr. Justice Story, in *Owings v. Hull, 9 Peters, 623,* "we are to understand not that part of the record, which, in a suit at the common law, technically follows the *ideo consideratum est,* etc., for that would be wholly unintelligible, without reference to the preceding pleadings and proceedings; but that which, in common as well as legal language, is deemed the *exemplification* of a judgment; that is to say, all the pleadings and proceedings on which the judgment is founded, and to which, as matter of record, it necessarily refers." Compare *Abbott's Trial Evidence, 536–7, 544–5; 1 Gr. Ev., sec. 511; 2 Phillips Ev., 344, note 371, 4 Am. ed., Cowan and Hill's notes; Knapp v. Abell, 10 Allen, 485; Clark v. Depew, 25 Pa. St., 509; Hargis v. Morse, 7 Kans., 415; Gest & Atkinson v. N. O., St. L. & C. R. R. Co., 30 La. Ann., 28.*

The record produced is insufficient, in and of itself, to show that judgment was rendered against Hallum as alleged.

The verdict of the jury on the issue raised by plea of the statute of limitations is also not supported by sufficient evidence.

2. STATUTE OF LIMITATIONS:—What is commencement of suit.

The complaint was filed March 31, 1882. There is no proof when, if ever, process was issued thereon; although there is a memorandum by the clerk that the original summons had been lost or mislaid. Hallum did not appear to the action until July 14, 1882. Now the filing of the complaint alone, without causing a summons to be issued, was not enough to arrest the statute. The burden was upon the plaintiff to show also the suing out of process within the ten years. *Mansf. Dig., sec. 4967; State Bank v. Cason, 10 Ark., 479; State Bank v. Brown, 12 Id., 94; McNeil v. Garland & Nash, 27 Id., 343.*

3 SAME: Issuing of summons. Proof of.

After proof of the loss or destruction of the writ, the date of its issue and its contents could have been proved by secondary evidence. *1 Gr. Ev., sec. 509; Freeman on Judgments, sec. 407; Davies v. Petit, 11 Ark., 349; Mason v. Bull, 26 Id., 164.*

4. RES JUDICATA: Effect of non-suit.

The third plea tendered an immaterial issue. The defendant testified that he had been a practicing lawyer in Colorado when it was a territory, and was familiar with the course of practice in its courts, and that the effect of a nonsuit, under the circumstances set forth in his plea, was to preclude any future litigation between the same parties upon the same cause of action. However this may be, it is certain that in other jurisdictions a nonsuit, whether voluntary or involuntary, does not constitute a judgment upon the merits and will not support the plea of *res judicata.* It is said to be "but the blowing out of a candle, which a man at his own pleasure may light again." *Freeman on Judgments, sec. 261; Hammergen v. Schuermier, 1 McCrary, 436, per Justice Miller; Martin v. O'Bannon, 35 Ark., 62; Jones v. Graham, 36 Ark., 383.*

The question, after all, is not whether a new suit might be maintained in the courts of Colorado, but whether it can be maintained here. The plaintiff may have found himself with

an insufficient record, upon which he could not safely go to trial, or barred by a short statute of limitations, and may have been compelled in consequence to dismiss his action. Yet this produced no satisfaction or extinguishment of the original judgment; nor would it prevent a renewal of the litigation elsewhere.

No testimony was offered in support of the fourth plea, and it may be considered as abandoned.

5. JUDGMENT: Adding interest to verdict.

The judgment in this case, moreover, does not pursue the verdict. After the jury had assessed the amount of recovery, the court had no power to add interest. *Mansf. Dig., sec. 5144; Taylor, Radford & Co., v. Hathaway, 29 Ark., 597; Cannon v. Davies, 33 Ark., 56.*

Reversed and remanded for a new trial.

BOSTICK V. STATE.

TAVERNS: *Must be licensed.*

The provisions continued from the Revised Statutes of 1838, requiring tavern keepers to take out license, and making the failure to do so a misdemeanor, have not been repealed and are not unconstitutional.

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

John M. Harrell for Appellant.

This prosecution is instituted under *Secs. 6416, 6417 and 1859, Mansf. Dig.*

1. There is no offense proved in the agreed statement. In *Baker v. State, 44 Ark.*, this court says: "The construction of

the taxation of privileges involved the decisions of this court in some confusion at an early day, and in *Washington v. State, 13 Ark., 752*, in an attempt to extricate itself from this difficulty, the court held that there was no restraint upon the *legislature* to authorize counties and towns to regulate and tax callings and pursuits." But to keep a "house of entertainment" is not keeping a *public tavern*, according to *sec. 6416*, and the statute authorizes a house of entertainment in the county without license. *Sec. 6417, ita lex scripta.*

2. The fine imposed is excessive. Counties and municipal corporations are put upon the same footing, by *Washington v. State*, as to other authority to tax for local purposes.

The license fee demanded is not a tax upon an occupation, but a compensation for issuing the license, for keeping the necessary record, and for municipal supervision over the business. *Fort Smith v. Ayers, 43 Ark., 82.*

3. The statute, *sec. 1859*, affixing a penalty for violating the provisions of the law against "tavern keepers" is not violated in any of its provisions by defendant, unless for not procuring a license to keep such tavern, and that statute evidently means such "tavern" as the law contemplates in the restraints and liabilities imposed upon taverns and inns and inn-keepers. *Story on Bailments, 474.*

As to the distinction between a boarding-house and an inn, see *Willard v. Reinbard, 2 E. D. Smith (N. Y.)*, and the very interesting opinion of Baily, J., in *Cromwell v. Stevens, 2 Daly 15; Bennett's note to Story on Bailments, 475.*

4. The information charges no offense. It is a tax, indirectly, without authority of the legislature to impose it, since the several successive revenue acts do not enumerate either tavern keepers or boarding-house keepers among the privileges to be licensed by a county. See *Revenue Act March 31, 1883; Mansf. Dig., sec. 5595.*

As to repeal and reversal of statutes, see *Mansf. Dig., sec. 6341.*

Although two enactments are not in all respects repugnant, yet if the latter act covers the whole subject of the earlier, and embraces new provisions which plainly show that the last was intended as a *substitute* for the first, it will operate as a repeal. *Norres v. Crocker, 13 How., 429; U. S. v. Tynen, 11 Wall., 88; King v. Cornell, 106 U. S., 395.*

When a revising statute, such as the customs act of June 30, 1864, covers the whole subject matter of antecedent statutes, it virtually repeals them without any express repealing clause; and the partial repeal of such revising statute does not reverse the provisions of the antecedent laws so supplied. *Butler v. Russell, 3 Cliff, 251; 11 Int. Rev. Rec., 30.*

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

These cases involve the same question, and are submitted together by consent of counsel.

The information filed by the prosecuting attorney before the justice of the peace was authorized by law, (*Mansf. Dig., sec. 5332,*) and is in due form. *State v. Adams, 16 Ark., 497.*

The agreed statement of facts shows that the defendants kept taverns. While, originally, a tavern meant a house for the retailing of liquors to be drunk on the spot, it has now come to mean the same as inn, with no particular reference to the sale of liquors. *Bouv. Law Dic., tit. tavern.* Such has evidently been the meaning in this state all the time, inasmuch as the statute requiring a license to keep a tavern was in the Revised Statutes. See *Sec. 6416 Mansf. Dig.*

This statute has never been repealed, has never been a part of the general revenue law of the state, and is constitutional. *Revised Stat., chap. 148; State v. Adams, supra.*

The judgments should be affirmed.

SMITH, J. The prosecuting attorney filed before a justice of the peace of Garland county an information, under oath, charging Mrs. Bostick with keeping a public tavern without license. After a demurrer to the information had been overruled, a trial was had, resulting in her conviction, and she appealed. In the circuit court she unsuccessfully renewed her objections to the sufficiency of the information to state any offense known to our laws. And upon a trial anew before the court, without a jury, she was again convicted and condemned to pay a fine of $10 and costs.

1. TAVERNS:—Must be licens'd

The information follows, substantially, the form of indictment which was approved in *State v. Adams, 16 Ark., 497.* It is based upon *Secs. 1859, 6416 and 6418 of Mansf. Dig.*. By these provisions any person proposing to keep a tavern, without regard to the fact whether he sells liquors or not, is required to apply to the county court of his county for license, by petition, setting forth the place where the business is to be carried on and the extent of the petitioner's accommodations for guests, horses, etc. The court, if satisfied that the public convenience will be thereby promoted, grants the applicant a license, which must be annually renewed, and assesses the license fee, which is called in the statute a tax. And it is made a misdemeanor to keep a tavern without having first procured a license.

These provisions were a part of the Revised Statutes of 1838 and have been retained in every subsequent compilation of our laws. It is said in *State v. Adams, supra,* that no serious doubts of their constitutionality were entertained. And our present constitution is, so far as questions of this nature are concerned, similar to the constitution of 1836. We have had some doubts, however, whether the whole statute was not abrogated by the constitution of 1868. That constitution continued in force all laws not inconsistent with it, but provided that the

general assembly should tax all privileges, pursuits and occupations that were of no real use to society; all others to be exempt. It was decided in *Henry v. State, 26 Ark., 523*, and in other cases, that the regulations for the licensing of groceries or dram shops, which were contained in the same chapter, and were identical with those relating to taverns, had not been repealed. And in *Straub & Lohman v. Gordon, 27 Ark., 625*, where the constitutionality of a law imposing a county tax upon liquor dealers was assailed, it was pretty broadly intimated that the selling of liquors, whether at wholesale or by retail, was of no real benefit to society.

But the inn-keeper's occupation is a useful and necessary one, and if the statute we are considering imposes a tax, it is inconsistent with the constitution of 1868 and has not been re-enacted since that constitution ceased to be in force. The true answer to this objection, doubtless, is that it is not a tax at all, but a valid exercise of the police power of the state, and that the object aimed at is not the raising of revenue, but the regulation of the business. *Taylor, Cleveland & Co. v. Pine Bluff, 34 Ark., 603; Russellville v. White, 41 Id., 485; Fort Smith v. Ayers, 43 Id., 82.*

Whenever the owner of property devotes it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good. This gives by implication the power to regulate ferries, common carriers, hackmen, bakers, butchers, hucksters, millers, wharfingers, inn-keepers, etc. *Munn v. Illinois, 94 U. S., 113.*

The case was tried upon an agreed statement of facts, which showed that the defendant kept a house of entertainment in the city of Hot Springs, but did not sell liquors. This house was advertised by a sign attached to it, bearing the inscription "Webb House," and also in the newspapers by a card announcing its location and stating that the house was open for the

accommodation of the public upon very reasonable terms. She was prepared to entertain fifteen guests, and visitors to the Springs stopped at her house and obtained board and lodging.

The finding of the court, that the defendant kept a tavern, was neither against law nor evidence. The testimony tends to prove that her house was a public house, intended for the reception and entertainment of all comers; and not a mere boarding-house, where the boarder is selected and received into the house upon an express contract for a certain period of time.

Affirmed.

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WEBSTER v. DANIEL & STRAUS.

1. JUSTICE OF THE PEACE: *Jurisdiction not presumed.*

Nothing can be presumed which is necessary to give a justice of the peace jurisdiction; but when jurisdiction appears upon the face of the proceedings, its action cannot be collaterally attacked for mere error or irregularity. The same presumption that it was correctly exercised will arise as prevails with reference to the action of courts of superior and general jurisdiction.

2. JURISDICTION: *In personam; Irregular service.*

Courts can acquire jurisdiction over a defendant only by service of summons either actual or constructive, or of some other process issued in the suit, or by his appearance to the action in person or by attorney. And objections for mere irregularity in the process or in the manner of its service must be made in the action. They cannot be set up in a collateral proceeding.

3. WARNING ORDER: *Proof of publication.*

When a warning order from a justice of the peace has been properly published, the failure to make proof of the publication by the person and in the form prescribed by law, is a mere irregularity which will not defeat the jurisdiction, and can not be taken advantage of in a collateral proceeding.

4. ATTACHMENT: *Warning order and affidavit; Priority.*

When a warning order and an affidavit for attachment are made at the same time, the affidavit will be considered to take effect first.

5. WARNING ORDER: *Certainty as to court issuing it.*

A warning order from a justice of the peace in the usual form, signed by the justice, sufficiently designates the court in which the defendant is summoned to appear, though the particular justice's court is not specified in the body of the order.

6. ATTACHMENT: *Affidavit under Sec. 348, Mansfield's Digest.*

The affidavit required by *Sec. 348, Mansfield's Digest*, of the non-existence of personal property before an order for sale of attached lands can be made, is not required where a constable has levied an attachment on land and certified that the defendant has no personal property.

7. SAME: *Indemnifying bond before sale; Presumption.*

In an action by the former owner for the recovery of land from a purchaser at a sale under an attachment, his deed from the sheriff duly acknowledged and recorded and containing the recitals required by the statute is *prima facie* evidence of the legality and regularity of the attachment proceedings, and in the absence of evidence whether the indemnifying bond required by the statute was or was not filed before the sale, it will be presumed that it was filed.

8. SAME: *Return of nulla bona before filing transcript from J. P.*

The failure of a constable to make a return of *nulla bona* before the transcript of a J. P. is filed in the clerk's office, is at most but an irregularity, which can be taken advantage of only by the defendant in the judgment by a direct proceeding to quash the process issued upon the judgment.

9. SAME: *Confirmation of sale.*

A sale of land under an execution issued by the clerk of the circuit court upon the transcript of a justice of the peace in proceedings by attachment needs no confirmation by the court.

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

John Hallum for Appellant.

1. The warning order is indefinite—it is based upon the constable's return, which is contradictory and in the alternative, and not a sufficient basis for an attachment or warning order. See *sub. sec. 6, sec. 4725, Gantt's Dig., Waples Att., p. 270–1, and authorities.* A warning order that is vague and indefinite is void. It supplies the place of a summons. See *6 Lea., Tenn., 521; Waples Att., 268–70 and notes; 40 Ark., 719.*

2. The affidavit for attachment is made upon information and belief only, and is void. *Waples, pp. 229–30.*

3. No proof of publication was made according to law. *Waples, pp. 275–6–7.*

4. The sale was never approved or confirmed by any court. *Gantt's Dig., sec. 428.* The doctrine of intendment and presumption cannot be invoked to supply fatal defects in title.

In the exercise of special statutory powers, as under attachment laws, there is no presumption of jurisdictional facts. *Waples on Att., 229–30; 52 Ala., 55; 61 Mo., 33; 30 Ind., 63; 31 Id., 150; 43 Ala., 568; 23 Ark., 41; 34 Id., Wells v. Rice; 25 Id., 52.*

5. No affidavit was made that no personal property could be found, nor any indemnifying bond given. *Gantt's Dig., sec. 426; Ib., 4727–9.*

6. The transcript filed in the office of the clerk of the circuit court was not a compliance with the law, and not sufficient to base an execution upon.

Jno. C. & C. W. England for Appellees.

The appellant brought ejectment three years after the sale, and now seeks to disregard the appellees' title, alleging that it is void because of defects apparent upon the face of the record. Unless the defects or irregularities are of such a nature as to render the judgment of the justice absolutely void he will necessarily fail. Justices' courts are courts of limited authority, and no presumptions of jurisdiction are indulged in their favor, but having acquired jurisdiction, the same intendments will be indulged in as in the case of superior courts. Courts not of record are like special agents—we must see their authority before regarding their decisions as lawful; but, seeing it, we are to respect it. Their authority is not the less certain because speci-

fied and confined. It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. *Freeman on Judgments, sec. 524.*

We are therefore led to the inquiry as to what the record must show in this case to settle the question as to whether the court had jurisdiction in this case. *Freeman on Judgments, sec. 611*, says, in referring to judgments *in rem*: Two jurisdictional inquiries must be answered in the affirmative in order to uphold the judgment or decree, viz:

1. Did the court have the authority to determine the subject-matter of the controversy?

2. Did the court have jurisdiction over the thing proceeded against as a defendant?

To determine if the court has authority over the subject-matter is simply to decide whether the court has authority in a given case to hear and determine a matter; or, as *Waples* states it: "The question of authority is whether the action required of the court is judicial or extra-judicial; whether the tribunal has authority of law to decide the issue presented." *Waples Pro. in rem., sec. 84.*

The Act of 1875, page 111, says in substance that whenever a constable, to whom an order of attachment is directed, cannot find any personalty on which to levy, he may seize any real estate, etc., belonging to the defendant. This court, in *Bush v. Visant, 40 Ark., 124*, has decided this act to be constitutional.

Hence the constable in this case, if he could find no personal property, had the right—nay, it was his duty—to seize the real estate. In his return he expressly states that defendant had no personalty, and this return cannot be contradicted. *Freeman on Executions, sec. 264.*

The debt sued on was less than one hundred dollars, hence it follows that the court had authority to determine the subject

matter; that is, it had jurisdiction over the amount sued on, and had the right to hear and determine whether or not the attachment against the land should be sustained; provided, the further inquiry, "did the court acquire jurisdiction over the thing," can be answered in the affirmative. Now, did the court acquire this jurisdiction to proceed against the thing? How does the court acquire jurisdiction in such cases? First, by seizure of the land. Second, by publication against the defendant, warning him to appear and defend. When the property is seized and this notice given, the jurisdiction is complete after the expiration of the time given to appear, and the court is then vested with the power to hear and determine the cause and give final judgment. *Waples Pro. in rem., sec. 87; Freeman on Judgments, sec. 126 and notes.*

Now, it cannot be denied that the warning order was made and published, the record shows this fact, and the record imports absolute verity, and cannot be gainsaid in this collateral proceeding. But, counsel for appellant says the court issued the warning order without sufficient authority of law. Let us see if this is true. The constable, in his return, says that he did not make personal service upon the defendant because he had left the county of his residence (Lonoke) to avoid the service of a summons, or so concealed himself that a summons could not be served upon him. *Subdivision 6 of sec. 4989, Revised Statutes,* says that whenever either of these facts are stated in the return of the officer the clerk shall make an order warning the defendant, etc., and *sec. 4990, Ibid,* says that the court may make such warning order upon the requisite facts, meaning, of course, any of the grounds authorizing publication of a warning order, being satisfactorily shown by affidavit or other proof, that is, satisfactorily shown to the court. The legislature certainly intended by this section to leave this question as to when a warning order should be issued to the court; provided always, the court was of opinion from the affidavit, or other proof, that

some of the grounds laid down in the statutes justified the issuance of the warning order. *Freeman*, in his work on *Judgments, sec. 522*, says: "Sometimes certain facts are required to be proved to a court of limited jurisdiction as grounds for issuing process. In such cases the tribunal must necessarily judge for itself upon the sufficiency of the proof offered. If there be any evidence, though slight and inconsiderable, having a legal tendency to prove the facts, the process will be held valid until the action of the court in issuing it be set aside by some direct proceeding." *Morrow v. Weed, 4 Iowa, 77.*

The next objection made by appellant's counsel is that the affidavit for attachment is vague and insufficient. We confidently submit there is nothing in this objection. The ground of objection as urged by counsel for appellant is that after stating the necessary facts which would authorize the court to issue an order of attachment, he proceeds to give the source of his information (as is claimed) as to grounds of attachment by simply saying "as shown by the return of the constable to the writ of summons issued him." This clause was unnecessary but did no harm when inserted in this affidavit. It was inserted evidently as additional proof of the matter set up as grounds for the attachment. It in nowise depended on the return of the constable. All other objections raised by counsel do not go to the jurisdiction of the justice, but to the exercise of that jurisdiction.

"A plain line must be drawn between jurisdiction and the exercise of jurisdiction. A court may have the right and power to determine the status of a thing, and yet may exercise its authority erroneously. After jurisdiction has attached in any given case all that follows is exercise of jurisdiction. The right to inquire into jurisdiction by another court, in a collateral action, is confined to the question of authority to hear and determine the cause." *Waples Pro. in rem, sec. 85; Freeman on Judg., sec. 126.*

A further objection is urged by counsel that no bond was filed before judgment as provided by second subdivision of *Sec. 5190, Revised Statutes.* The Acts of 1875 provides that no sale shall take place until such bond as is now provided by law shall be filed. In *Bush v. Visant,* this court say the bond referred to in this act is evidently the bond referred to in above section, and in that case decided that in order to make the sale valid this bond must be filed before sale. In *Bush v. Visant* it was admitted by counsel that this bond had not been filed. In this case the record is silent, but in appellant's brief he states that the bond was filed with the clerk before sale, but not with the justice before judgment was rendered.

We make this quotation from *Bush v. Visant:* "*Sec. 41 Ch., 17 of Gantt's Dig.* required a bond of indemnity to be executed to the defendant in attachment before execution could issue, or his property sold. In *Rust v. Rives. 24 Ark. 359,* the court said it was unquestionably law that no execution could be awarded, or property sold until such bond was executed. But as the court had ordered an execution it would be presumed that the law had been complied with. Here there is no room for presumption, for on the trial of this case appellee admitted that no bond had been executed."

From this quotation it would seem that when the record is silent the court would presume that this bond had been filed, and this seems sound in principle, for every presumption is indulged in in favor of courts of limited jurisdiction that are indulged in in favor of courts of record where jurisdiction is shown, and certainly the filing of the bond before entering judgment cannot be necessary to give the court the power to hear and determine the cause, and until the cause is heard and determined in favor of the plaintiff, the bond is not required; hence it cannot be required to complete jurisdiction; and in deciding in the case quoted from, that when this omission is admitted at the trial it rendered the sale void, is not in line with the current

authority upon this question, which holds that no error in the exercise of jurisdiction once properly acquired will render the judgment of the court void, but only voidable, subject to be set aside by a direct proceeding for that purpose. We are aware that proceedings out of the course of the common law, as is this case, must be strictly construed, and that in exercising special authority granted by the statutes, the requirements must be strictly followed. But we submit that this does not change the general and universal rule so long recognized by the courts, that any irregularity in the exercise of jurisdiction will not render the judgment vulnerable to collateral attack. *Waples Pro. in rem, sec. 112.*

Upon the question of notice see the following: *Paine v. Moreland, 15 Ohio, 435; Williams v. Stewart, 3 Wis., 773; Buch v. Abbott, 6 Vt., 586; Drake on Attachments, secs. 437–8.*

If two grounds of attachment are stated in the affidavit in the disjunctive, it is nevertheless good, provided the grounds are both sufficient to sustain it. *Waples Pro. in rem, sec. 587, citing the following: Commercial Bank v. Ulman, 10 S. & M., 411; Cannon v. Logan, 5 Porter, 77; Wood v. Wells, 2 Bush, 197; Hardy v. Trabue, 4 Id., 644; Conrad v. Magee, 9 Yerger, 428; Goss v. Gowing, 5 Richardson, 477; Hopkins v. Nichols, 22 Tex., 206; Bosbyshell v. Emanuel, 12 S. & M., 63; Van Alstyne v. Erwine, 1 Kernan, 331; Kleuk v. Schwalm, 19 Wis., 111.*

And if good in support of attachment, by analogy they would support the issuance of a warning order.

BATTLE, J. Peter Webster, the appellant, was the owner of the land in controversy. Being indebted to Daniel, Straus & Co., as evidenced by his promissory note, they sued him on the note before a justice of the peace of Lonoke county. A summons was issued, and returned not served, because the defendant, Peter Webster, could not be found, the constable stating

in his return that the defendant had left the county of his residence (Lonoke) to avoid the service of the summons, or so concealed himself that a summons could not be served on him. And thereafter, on the 13th day of April, 1878, the justice of the peace made a warning order in the following words:

"STATE OF ARKANSAS, }
COUNTY OF LONOKE, }

In Justice's Court, Lonoke County.

"Daniel, Straus & Co., vs. Peter Webster.

"The defendant, Peter Webster, is warned to appear in this court within 30 days, and answer the complaint of plaintiff filed herein against him.

"Given under my hand, this 13th day of April, 1878.

"(Signed,) T. C. BEARD, J. P.;"

and ordered that this warning order be published for four consecutive weeks in the Lonoke Democrat, a newspaper published in Lonoke county, and appointed A. D. Lawhorn attorney *ad litem* for the defendant.

On the same day, Dan Daniel, one of the plaintiffs in that action, made and filed an affidavit in the following words:

"The plaintiff, Dan Daniel, for Daniel, Straus & Co., states that the claim in this action against the defendant, Peter Webster, is for money due upon contract, evidenced by a promissory note, and that it is a just claim; that they ought, as he believes, to recover thereon eighty-four 84-100th dollars, and that said Peter Webster has left the county of his residence to avoid the service of a summons, as shown by the return of a constable to the writ of summons issued herein.

"(Signed,) DAN DANIEL."

"Subscribed and sworn to before me, this 13th day of April, 1878. (Signed,) T. C. BEARD, J. P.;"

and filed the bond required to obtain a general order of attachment, conditioned according to law, which was approved. And on the same day the justice issued an order of attachment,

returnable on the 18th day of May, 1878, and adjourned his court to that day. On the 18th day of May, 1878, Lawhorn filed his acceptance of the appointment of attorney *ad litem*, and the constable to whom the order of attachment was directed made return that no personal property of defendant could be found on which to levy the attachment, and that he had executed the order of attachment upon the above-mentioned tract of land by posting copies thereof in a conspicuous place thereon, and that defendant not being found no copy or notice was served on him; and the plaintiffs, Daniel, Straus & Co., filed with the justice proof of publication of the warning order, showing that it was published for four consecutive weeks in the Lonoke Democrat, a newspaper printed and published in the county of Lonoke; and the cause was continued until the 18th day of June, 1878, on which day, the plaintiffs appearing, the cause was heard, and the plaintiffs were adjudged to be entitled to recover the amount sued for and the attachment was sustained, and a transcript was ordered to be filed with the clerk of the Lonoke circuit court in order that the land attached might be sold in the manner prescribed by law to satisfy the amount adjudged to be due the plaintiffs. A certified transcript of the judgment and docket entries of the justice of the peace in the cause was filed with the clerk of the Lonoke circuit court, who thereupon issued an execution, directed to the sheriff of Lonoke county, commanding him to sell the land, which he did, on the 5th day of September, 1878, and Dan Daniel and Gus Straus, the appellees herein, became the purchasers thereof, they being the highest and best bidders. The land not being redeemed in twelve months the sheriff conveyed it to Daniel & Straus, the purchasers, by deed, reciting therein the names of the parties to the execution, the date when issued, the date of the judgment, the time, place and manner of the sale, and other particulars recited in the execution, certificate of sale, and the failure to redeem in twelve months. On the 4th day of October, 1881, Peter Webster brought this

action in the Lonoke circuit court, against appellees, for the recovery of the land, it being in their possession. Judgment was rendered in favor of appellees. Peter Webster filed a motion for new trial, which was overruled, and he saved exceptions and appealed.

The only question involved in this case is, was the sale made by the sheriff void? Appellant insists it was. The following reasons which he gives for saying so, are only necessary to be noticed by us:

1. The affidavit for the attachment was insufficient.

2. The warning order was indefinite, uncertain, and was prematurely issued.

3. The proof of the publication of the warning order was not made as required by law.

4. No affidavit was made by Daniel, Straus & Co., before the issuance of the execution by the clerk, to the effect that Webster had no personal property out of which their debt could be made.

5. No indemnifying bond was given before rendering judgment.

6. The execution was based on an insufficient transcript.

7. The sale made by the sheriff was never approved or confirmed by any court.

1. JURISDICTION: Of J. P. not presumed.

Nothing can be presumed which is necessary to give a justice of the peace jurisdiction. "Courts not of record," says *Freeman on Judgments*, "are like special agents—we must see their authority before regarding their decisions as lawful; but seeing it, we are to respect it. Their authority is not the less certain because specified and confined. It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action can not be collaterally attacked for mere error or irregularity, The jurisdiction appearing, the same presumption of law arises—that it

was rightly exercised—as prevails with reference to the action of a court of superior and general authority." *Freeman on Judgments, sec. 524.*

2. IN PERSONAM: Irregular service.

There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction. The defendant must be brought within the power of the court by service of summons, either actual or constructive, or of some other process issued in the suit, or by the voluntary appearance of the defendant in person or by his attorney, in order to give the court jurisdiction. If, however, "there is any irregularity in the process, or in the manner of its service, the defendant must take advantage of such irregularlty by some motion or proceeding in the court where the action is pending. The fact that the defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not, ordinarily, make the judgment vulnerable to a collateral attack." *Freeman on Judgments, sec. 126.*

In *Harrington v. Wofford, 46 Miss., 41*, the court said: "It is insisted that the decree of the court below, ordering a sale of real estate, is not only erroneous, but void, for the want of sufficient return of the service of process upon the defendants. We do not think so. There is a very clear and obvious distinction between a total want of service of process and a defective service of process, as to their effect in judicial proceedings. In the one case the defendant has no notice at all of the suit or proceeding against him. The judgment or decree in such case, it is conceded is *coram non judice* and void, upon the principles of law and justice. In the other case, the defective service of process gives the defendant actual notice of the suit or proceeding against him, and the judgment or decree in such case, although erroneous, would be valid until reversed by a direct proceeding in an appellate jurisdiction, and its validity can not

be collaterally called in question. And this view of the law is believed to be sustained by reason, principle and authority. The case of *Smith v. Bradley, 6 Smeed & Marsh, 492,* decides that a defective return of process presents the question of error or no error." *Campbell v. Hays, 41 Miss., 562; Isaac v. Price, 2 Dil., 351; DeTar v. Boone County, 34 Iowa, 490; Glover v. Holman, 3 Heisk., 519.*

In *Ballenger v. Tarbell, 16 Iowa, 492,* Mr. Justice Dillon, in delivering the opinion of the court, said: "The original papers in this action were not before the court, but the transcript shows that the original notice was served by the constable on the 6th day of February, 1860, on the wife of Robertson, and as to Tarbell, the service, as recited in the justice's transcript, was as follows: 'On the 7th day of February, 1860, I, H. H. Wilson, a justice of the peace, served the said notice upon John Tarbell, by reading the same to him personally, in the city of Keokuk, who confessed judgment;' and on the 11th day of February, 1860, the justice rendered judgment against the defendants, without any appearance by them. That this service, as to Tarbell, was defective, is apparent, because the statute requires five days' notice, and here were only four. It may also be defective because served by the justice himself, and not the constable. It was, therefore, clearly erroneous in the justice to have rendered judgment against Tarbell on this service. It would have been, without doubt, reversed on writ of error. But it was erroneous simply, and not void. It is not a case where there is *no* service at all, but a case where there was a *defective* service. The justice erred in deciding that this service authorized him to render judgment against Tarbell; but neither Tarbell nor his assignee can question the validity of this judgment, or claim to have it treated as *void* in this collateral proceeding. *Bonsall v. Isett, 14 Iowa, 309; Cooper v. Sunderland, 3 Id., 114; Morrow v. Weed, 4 Id., 77; Boker v. Chapline, 12 Id., 204.*"

3. WARNING ORDER: Proof of publication.

In the suit before the justice of the peace the warning order supplied the place of a summons. The publication of it in the manner prescribed by the statute constituted it a constructive notice to the defendant. The proof of publication filled the place of a return upon a summons. If the warning order was properly published the failure to make the proof of publication by the person and in the form prescribed by law, would be a mere irregularity, and would not defeat the jurisdiction of the justice, and could not be taken advantage of by a collateral proceeding, as shown by the authorities cited. The constructive notice would, nevertheless, have been given.

It is contended by appellant that the proof of the publication of the warning order, made in the suit before the justice, was not made as required by law. There was no evidence of the proof of publication of the warning order, except a certified copy of the docket entries of the justice, which the statute makes competent evidence, from which it appears that proof of publication of the warning order was filed, showing that the warning order was published for four consecutive weeks in the Lonoke Democrat, a newspaper printed and published in Lonoke county. As already shown by the authorities cited, this is sufficient for the purposes of this action.

It is insisted by appellant that the warning order was prematurely made. The statute provides that justices' courts shall be governed in attachment suits by the rules in force in the circuit courts, so far as they are applicable; that when it is stated in the return, by the proper officer, of a summons against the defendant, that the defendant has left the county of his residence to avoid the service of a summons, or conceals himself so that a summons can not be served on him, the clerk shall make upon the complaint an order warning such defendant to appear in the action within thirty days from the time of making the order; and that when such statements are made in such return it shall be equivalent to the statement of such facts

in an affidavit for attachment. This statement was made in the return on the summons in the suit before the justice, and the warning order was made after the return, and not prematurely.

4. ATTACHMENT: Warning order and affidavit. Priority.

On the same day the warning order was made an affidavit was filed, in which affiant states that "the defendant had left the county of his residence to avoid the service of a summons, as shown by the return of a constable to the writ of summons" issued by the justice. But it is insisted that the affidavit is defective, because it appears to have been made upon information and belief. We think not. According to every reasonable intendment the reference to the return of the constable was only made as evidence of the truth of the statement sworn to, and for no other purpose. The affidavit and warning order being made at the same time, the affidavit will be considered to take effect first. The rule is, "where two acts are done at the same time, that shall be considered to take effect first which ought, in strictness, to have been done first in order to give it effect." *Hubbardston L. Co. v. Covert, 35 Mich., 254.*

5. WARNING ORDER: Certainty as to court issuing it.

It is further contended that the warning order is vague and uncertain, because it does not show before which justice the defendant was warned to appear. It was susceptible of but one interpretation, and it is clear that he was required to appear before the justice making the warning order. No other reasonable construction could have been placed upon it.

6. ATTACHMENT: Affidavit under Sec. 348, Mansf. Digest.

The fourth reason given by appellant why the sale should be held void is, the affidavit required by *Section 348 of Mansfield's Digest* was not filed. No such affidavit was required or was necessary. *Section 4125 Mansfield's Digest* says: "Whenever the constable, to whom any order of attachment issued by any justice of the peace of this state shall be directed, can find no personal property upon which to levy the same, he may and shall levy such order upon any lands, tenements, town lots, interest in or equity of redemption in any real property belong-

ing to the defendant in such attachment, subject to execution by the laws of this state, and make his return accordingly, describing in said return the property so levied upon." That was done in this case. The return of the constable shows that he could find no personal property on which to levy the order of attachment. *Section 4126* says what shall be done after this before the land can be sold, and how it shall be sold. It says. "In all cases by suits by attachment in which lands, tenements, town lots, interest in or equity of redemption in any real property, shall have been levied upon as provided for in the preceding section, the plaintiff, if he obtain judgment thereon, shall be entitled to a transcript of the judgment and proceedings in said cause, and, upon the filing of such transcript in the office of the clerk of the circuit court of the county in which such judgment was obtained, the same shall be entered in the docket of the circuit court for common law judgments, and shall thenceforth have the same force and effect of a judgment rendered in said circuit court, upon which an order of sale shall be issued by the clerk of said court, directed to the sheriff of the county, under which the property so seized and levied upon and condemned to be sold by said judgment shall be sold in the same manner, and with the same notice, as sales of real property under executions are made. *Provided,* no such sale shall be made until the plaintiff shall execute bond to the defendant in the manner now prescribed by law."

7. SAME: Indemnifying bond before sale. Presumption.

But appellant says the sale was illegal and void, because no indemnifying bond was filed before the sale, as required by *Secs. 4126 and 5190 of Mansf. Dig.* There is no positive evidence that such bond was or was not filed. The deed executed by the sheriff to appellees contained the recitals required by the statute, and was duly made and executed, acknowledged and recorded, as required by law. The statute in such cases made and provided says such a deed shall be evidence "of the *legality* and *regularity* of the sale of the land so conveyed until

the contrary be made to appear." The presumption, then, is, the bond was filed according to law. *Mansf. Dig., secs. 668, 3075; Bush v. Visant, 40 Ark., 124.*

The sixth objection of appellant to the sale is, that the execution under which it was made, was based on an imperfect and insufficient transcript. If there is any defect in the transcript filed with the clerk, on which the execution was issued, it is, it did not contain a copy of any bond, proof of publication, order of attachment and every other paper filed with the justice, which were not copied on his docket. We fail to see wherein this omission affected appellant injuriously. If such an omission amounts to anything, it is an irregularity which does not make the sale void, and can be of no avail in an action like this.

8. SAME:—Return of *nulla bona* before filing transcript from J. P.

The statute requires a return of *nulla bona* to be made upon an execution issued by a justice of the peace, before a transcript of the justice's judgment on which it was issued can be filed in the circuit clerk's office for the purpose of reaching realty. In *Jordan v. Bradshaw, 17 Ark., 112,* it was held that the failure of the constable to make the return of *nulla bona* on the execution before the transcript is filed in the circuit clerk's office is, at most, an irregularity, and as such, can only be taken advantage of by the defendant in the judgment, in a direct proceeding interposed for the purpose of quashing the process issued upon such judgment.

9. SAME:—Confirmation of sale.

The last objection to the sale we shall notice is, it was not approved or confirmed by any court. Be this as it may, it was not required and was unnecessary. The sale was not made by the court, or under the supervision of any court. It was required to be made under an execution and in the manner prescribed by law for the sale of land under execution, and no report thereof was required to be made to any court.

Judgment affirmed.

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MATLOCK v. REPPY.

1. ACTION FOR DECEIT: *Fraudulent representations.*

The principles of law applicable to a suit in equity for the rescission of an executed contract for land, on account of fraudulent representations of the land, are applicable to an action at law for damages for similar false and fraudulent representations.

2. SAME: *Same; What essential to.*

To maintain an action for damages for false and fraudulent representations as to land sold, the vendee must prove: 1. That the fraud related to some matter of inducement to the making of the contract. 2. That it wrought injury to him. 3. That the relative position of the parties was such, and their means of information such, that he must necessarily be presumed to have contracted upon the faith reposed in the statements of the vendor; and, 4. That he did rely upon them, and had a right to rely upon them, in full belief of their truth. *Yeates v. Pryor, 11 Ark., 58.*

3. DAMAGES: *Measure of, for fraudulent representations.*

In an action for deceit the injured party may have his damages measured by the difference in the value of the property purchased as it really was and what it would have been if the representations made concerning it had been true; or, if he prefers, he may have the difference between the real value of the property in its true condition and the price paid, or the value placed upon the property in the transaction. *Goodwin v. Robinson, 30 Ark., 540.*

4. FRAUD: *Waiver of; Estoppel.*

The fact that a party injured by fraudulent representations as to the property sold to him, accepts and holds the property after ascertaining the fraud, neither waives the fraud nor estops him from suing for damages. The false representations are in the nature of warranties and must be made good.

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

James K. Jones and *B. B. Battle* for Appellant.

In *Byard v. Holmes, 34 N. J. L., 296,* Mr. Justice Woodhull, in speaking of an action like this, said: "The action being grounded on fraud in the defendant, concurring with damage to

the plaintiff resulting from that fraud, to maintain it the plaintiff must allege, with reasonable certainty, and be prepared to prove, at least three things: 1. That the defendant made some representation to the plaintiff meaning that he should act upon it. 2. That such representation was false, and that the defendant, when he made it, knew it to be false. 3. That the plaintiff, believing such representation to be true, acted upon it, and was thereby injured."

To entitle a vendee to recover in an action against the vendor for damages sustained by reason of false representation made by the vendor in the sale of real estate, it must not only appear that the representations were contrary to the facts, but that they were made for the purpose of inducing the vendee to enter into the contract of sale, and that the party making them knew them to be false. *Holmes v. Clark, 10 Iowa, 423; Hallam v. Todhunter, 24 Iowa, 166; Gates v. Reynolds, 13 Iowa, 1; Courtney v. Carr, 11 Iowa, 295; Kineman v. Chandler, 13 Iowa, 327; Hubbell v. Meigs, 50 N. Y., 480; Campbell v. Hillman, 15 B. Mon., 508; Ball v. Lively, 5 Dana (Ky.), 369.*

It is not, however, every false representation of a vendor which will support an action for damages. To do so it must be material to the contract and relate to it; it must work an injury; and the injured party must not only have relied upon it, but have had a right to rely upon it in full belief of its truth. *Winter v. Bandel, 30 Ark., 373; Yeates v. Pryor, 11 Ark., 66; Wilson v. Strayhorn, 26 Ark., 28; Grider v. Clofton, 27 Ark., 244.*

In order for a false representation to be material to a contract, it should be a determining ground of the transaction. It must necessarily influence and induce the contract, and affect and go to its very essence and substance. It amounts to nothing unless it is a proximate and immediate cause of the contract. The contract must be a necessary, and not merely an indirect, result of the representation. If the contract would have been entered into if the representation had not been made, the rep-

resentation would not be material to the contract, but immaterial, and no one could be injured thereby, or complain, because the contract would have been entered into in the same way it would have been if the representation had not been made. *McAleer v. Horsey, 35 Md., 452; Clark v. Everhart, 93 Penn., St., 349; S. M. R. R. Co. v. Anderson, 51 Miss., 829; Wakeman v. Dally, 51 N. Y., 27; Furman v. Titus, 4 N. Y., Superior Ch. Reps., 284; Ball v. Lively, 4 Dana (Ky.), 369; Safford v. Grant, 120 Mass., 25; Lindsey v. Lindsey, 34 Miss., 432; Taylor v. Guest, 58 N. Y., 266; Atwood v. Small, 6 Clark & Finnelly, 447; Coffee v. Newsome, ex. etc., 2 Kelly (Ga.), 458; Cunningham v. Smith, 10 Grat., 255; Taylor v. Fleet, 1 Barb., 471; Morgan v. Snapp, 7 Ind., 537; Slaughter's admr. v. Gerson, 13 Wall., 383; 2 Parsons on Contracts, 6 ed., pp. 770, 773.*

2. It must work an injury. Falsity, alone, is not a sufficient ground to avoid a contract, but it must work an injury, or, as it has been expressed, "fraud without damage, or damage without fraud, gives no cause of action, but where these two occur and meet together, there an action lieth." *Story on Contracts, sec. 507; 2 Kent's Comm., Lect. 39, p. 490, and authorities already cited.*

3. The injured party must not only have relied upon the false statement, but have had a right to rely upon it in full belief of its truth. No one has a right to rely on exaggerated, unreasonable, incredible or improbable statements, or on statements on which a prudent and cautious man would not rely in full belief thereof. The law demands of every one the exercise of due caution and prudence. If, therefore, any one should put faith in any statement which is unworthy of credence, or is unreasonable, or improbable, or represents something to be true which is inconsistent with human experience, he can not ask of the law to relieve him from the consequences. In all such cases, caution and prudence put him on inquiry, and he must suffer the consequences if he fails to inquire. See *Kerr on Fraud and Mistakes, pp. 82, 85.*

That no one has a right to rely on representations which merely amount to statements of opinion, as for instance, that wild land is fertile and susceptible of cultivation, or capable of producing crops, or yielding so much to the acre, the authorities prove beyond question. Although they may be fraudulently made by a vendor for the purpose of inducing and should induce another to purchase, and should prove to be false, and the purchaser should be injured on account thereof, he would not be entitled to sue or recover damages. *Gordon v. Parmelee, 2 Allen, 212; Sherwood v. Salmon, 2 Day (Com.), 128; Haycroft v. Creasy, 2 East. 92, new ed., vol. 1, 376; Curry v. Keyser, 30 Ind., 214; S. M. & M. R. R. Co. v. Anderson, 51 Miss., 829; Hubbell v. Meigs, 50 N. Y., 480; Walker v. Mobile, etc., R. R. Co., 34 Miss., 245; Anderson v. Hill, 12 S. & M., 679; Mooney v. Miller, 102 Mass., 220; Coldby v. Gadsden, 34 Beavan, 416.*

Kerr on Fraud and Mistake, p. 85, says: "The difference between a false averment in matter of fact, and a like falsehood in matter of judgment, opinion and estimate, is well illustrated by familiar cases in the books. If the owner of an estate affirms that it will let or sell for a given sum, when, in fact, such sum can not be obtained for it, it is, in its own nature, a matter of judgment and estimate, and so the parties must have considered it. But if an owner falsely affirms that an estate is let for a certain sum, when it is, in fact, let for a smaller sum, or that the profits of a business are more than, in fact, they are, and thereby induces a purchaser to give a higher price for the property, it is fraud, because the matter lies within the private knowledge of the owner." So, if the owner of an estate fraudulently represents that the improvements on it cost him a given sum, when, in fact, they cost him a smaller sum, he is liable to an action of deceit by the purchaser, if he was deceived and induced by such representation to purchase the estate. The cost of the improvements is an ascertainable fact and within the knowledge of the owner. It is a material fact which largely enters into the esti-

mate of the buyer when he comes to fix in his own mind what he will give for the estate, especially if he be ignorant and inexperienced as to such matters, as in this case. It is often the only fact by which the buyer can determine the value of the property. Hence it is held by the courts that fraudulent representations as to the actual costs of the property will sustain an action of deceit, when the purchaser has been induced thereby to purchase and was damaged. *Pendegast v. Reid, 29 Md., 398; Sandford v. Handy, 23 Wend., 268; Ives v. Carter, 24 Conn., 392; McFadden v. Robinson, 35 Ind., 24; Somers v. Richards, 46 Vt., 170; Wise v. Fuller, 29 N. J. Eq., 257; Lysney v. Selby, 2 Raymond, 1118; Dobell v. Stevens, 3 Barnwell & Creswell, 623; Risney v. Selby, 1 Salkelds, 211; Elkins v. Tresham, 1 Levinz, 102; Clark v. Dickson, 95 Eng. Com. Law, 453; Bedford v. Bagshaw, 4 H. & N., 53.*

At the time these statements or admissions are said to have been made by Arrington, his agency for the defendant had ceased. He was only authorized by the defendant to make a trade with plaintiff, and that had been made. He could not affect defendant by any word or statement or act of his, except in the course of his agency. His admissions or declarations made when he was not an agent of defendant are and were not admissible against the defendant. *Stiles v. Danville, 42 Vt., 282; Stiles v. R. R., 8 Met., 44; 2. Wharton on Evidence, sec. 1180; Lowell v. Winchester, 8 Allen, 109; Hubbard v. Buist, 7 Wend., 446; Jex v. Board of Education, 1 Hun. (N. Y.), 159; Stewartson v. Watts, 8 Watts, 392; Waterman v. Peet, 11 Ill., 648; Chicago, B. & Q. R. R. v. Riddle, 60 Ill., 534; Chicago, etc., R. R. v. Lee, 60 Ill., 501; Rowell v. Kline, 44 Ind., 290; McComb v. R. R., 70 N. C., 178; Raiford v. French, 11 Rich. (S. C.), 367.*

The court erred in rejecting the evidence as to the rental value, the taxes, the highest price offered, etc., as to the fruit farm.

The object in introducing this evidence is to show that plaintiff did not rely on any representation made by Arrington about the three thousand acres defendant agreed to convey to him. We have already seen that if plaintiff would have made the trade in the way he did, in the event the representations made had not been made, then he would not be entitled to recover of defendant any damages in the event said representations were false and he was damaged. If the effect of this evidence was to show that plaintiff would, probably, have made the trade he did, if the representations made had not been made, it should have been admitted. *Ward v. Young, 42 Ark., 554; Peterson v. Gresham, 25 Ark., 383; 1 Wharton on Evidence, secs. 20, 21; 1 Greenleaf on Evidence, sec. 511 a; 1 Phillips on Evidence, 598; Butler v. Watkins, 13 Wal., 464.*

"Relevancy," says Mr. Wharton, "is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issues." "Hence," says he, "it is relevant to put in evidence any circumstance which tends to make the proposition at issue more or less improbable."

In *Peterson v. Gresham, supra,* Mr. Justice HARRISON, in delivering the opinion of the court, said: "It is an established rule, governing in the production of evidence, that 'the evidence offered must correspond with the allegations, and be confined to the point in issue,' but it is not necessary that it should bear directly upon the issue."

"It is admissable if it tends to prove the issue or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it." *1 Green. Ev., sec. 511 a; Phillips on Ev., 598.*

Assuming that Arrington represented the lands of defendant to be above overflow, would plaintiff have made the trade he did if such a representation had not been made? The facts

defendant proposed to prove by the rejected evidence show that he would.

The first and second instructions are clearly erroneous. See authorities, *supra*.

The fifth instruction wholly wrong.

The measure of damages in cases like this is the difference in the value of the three thousand acres as it really was, and as Reppy was fraudulently induced to believe it was—that is to say, if he is entitled to any damages. *Marton v. Scull, 23 Ark., 289; Hubbell v. Meigs, 50 N. Y., 480; Campbell v. Hillman, 15 B. Mon., 508; Jackson v. Armstrong, 56 Mich., 65; Morse v. Hutchins, 102 Mass., 439; 3 Sutherland on Damages, 389; Sedgwick on Damages, 559–562; Miller v. Barber, 66 N. Y., 558; Platt v. Brown, 30 Conn., 336; Briggs v. Brushaber, 43 Mich., 330; Page v. Parker, 43 N. H., 363; S. C. 40 N. H., 47; Fish v. Hicks, 31 N. H., 535; Carr v. Moore, 41 N. H., 131; Stiles v. White, 11 Met., 356; Wright v. Roach, 57 Me., 600; Page v. Wells, 37 Mich., 415; Hamilton v. Billingsley, 37 Mich., 107; Foster v. Kennedy, 38 Ala., 359; Davis v. Elliott, 15 Gray, 90; White v. Smith, 54 Iowa, 233.*

But plaintiff insists that Arrington visited the place and saw for himself, and had no right to rely on the representations made by him. Arrington visited the place in company with Britton and Rapp, but he was not then an agent of defendant, and had no trade in view. It is said, "if one, in the course of his business as agent for another, obtain knowledge from which a trust would arise, and afterward become the agent of a subsequent purchaser in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acted." *Houseman v. Girard, etc., Mutual Association, 81 Pa. St., 262; Hood v. Fahnestock, 8 Watt., 489; Lawrence v. Tucker, 7 Greenl., 195; Plympton v. Preston, 4 La. Ann., 356; Mundine v. Pitts, 14 Ala., 84; Pepper v. George, 51 Ala., 190.*

The sixth instruction for defendant should have been given. *1 Story on Contracts, sec. 498; 2 Parsons on Contracts, 3 ed., star page 280, 5 ed., 782; Warburton v. Aken, 1 McLean, 460; Taylor v. Weld, 5 Mass., 116; Hanney v. Eve, 3 Cranch, 242.*

Also, the ninth. *81 Ind., 350.*

Thos. C. McRae and *Dan W. Jones*, for Appellee.

There can be no doubt, nor is it denied, that Arrington was the agent for appellant in the purchase of appellee's residence and fruit farm. Consequently, appellant is liable for any fraud which his said agent may have perpetrated upon appellee in this matter. *2 Parsons on Contracts, 779 and 780; Fitzsimmons v. Joslin, 21 Vt., 129; Morton v. Scull, 23 Ark., 289; Strayhorn v. Giles, 22 Ark., 517.* And although the contract was made between Arrington, acting as appellant's agent, and appellee, and was reduced to writing, still parol evidence is admissible to show the fraudulent representations made by Arrington to appellee to induce him to enter into the contract. *Plant v. Condit, 22 Ark., pp. 463-4; Hooper v. Chism, 13 Ark., 498; Tune v. Rector, ad., 21 Ark., 284; 1 Smith's Leading Cases, 273; Hanger, et al., v. Evins & Shinn, 38 Ark., 334.*

At common law an action on the case would always lie for fraudulent representations by the vendor as to the character of goods or land sold by him, when he makes them knowingly, wilfully and with the design to deceive the vendee, and when the vendee at the time has a right to, and does rely upon them, and is misled to his prejudice; and in this respect our statutes have made no change in the common law. *1 Chitty's Pleadings, 157 and note 3; Hanger et al. v. Evins & Shinn, 38 Ark., 334 and 339.* It was not necessary for the appellee to prove an offer to return the property before suit was brought, nor was it necessary to make such an offer. He had his election, either to demand a rescission of the contract or to bring his action for damages for deceit, and he elected to pursue the

latter remedy. *Hanger et al. v. Evins & Shinn, 38 Ark., 339; Plant v. Condit, 22 Ark., 454; 1 Smith's Leading Cases, 252; Williams v. Miller, 21 Ark., 469; Desha's exrs. v. Robinson, admr., 17 Ark., 228; Yeates et al. v. Pryor, 11 Ark., 58; Goodwin et al. v. Robinson, 30 Ark., 535; Withers v. Green, 9 How. (U. S.), 213.*

In this case, however, as is well sustained by the proof, appellee refused to take the appellant's land after ascertaining its character, and notified him that he would not have it. He refused a deed from appellant and has never claimed title to any part of said 3000 acres. (Evidence of both appellant and appellee in transcript.)

Appellant claims that his agent, Arrington, was deceived by false representations of appellee as to the value of his residence and fruit farm; appellee denies any such false representation. But the claim is untenable in any event, because Arrington examined the property before purchasing, and if he was deceived it was through his own fault and laches and he can not be heard to complain; and he, Arrington, testifies that he relied chiefly on his own judgment of its value in trading. On the other hand, appellee was compelled to rely on the representations of Arrington as to the character of the lands on the Ouachita river, because he had never seen them and was then in the city of St. Louis, several hundred miles away from said lands, and was at the place appointed by Arrington for making the trade. He had a right to rely on Arrington's representations, and the evidence clearly establishes the fact that he did rely upon them, and that he was misled by them to his prejudice. *2 Parsons on Contracts, 773; 1 Story on Contracts, secs. 510 and 511; Righter et al., v. Roller et al. 31 Ark., 170; Hanger et al. v. Evins & Shinn, 38 Ark., 334; Yeates v. Pryor, 11 Ark., 58; Winter v. Bandel et al. 30 Ark., 362; Hill v. Bush, 19 Ark., 522; House v. Marshall, 18 Mo., 368; Langden v. Green, 49 Mo., 363; Slaughter v. Gerson, 13 Wall., 379; Gaty v. Holcomb, 44 Ark., 216.*

The court below, therefore, did not err in excluding the depositions of C. F. Lee, Sullivan, Frazier, and the other witnesses for appellant mentioned in his motion for a new trial, from nine to thirty-one inclusive, because they relate to the value of appellee's place in Hillsboro, Mo., and to the value of fruit trees, grape vines, etc., thereon, and the value of building materials, mechanics' work, etc. The appellant purchased upon the judgment of his agent, who had opportunity for personal inspection of these things, and not upon the representation of appellee. Said Arrington testified that he visited the said premises and examined them, and herein he is corroborated by the testimony of appellee and T. H. McMullin.

Upon such state of facts the above authorities decide that he is held to have purchased on his own judgment. Arrington testifies that he depended chiefly upon his own judgment of the value of appellee's premises, together with information obtained from T. H. McMullin with reference thereto. Although other circumstances may have induced appellee to wish to sell his property, such as being in debt, etc., still this can not shield appellant from the legal consequences of his agent's false and fraudulent representations. As remarked by this court in *Goodwin et al. v. Robinson, 30 Ark., 540,* "we do not think it comes with a very good grace from a party who has deceived and defrauded another by false representations, to shield himself from responsibility by claiming that other influences may have aided him in the deceit, contributed to his assistance, any more than it would to chide his dupe for his credulity." *Goodwin et al. v. Robinson, 30 Ark., 540; 2 Parsons on Contracts, 773; Winter v. Bandel et al., 30 Ark., 373.*

The jury were the proper judges of the question of fraud upon all the facts and circumstances of the case. They have determined that question and their verdict should not be disturbed. *Hanger et al. v. Evins & Shinn, 38 Ark., 346.*

The measure of damages is correctly given in appellee's fifth instruction. The appellant having admitted in his answer that the price agreed to be paid by appellee for the 3000 acres of land was $5 per acre, amounting to $15,000, and there being no controversy upon this point, it was not error in the court to state this as the price agreed upon. It was an admitted fact and the rule was correctly stated in said fifth instruction. *Morton v. Scull, 23 Ark., 289; Murray v. Jennings, 42 Conn., 9.*

GEO. W. CARUTH, *Special Judge.* Samuel A. Reppy, the appellee, in 1873 was the owner of an improved fruit farm in the State of Missouri, and put it on the market for sale or exchange. On the 26th day of October, 1873, one R. E. Arrington, in company with others, came to Reppy's farm, looked over the place, including the orchard and premises generally, and closely examined the house. Nothing came of this visit; but about seventeen days thereafter Reppy received a letter from Arrington, in which he proposed to purchase the farm, and pay for the same by assuming certain incumbrances thereon, amounting to about $10,000, and pay the balance in lands, "situated near the largest and one of the best towns in the state —Camden, in Ouachita county, lying on the west bank of the Ouachita river, abounding with the best and most splendid timber, and at least half of it the very best of river bottom land, all lying within from two to five miles of Camden, embracing upwards of three thousand acres, all in one body. This tract I will put in the trade at $5 per acre; worth the money I think today."

Two days later Reppy received a telegram requesting him to meet Arrington in St. Louis, which he did on the 16th or 17th day of November, 1873. At which time Arrington reiterated the statements of his letter, and, on being questioned, stated that two-thirds of the Arkansas lands were above overflow, and that out of any 3000 acres Reppy might choose to

select there would be 2000 acres in a body, high, dry and level. These Arkansas lands were the property of John Matlock, the appellant, who was Arrington's brother-in-law, and who was the party making the trade, through Arrington, his accredited agent.

Upon this state of case, Reppy agreed to trade as Arrington proposed, and immediately executed a deed of conveyance to Matlock, reciting the consideration as $25,600 cash in hand paid, and delivered the same to Arrington, who went with it to Reppy's farm (the same purchased) and had Mrs. Reppy acknowledge it, Reppy being on the federal jury at St. Louis and could not leave. At the time of the delivery of the deed Arrington gave Reppy a writing binding Matlock to comply with the terms of the trade, to-wit, pay the incumbrances of about $10,000 and convey the 3000 acres of land. Reppy delivered possession of his farm to Matlock, and subsequently discovering that the land he was to receive in Arkansas was worthless, and not such as it had been represented, declined to accept a deed therefor, and brought suit in the nature of an action for deceit against Matlock, claiming $15,000 damages. There was a jury trial and a verdict of $10,000 found in favor of Reppy; motion for a new trial was made, overruled, and Matlock prosecuted this appeal.

The motion was based on numerous grounds, but those which require the notice of this court may be grouped as follows:

First. Errors in giving and refusing certain instructions therein set out.

Second. Errors in permitting or refusing the introduction of certain evidence.

The following are the instructions given and refused, to which action of the court objection is taken:

"1. If the jury find from the evidence in this case, that R. E. Arrington, as the agent of the defendant, John Matlock, on or about the 15th day of November, 1873, or theretofore, for the purpose of inducing the plaintiff, Samuel A. Reppy, to sell to defendant his residence and fruit farm, and take in part pay therefor three thousand acres of land of the defendant, to be selected by plaintiff out of a body of seven thousand acres, did falsely, fraudulently, knowingly and deceitfully make to plaintiff representations concerning the quality, character and condition of said land of defendant as facts, and did by such representations knowingly lead plaintiff to believe that of any three thousand acres of land which plaintiff might select in a body out of defendant's said seven thousand acres of land, two-thirds or a greater portion thereof was entirely above overflow, susceptible of cultivation, and that the plaintiff had never been in the vicinity of said lands, and had no opportunity to know, and did not know, anything of the character, quality and condition of said lands of the defendant, and relied on said representations concerning the same, and believed them to be true, and was thereby induced to convey to the defendant his said residence and fruit farm, and to agree and did agree to take in part payment therefor three thousand acres of said land of the defendant, to be selected by plaintiff in a body, at five dollars per acre; and further find that said lands of defendant, except a small portion thereof, were not susceptible of cultivation by any ordinary means, but were almost wholly subject to annual overflow so as to be unfit for cultivation, and the plaintiff was misled, to his injury, by such false and fraudulent representations, then they, the jury, will find the issues for the plaintiff, and assess his damages as herein directed.

"2. If the jury find from the evidence that R. E. Arrington, as the agent of the defendant, John Matlock, on or about the eighteenth day of November, 1873, or theretofore, for the purpose of inducing the plaintiff, Samuel A Reppy, to sell to defendant his residence and fruit farm, and take in part payment

therefor three thousand acres of land of the defendant, to be selected by plaintiff in a body out of a body of seven thousand acres, did falsely, fraudulently, knowingly and deceitfully represent to plaintiff as facts, and lead plaintiff to believe that out of any three thousand acres of said land of defendant the plaintiff might select in a body, at least two-thirds thereof was above high-water mark and susceptible of cultivation, or words to that or like effect; and if the jury further find that plaintiff had never been in the vicinity of said land of the defendant, and had had no opportunity to know, and did not know anything concerning their character, quality and condition, but relied upon said representations and believed them to be true, and was induced thereby to sell to defendant his said residence and fruit farm, and to agree to take in part pay therefor three thousand acres of the said lands of defendant at five dollars per acre; and also further find that said lands of the defendant were almost wholly subject to overflow so as they were not susceptible of cultivation by any ordinary means, and that plaintiff was misled to his injury by reason of such false and fraudulent representations, then the jury will find for the plaintiff and assess his damages as hereinafter directed.

"5. If the jury find the issues for the plaintiff, they will assess his damages at such sum as from the evidence they may find he has sustained, not to exceed the sum claimed in the complaint, and will regard as the measure of damages the difference between the real value of said three thousand acres of land as shown by the evidence and the price agreed to be paid therefor."

And the defendant asked the court to instruct the jury, among other things, as follows:

"5. If the jury believe from the said testimony, that the plaintiff, knowingly and wilfully, made to defendant, or his agent, false representations as to the costs of the dwelling house on said lands of plaintiff, and other improvements thereon, or as to the number of apple and peach trees growing on said lands, or

as to the costs of said land and the improvements thereon, or as to the encumbrances on said lands, or any part thereof, or concealed from defendant, or his agent, information of encumbrances on said lands within his possession, for the purpose of inducing, and did induce defendant to purchase said land, or any part thereof, and that defendant had a right to rely, and did rely on said representations, or any part thereof, and that defendant has actually been damaged and injured by such representations, or any part thereof, they will return a verdict in favor of defendant, and assess his damages in whatever amount they find he has been damaged."

The court struck out that portion of the instruction commencing with "as to the costs of the dwelling house, etc.," and ending with "the encumbrances on said land or any part thereof," and gave the same as amended.

"6. If the jury believe from said testimony, that plaintiff, before making the contract to sell, convey and exchange lands, as proven in the present trial of this action, the said contract being referred to in the complaint and answer herein, wilfully and knowingly made false representations to defendant, or his agent, with the fraudulent intent to cheat and defraud defendant, or in the making of said contract, was guilty of any fraudulent intention to cheat and defraud defendant, they will return a verdict in favor of defendant."

This the court refused and amended the same by interlining after the words, "any fraudulent intent to cheat and defraud defendant," and before the words, "they will return a verdict," the words, "and that defendant or his agent, was in such condition and so situated as to have a right to rely, and did rely on said false and fraudulent representations of the plaintiff," and gave the same so amended.

"7. The jury will wholly disregard and leave out of consideration all statements of defendant's agent, Arrington, as to the prospects of Camden, Arkansas, and its railroad prospects,

and as to the fertility of defendant's lands in the valley of the Ouachita river, and its capacity of producing corn and cotton, and its susceptibility of cultivation, and its being the best of river bottom lands, as such statements can only be matters of opinion."

The court struck out the words, "and its susceptibility of cultivation," and gave as amended.

"9. If the jury believe from said testimony, that plaintiff ascertained the character of said lands of the defendant, in the valley of the Ouachita river, and thereafter selected three thousand acres to be conveyed to him under his contract with defendant, without any complaint of misrepresentation on the part of the agent of the defendant, such designation was an acceptance of said lands, so far as the plaintiff was concerned, and that upon a tender of a deed by defendant, in compliance with the written contract of the nineteenth day of November, 1873, the plaintiff refused the same, they will find for defendant."

The evidence in this cause tends to establish the facts that the trade out of which the controversy has arisen was entered into at St. Louis, Missouri, where the appellee was at the time serving as a juror in the federal court. Reppy had never seen the Arkansas lands and knew nothing about them except what Arrington told him, which was, in effect, that two-thirds of it was above overflow, and that out of any three thousand acres Reppy might select, there would be two thousand acres in a body, high, dry and level—all of which was untrue.

Reppy was so situated he was compelled to rely on the representations so made, and traded accordingly. Arrington, on the contrary, had inspected and examined Reppy's fruit farm shortly before the trade, and had further opportunity to do so when he went there to have Mrs. Reppy sign the deed. The property was but a short distance from St. Louis, and therefore easy of access to Arrington, had he desired to make further examination. The Arkansas land, valued in the trade and rep-

sented to be worth fifteen thousand dollars, was shown to be worth three thousand dollars. Reppy refused to accept the deed for it, and it remained the property of Matlock. The situation of affairs, therefore, when the suit was instituted, was that Matlock had Reppy's fruit farm, valued in the trade at $25,000, in his possession, for which he had paid or assumed to pay certain encumbrances, which amounted to somewhere in the neighborhood of eleven thousand dollars, and his own land in Arkansas besides.

1. Action for Deceit: False representations.

The principles of law, applicable to an action of deceit for damages, under the state of case which the evidence here tended to establish, have been well settled by the adjudications of this court.

In *Yeates et al. v. Pryor, 11 Ark., 58*, this court, speaking through Mr. Justice WALKER, held:

"It is not every misrepresentation of the vendor, in regard to the property sold, which will amount to fraud, be it ever so exceptional in point of morals. The misrepresentation in order to affect the validity of the 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 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. Such representations therefore to amount to fraud must be of a decided and reliable character, holding out inducements to make the contract, calculated to mislead the purchaser and induce him to buy on the faith and confidence of the representations, and in the

absence of the means of information to be derived from his own observation and inspection, and from which he could draw conclusions to guide him in making the contract independent of the representations of the vendor."

All subsequent opinions of this court are in perfect harmony with this statement of the law applicable to such cases.

Yeates v. Pryor was a bill in chancery, seeking the rescission of an executed contract on the ground of fraudulent representation as to land being above overflow. The same principles are applicable to suits at law for damages, because of similar false and fraudulent representation.

2. SAME.

Actions of this character should be subjected to four tests in order to determine whether they may be maintained.

a. Was the fraud material to the contract; did it relate to some matter of inducement to the making of the contract?

b. Did it work an injury?

c. Was the relative position of the parties such and their means of information such, that the one must necessarily be presumed to contract upon the faith reposed in the statements of the other?

d. Did the injured party rely upon the fraudulent statements of the other and did he have a right to rely upon them, in full belief of their truth. *Yeates v. Pryor, 11 Ark., 60; Winter v. Bandel, 30 Ark., 373; Wilson v. Strayhorn, 26 Ark., 28.*

Squared by these well established principles, the instructions one and two as given for plaintiff were proper, and the fifth and sixth asked by defendant were properly refused.

The principal objection urged to instructions one and two, is that the jury were allowed to consider representations concerning the fertility of the lands and susceptibility to cultivation. This is not tenable as error for two reasons:

1. The instructions specially set out the fraudulent representations, that is to say, that the lands were above overflow,

and susceptible of cultivation, and make the finding of such representation to have been made the test. But it is said, the words "susceptible of cultivation" expressed a mere matter of opinion relating to the character of the soil as to fertility, etc. We do not so understand it. The deceit claimed was the representation that the land was above overflow, and of course if it was it was susceptible of cultivation, whether it produced much or little. If it was covered with water of course it was not, and in leaving it to the jury to say whether it was susceptible of cultivation or not, the instructions did not require at its hands any inquiry as to the character, quality or fertility of the lands, but simply whether they could be worked at all, or in other words were above overflow.

2. Admitting that there might be some objection to the expressions employed in instructions one and two concerning representations as the quality, character and condition of the land, being mere matters of opinion, the matter was remedied by the seventh instruction given at the instance of defendant in which the jury was instructed to disregard and leave out of consideration, all the representations objected to except "susceptibility of cultivation" and we have already seen that it was proper to let that go to the jury.

3. DAMAGES: Measure of, for false representations.

We come now to consider the fifth instruction, defining the measure of damages. This is objected to on the ground that the court assumed $15,000 as the price paid. The complaint charges that $15,000 was the price at which the Arkansas land was taken, and upon the basis of which the trade was made. This is admitted by the answer, and the court was justified in assuming that to be the sum agreed upon. In actions of deceit, the injured party may insist on having his damages measured by the difference in the value of the property purchased as it really was, and what it would have been had the representations made concerning it been true; or, if he prefer, he may content himself with the difference between the real value of

the property in its true condition and the price paid; or, the value placed upon the property in the transaction.

In this case, the plaintiff chose to resort to the latter course, and inasmuch as the price paid was admitted by the pleadings, the instruction as given was proper. This court, in *Goodwin et al. v. Robinson, 30 Ark., 540,* held that: "A party who has been induced to enter into a contract for the purchase of property by the false representations of the vendor, concerning the quantity or quality of the article sold, may have either of these remedies which he conceives it is most to his interest to adopt." "He may annul the contract, and by returning or offering to return the property purchased within a reasonable time entitle himself to recover whatever he had paid upon the contract; or he may elect to retain the property and sue for the damages he has sustained by reason of the false and fraudulent representations, *and in this event the measure of the damages would be the difference between the real value of the property, in its true condition, and the price at which he purchased it;* or, to avoid a circuity of action and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped from the price he agreed to pay. *2 Kent Com., 8 ed., pp. 605 and 610; Sugden on Vendors, 381 star page; Sedgwick on Damages, pp. 445–6; Desha v. Robinson, 17 Ark., 246.*"

The instruction, as given, is in perfect harmony with the doctrine laid down by us in *Goodwyn v. Robinson,* nor is it in any wise inconsistent with the adjudged cases in other states, as we understand them.

It follows from what we have said, there is no error in granting the instruction objected to.

It is urged that the court improperly refused the fifth and sixth instructions as asked by the defendant. These instructions, as asked, did not express the law of the case, and ought not to have been given, even as amended, though as to that

part of it, appellant has no right to complain. If they had been given, they would in all probability have misled the jury, and justified them in resolving against the plaintiff, upon a belief on their part, that the plaintiff had not made any fraudulent representation whatever, without reference to its being material, or to the relative position of the parties and their means of information; and is condemned by the doctrine laid down by Judge WALKER in *Yeates v. Pryor, supra.*

4. Waiver of the fraud:—Estoppel.

This brings us to the last error suggested in relation to the instructions. It is insisted the ninth, as asked by defendant, should have been given. This was properly refused on two grounds. It is entirely abstract. There is no testimony whatever upon which it might have been based. On the contrary, the letter, in which it is claimed Reppy selected the lands, expressly states it to be a conditional acceptance, subject to further examination. Secondly, it is not the law applicable to actions of deceit. In such cases the injured party, by accepting and holding on to the property concerning which the false representations have been made, after ascertaining their falsity, produces neither a waiver, nor does it operate as an estoppel, to prevent his suit for damages. He is entitled to all the benefits of his trade. These false representations are in the nature of warranties, and must be made good. He therefore waives nothing by accepting what is offered, although not what he traded for. He may take that, and then bring his suit. *Ahrens v. Adler, 33 Cal., 609; Murray v. Jennings, 42 Conn., 9; 3 Clark (Iowa), 584; 8 Ib., 370.*

Taking the instructions, as a whole, as given to the jury, we are unable to perceive that any injustice has been done the defendant.

In the course of the trial, the plaintiff was permitted to read the depositions of sundry parties, speaking to certain declarations of Arrington, shortly after the trade, describing Reppy's

farm in glowing terms, and to have the benefit of the testimony of N. T. Richmond, to the same effect, over the objection of defendant. This would have been irrelevant and incompetent, even if the agency of Arrington had been sufficiently established to have been in operation at the time the statements were made, which was by no means the case, and it was error to admit it. It is not, however, every admission of irrelevant or incompetent testimony, which constitutes a reversible error. We cannot see how, under the state of the pleadings, and the circumstances of this case, it could have worked any injury to defendant's case. The same may be said with much more force, as to the exclusion of the depositions offered by defendant to prove the value of Reppy's farm, as estimated by numerous deponents, but that testimony was clearly incompetent. It is sought to justify it upon the ground that if it could be shown that Reppy's farm was worth little or nothing, then the jury might infer that he did not rely upon Arrington's representations. We cannot so conclude. The valuation of the Arkansas land is not an open question. The pleadings settle that. There was no issue to which this proof was responsive. Besides, Arrington did not buy a "pig in a poke." He had opportunities of examination and inspection. He, in his haste to have the trade concluded, took the deed with him to Reppy's home (which was the place traded for), to have Mrs. Reppy sign it, and there, in the absence of Reppy, on the spot, closed that part of the transaction. The valuation was agreed to—so charged in the complaint and admitted by the answer. That being so, it was immaterial what the opinion of other people might have been touching it. It could not affect the recovery as to his false representations touching the Arkansas land.

The judgment must be affirmed.

Hon. B. B. BATTLE did not sit in this case.

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RICHARDSON v. COGSWELL.

STATUTE OF LIMITATIONS: *Absconding debtor.*

The absconding of a debtor to prevent the institution of a suit against him does not suspend the statute of limitations under *Sec. 4502 Mansf. Dig.*, unless such obstruction to the suit existed at the time the cause of action accrued.

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

John J. Sumpter for Appellant.

This action was barred by limitation. *Gantt's Dig., sec. 4121.* When the statute once begins to run, it continues to run over all intervening disabilities. *Abbott's Nat. Dig., secs. 165–166, p. 227, and cases cited.*

The act makes no reservation in favor of non-residents, and the court can make none. *17 Ark., 199.*

Z. P. H. Farr for Appellant.

The account was barred. *Mansf. Dig., sec. 4478.* The reply of plaintiff was no answer to the plea of limitation, as the statute under which it was drawn has reference to non-resident debtors. *Mansf. Dig., sec. —.* Richardson was a resident. *8 Ark., 429.*

Sanders & Husbands for Appellee.

The evidence shows that appellant was a non-resident when the suit was brought.

COCKRILL, C. J. The appellee is a hotel proprietor in Hot Springs. The appellant was a resident of the same city, and became indebted to her in the sum of $119.28 for board and

lodging, and then absconded, as the evidence tended to prove, to prevent the commencement of an action against him. Somewhat more than five years thereafter he reappeared in Hot Springs, and Mrs. Cogswell sued him for the amount of his board bill. The defense offered was that the cause of action did not accrue within three years of the institution of suit. There was judgment against the appellant in the court of common pleas, and again on appeal to the circuit court, where judgment was rendered against the sureties in his appeal bond. It is in the interest of his sureties mainly that this appeal is prosecuted.

Mrs. Cogswell admits that her cause of action accrued more than three years before suit brought, and relies upon the following provision of the statute to prevent the bar: "If any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times respectively limited after the commencement of such action shall have ceased to be so prevented." *Mansf. Dig., sec. 4502.*

In the case of *Denton v. Brownlee, 24 Ark., 554,* the statute in question, upon mature consideration, was construed to suspend the operation of the statute of limitations only when the obstruction to suit existed at the time the cause of action accrued. When no disability in the creditor, arising from the act of the debtor, exists at the time the cause of action accrues, the statute of limitations begins to run, and is not checked by the obstructing act of the debtor done after that time. *Denton v. Brownlee, supra; Burr v. Williams, 20 Ib., 185.*

The proof showed that Mrs. Cogswell's cause of action accrued, and that she had the opportunity thereafter to bring her action, before her debtor absconded.

It is only the act of absconding from the county of his residence that is relied on to suspend the statute, but, by the

authority quoted, that did not have the effect to check the operation of the statute when it was once in motion. As the burden of proof was upon the plaintiff to show facts which would remove the bar, (*Taylor v. Sear, 6 Ark., 381; McNeil v. Garland, 27 Ib., 343,*) it follows that the verdict is not sustained by evidence, and the judgment must be reversed and the case remanded for a new trial.

YATES v. STATE.

CRIMINAL EVIDENCE: *Confession of prisoner.*

The confession of a prisoner of the locality of stolen property, though induced by threats, is admissible when verified by finding the property where he locates it; and all he says in conveying the information which is directly connected with or explanatory of the discovery is also admissible, but his confession that he stole it is not admissible.

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

G. W. Shinn for Appellant.

1. Admissions to be admissible in evidence must have been voluntarily made; if not, they are inadmissible. Such as are made under threats or fear, or by reason of promises made, are wholly inadmissible. *28 Ark., 121; 5 Cush., 605; 49 Ala., 9; 42 N. Y., 200; 97 Mass., 574; 46 Mo., 566.*

The burden of proving that the confessions were voluntarily made is upon the state. *22 Ark., 336.* The jury are bound to consider the confessions when once admitted. *28 Ark., 531.*

2. Outside the confessions there is no evidence sufficient to convict.

Dan W. Jones, Attorney General, for Appellee.

Appellant was indicted for the larceny of money. The money was shown to have some value for the appellant bought goods with it. *Houston v. State, 13 Ark., 66; Shepherd v. State, 44 Ib., 41.* The bill of exceptions fails to state anywhere that it contains all the evidence adduced at the trial. There is a statement that certain evidence was all that was introduced for the prosecution and this is all that is shown in this respect. This court will consider no questions of evidence. *Potter v. State, 42 Ark., 30.* But the evidence disclosed supports the verdict. There was an exception reserved to the admission of a confession. Taken with the instruction of the court on that point it was perfectly admissible and the appellant not excepting to any instruction of the court gave acquiescence to its admission with the instruction. The instruction was the law. *1 Greenl. Ev., sec. 231; 1 Bish. Crim. Pro., sec. 1242.*

The evidence being ample the verdict and judgment should stand.

COCKRILL, C. J. On the trial of the appellant for petit larceny a confession of his guilt was given in evidence against him. There was evidence tending to show that the confession was extorted from the accused through the influence of threats and upon compulsion. The court found as a fact that the confession was not made voluntarily, but ruled, against the apt objection of the appellant, that the evidence was nevertheless competent, cautioning the jury that the statements made by the accused were not to be considered by them in arriving at their verdict, unless they believed from other evidence that the statements

were true. The appellant was convicted and urges the action of the court in this behalf as error.

The exception that exists to the general rule that confessions in cases of larceny made under threats are not evidence, is shown by the authorities to be this: When statements are made by the accused that lead to the discovery of the stolen property, then the rule is that it is admissible to show that the property had been traced by means of information received from the accused; and all that was said by the accused in conveying the information, which is directly connected with or explanatory of the discovery, is also admissible. The statement as to his knowledge where the stolen property was to be found being thus confirmed by the fact of finding, is proved to be true and not to be fabricated in consequence of the improper means employed to obtain the confession. But the rule as to the direct confession of guilt remains intact, and the discovery of the property through information derived from the accused does not justify the introduction of the confession that it had been stolen by him. That must be excluded notwithstanding the facts otherwise proven to be true, leaving the prisoner to reconcile, as best he can, his knowledge of these facts with his innocence of the crime. *1 Greenl. Ev., sec. 231; Davis v. State, 8 Tex. App., 510; Strait v. State, 43 Tex., 486; White v. State, 3 Heisk, 338; State v. Garvey, 28 La. Ann., 925; Laws v. Com., 84 Penn., 200.*

In this case it was the confession that he had stolen the property that was objected to, and the evidence should have been excluded.

For this error the judgment must be reversed and the case remanded for a new trial.

NEELLY v. LANCASTER.

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HUSBAND AND WIFE: *Curtesy; Construction of statute, etc.*

The effect of *Section 4624, Mansfield's Digest*, and the Constitution of 1874, upon the rights of husband and wife in her real estate, was to exclude his marital rights during her life and to secure to her the right to use and dispose of it at will; but if she makes no disposal of it, and there be issue of the marriage, born alive, his title by curtesy consummate attaches at her death as at common law.

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

W. N. May and *Hall & Carter* for Appellant.

Under our present constitution and laws the husband has no curtesy. *Art. 9, sec. 7, Const. 1874; 15 Ark., 483; Cooley's Blackstone, vol. 1, top p. 126 and notes; 36 Ark., 355; Ib., 586; 43 Id., 28; Ib., 156; Ib., 160.*

Davis & Bullock and *Jacoway & Jacoway* for Appellees.

Under the constitution of 1874 the wife may convey or devise her property as if she were a *femme sole* and thus defeat her husband's curtesy, but unless she does so, the curtesy attaches on her death. See *44 Ark., 153; 43 Id., 427; 36 Id., 355; Kelly Cont. Mar. Women, pp. 94–5, 109 to 117; 65 Ill., 132; 51 Id., 209; 45 Id., 57; 51 Id., 226; 44 Id., 58; 54 N. Y., 280; 52 Barb., 412; 24 Barb. (N. Y.), 581; 9 Id., 399; 3 C. E. Green, (N. J.), 213; 2 Vroom, 244; 7 Jones, (N. C.), 161; 76 Penn. St. 280; 3 Smith (Pa.), 400; 2 Mich., 93; 11 Id., 33; 15 Id., 60; 31 Vt., 607; 12 Minn., 60; Bishop Mar. Women, vol. 2, p. 129, etc.; 3 Lea (Tenn.), 710; 6 Mo., 549; 30 N. J., 689; 50 Miss., 776; 82 Penn St., 86; 54 Miss., 50; 12 Heisk (Tenn.), 94; 60 Ill., 226.*

COCKRILL, C. J. The action in this case is ejectment. Mary Jane Wicker acquired title to the lands in controversy by descent from her father in 1861. In 1881, being still seized in fee of the lands, she intermarried with John L. Lancaster, the appellee. A child, capable of inheriting the estate, was born alive of this marriage, and in 1883 the wife died without living issue, and without making or attempting to make any disposition of the land. The husband continued in possession, when the appellant, who is admitted to be the vendee of the rightful heir at law, brought this action against him. The appellee, who is the husband, in his answer set forth the facts substantially as stated. A demurrer to the answer was overruled, the plaintiff submitted to judgment and appealed.

1. CURTESY:—Construction of statute.

The question is, has curtesy been abolished by the married woman's enabling provisions contained in the constitution and statutes. Art. 9, sec. 7, of the constitution of 1874 is as follows:

"The real and personal property of any *femme covert* in this state, acquired either before or after marriage, whether by gift, grant, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her, the same as if she were a *femme sole*, and the same shall not be subject to the debts of her husband."

Section 4624, Mansfield's Digest, which is taken from the Act of April 28, 1873, declares that the property of a married woman, together with the rents and profits thereof, whether acquired before or after marriage, "shall notwithstanding her marriage be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband or liable for his debts."

Curtesy has not been the subject of legislative enactment in this state, and the common law upon that subject prevails, except as modified or changed by the provisions above quoted. They contain no express exclusion of the husband's marital rights in the deceased wife's property, and if the incidents of marriage as recognized by the common law are abrogated by them, it is because the rights which they secure to the wife are inconsistent with the husband's common law rights. To the extent of the inconsistency between the positive provisions of the law and the rules of the common law the latter must of course yield and give place to the former. That the wife may hold her lands to her separate use, free from the interference of her husband and his creditors, is plain from the terms of the written law. In the absence of regulating statutes, or constitutional provisions, she would not enjoy these rights, for the immediate effect of coverture would be to invest the husband with the usufruct of her real estate, and upon the birth of issue capable of inheriting the estate, he would take an enlarged life interest in it, and would become what was termed a tenant by the curtesy initiate, with power to convey his estate without the wife's concurrence. That it was the purpose of the provisions quoted to abolish this feature of the tenancy by the curtesy, and thereby exclude the rights of the husband during coverture, their terms leave no room to doubt. *Hitz v. Natl. Bank, 111 U. S., 729-31.*

The same result was easily reached before the enactments referred to, by a conveyance to the wife, or to a trustee, for her sole and separate use; and the intention of the grantor in such conveyances to modify or totally exclude the husband's marital rights, as gathered from the language employed, was the test of the interest that he acquired in the lands so held by his wife. It was always admitted that the question, in courts of equity at least, was one not of power to exclude the ordinary marital rights of the husband, but of intention. It accordingly became

a settled rule that if a legal or equitable estate of inheritance was limited simply to the separate use of a married woman, no intention was manifested to exclude the husband's ultimate estate, and upon issue born alive and death of the wife, he took his curtesy out of it. The fact that the rents and profits were expressly secured to the wife's separate use and the estate in terms exempted from liability for the husband's debts, it is said, did not alter the rule. And the same was true of a like estate settled upon the wife, or in trust for her, with power to convey or to direct by will or otherwise the person to whom the land should be conveyed, if at her death the power remained unexecuted. The cases all concede that the intention of such conveyances to cut off the husband's rights after the death of the wife must in some form be expressed or clearly implied to have that effect. This was ordinarily done either by stipulating that the husband should not be tenant by the curtesy of the lands conveyed, or else by passing the property immediately upon the wife's death to her heirs or appointee. *Cushing v. Blake, 30 N. J. Eq., 689; Stokes v. McKibben, 13 Pa. St., 267; Carter v. Dale, 3 Lea (Tenn.), 710; Tremmel v. Kleiboldt, 75 Mo., 255; Frazer v. Hightower, 12 Heisk (Tenn.), 94; Morgan v. Morgan, 5 Madd., 410.*

If the settlement or trust deed to the wife's separate use did not plainly exclude the husband's participation after the wife's death, the restriction was construed by the courts to extend to the period of coverture only, and as the matter of his total exclusion was a thing to be accomplished merely by the expression of the intention, the conveyance was not construed to divest the husband's rights further than the terms strictly required, and words of doubtful import were not permitted to have that effect.

The provisions of the statute law restricting the marital rights of the husband stand upon a like footing and have been so likened and construed in most of the jurisdictions where the question has arisen, the statutory or constitutional provision

being held to occupy the place of the conveyance which created the separate use.

The interest of the wife under the enabling acts is not essentially different from that which subsists in relation to her separate estate when created by settlement or deed of trust. It is declared by our law to be her sole and separate property, subject to be conveyed or devised by her, as though she were a *femme sole*, and the language of the law may have full effect as like language in a deed would have without impairing the right of the husband in the enjoyment of the estate after the death of the wife. It protects her estate during her life; it does not at her death purport to affect the law of succession. There is no reason of public policy which requires that the law should be differently construed, and the common law incidents of marriage are swept away only by express enactment or necessary implication. *Bertles v. Nunan, 92 N. Y., 160; Robinson v. Eagle, 29 Ark., 202.*

If the framers of the law intended a different construction it would have been easy to accomplish it either by expressly abolishing curtesy, or by directing a different succession on the death of the wife. But under the provisions of the law quoted, and the construction that we have heretofore placed upon it, whatever interest the husband may acquire in the lands of his wife by marriage, may be swept away by her subsequent conveyance or devise of them. *Bagley v. Fletcher, 44 Ark., 153; Milwee v. Milwee, Ib., 112; Roberts v. Wilcoxon, 36 Ib., 355.*

In the same manner she could defeat the possibility of curtesy in her separate estate before the statute, by conveying or causing it to be conveyed away in pursuance of a power granted to her in the instrument.

The rule, therefore, under our law is, and it is the established doctrine under similar laws, with few exceptions, that while the husband is excluded during the wife's life from the control of or interference with her separate real estate, yet the right of

curtesy is left to him in so much of it as remains undisposed of at her death. *Kelly Cont. Mar. Women, pp. 94–5; 1 Bishop Mar. Women, secs. 147, 150; Schouler Husb. and Wife, sec. 423; Johnson v. Cummins, 16 N. J. Eq., 97; Porch v. Fries, 18 Ib., 204; Prall v. Smith. 31 N. J. L., 244; Hatfield v. Sneden, 54 N. Y., 280; Bertles v. Nunan, 92 Ib., 160; Martin v. Robson, 65 Ill., 129; Cole v. Riper, 44 Ib., 58; Leggett v. McClelland, 39 Ohio St., 624; Houck v. Ritter, 76 Penn. St., 280; Stewart v. Ross, 50 Miss., 776; Houston v. Gassell, 7 Jones (N. C.), 161.*

In the case at bar, upon the death of the wife, the estate vested in her heir subject to the intervening particular estate of the appellee as tenant by the curtesy. He therefore holds an estate in the lands for his life, and the plaintiff is not entitled to the possession.

Let the judgment be affirmed.

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SNEED v. STATE.

1. CRIMINAL PRACTICE: *Competency of juror.*

A juror who states upon his *voir dire* that, while he has neither formed nor expressed an opinion as to the guilt or innocence of the accused, and has no partiality for, or prejudice against him, yet has impressions on his mind in regard to the case which it would require evidence to remove; that the impressions were not derived from conversations with the witnesses or with any one who professed to know the facts connected with the homicide, but were based upon rumor, and that he could and would decide the case from the evidence as honestly and impartially as if he had never heard of the case, is a competent juror for the trial.

2. SAME: *Same.*

The entertainment of preconceived notions about the merits of a criminal case, renders a juror *prima facie* incompetent. But the disqualification is removed by showing that the impression is founded upon rumor, and not of a nature to influence his conduct.

3. CRIMINAL EVIDENCE: *Former testimony of witness out of jurisdiction.*
The testimony of a witness, in the presence of the defendant, on the hearing of his application for bail, may be read on the final trial, if the witness is out of the jurisdiction of the court, or cannot be found.

4. CRIMINAL PRACTICE: *Postponement of trial.*
Whether Section 5108 of the Civil Code is applicable to criminal trials, or if so is constitutional, *quere?*

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

Met. L. Jones for Appellant.

The deposition of Waller was improperly admitted. This witness was never subpœnaed.

The continuance should have been granted. Appellant was entitled to be confronted with his witnesses.

The Waller testimony does not come within the rule of *Hurley v. State, 29 Ark., 17;* nor *Dolan v. State, 40 Ark., 504.* See *33 Ark., 539.*

The jurors who stated that they had formed opinions, should have been excused.

The rule as to admitting what a witness would testify, if present, to defeat a continuance, does not apply to criminal cases. The defendant is entitled to have the benefit of the witnesses' testimony before the jury. If it does apply, it is unconstitutional.

Dan W. Jones, Attorney General, for Appellee.

In admitting this written statement of Waller, the court committed no error. *Hurley v. State, 29 Ark., 17; Dolan v. State, 40 Ark., 454.*

The instructions, given at the instance of the state as well as those by the court on its own motion, were excepted to in mass. They were all legal and exceedingly fair. But any of

them being good, all must stand. *Carroll v. State, 46 Ark.*, and cases there cited. *45 Ark., 539.*

The appellant's third, sixth, eighth, tenth and thirteenth instructions were refused. The third was in reference to the degrees of murder, and the jury finding the appellant guilty of manslaughter, was unaffected by its refusal.

The sixth, as asked, was misleading to the jury by conveying the idea that if the witness contradicted himself, they should disbelieve everything he said. The court had already properly stated the law in the fifth for appellant, and on its own motion also. *Yoes v. State, 9 Ark., 43; Atkins v. State, 16 Ark., 569; Drennen v. Lindsey, 15 Ark., 359.*

The eighth asked that appellant be excused for what he did if the deceased or his party fired on him first. This was erroneous, for if he could then avoid further conflict without greater danger to himself, it was his duty to do so. *Palmore v. State, 29 Ark., 250; Dolan v. State, supra.* The third instruction, at the instance of the state, was a proper direction on the point. The thirteenth was faulty in calling the attention of the jury to the weight they should give to a part of the evidence, while the court gave instructions as to reasonable doubts in the twelfth for appellant, and in those given on its own motion.

The appellant fails to show how he was prejudiced in the rulings upon the qualifications of jurors, because each one with whom any fault could be found, was challenged by him, and he does not show that he was compelled to take an objectionable one after his challenges were exhausted. But the court committed no error as to the jurors. *Wright v. State, 43 Ark., 641.*

The evidence fully sustains the verdict, and the instructions taken together as a whole, were full, clear and impartial, and the appellant has no just ground of complaint in the whole case.

SMITH, J. B. C. Sneed was, jointly with his son, Dink Sneed, and his son-in-law, McCall, indicted by the grand jury of Grant County, for the murder of Jacob Rhodes. The venue was changed to Saline, and, upon a separate trial, he was convicted of voluntary manslaughter, and sentenced to the penitentiary for four years. A new trial was denied him, and numerous exceptions were saved, of which the following only are deemed worthy of notice:

1. It was alleged that the verdict was contrary to the evidence.

The proofs tended to show the existence of a bitter feud between the indicted parties and the deceased, his brother Henry, and brother-in-law, Carver. In fact they were at open war; habitually wearing arms in expectation of a rencounter. The elder Sneed had sworn out a warrant, charging Henry Rhodes with the removal or disposal of a horse, upon which he held a mortgage lien. Jacob and Carver were subpœnaed as witnesses. On the day of trial, the partisans of both sides attended, the majority of them with arms in their hands. And after the trial was concluded, about three o'clock p. m., Jacob Rhodes and Carver started home afoot. They were armed with double barreled shot-guns, and traveled the same highway, by which it was necessary to reach their homes. They were soon followed by McCall and the younger Sneed, also on foot, the latter carrying in his hand a large navy repeater, with his thumb on the cock and his finger on the trigger. Close in the rear rode his father, with a gun across his lap, and three other persons, who had no connection with the quarrel. By quickening their pace, they overtook the Rhodes party at the distance of three quarters of a mile from the magistrate's house, where the trial had taken place, and just before reaching a road which diverged to the right, and led to the home of Rhodes and his companion, McCall brought on the affray by attempting to seize Carver's gun. A scuffle ensued,

ten or a dozen shots were fired in rapid succession, and Jacob Rhodes fell, pierced with two balls. After he was down, B. C. Sneed beat him over the head, shoulders and breast with his gun, and fled the same night to Texas. Jacob died next day.

Under these circumstances, it is wholly unimportant to the proper disposition of this appeal, to inquire who fired the first shot, or whether B. C. Sneed fired before he was shot at, or whether it was his shot that cut down Jacob, or whether Jacob's death was caused by a gun-shot wound, or by the blows that were rained upon him after he had fallen. Indeed there are indications in the record that the whole affair was preconcerted, so far as the Sneed party was concerned; and we should have been loth to disturb a verdict for a higher grade of homicide, if the jury had so found. It will suffice to say that the verdict was as favorable to the defendant as the law and the testimony warranted.

2. The court gave an elaborate charge to the jury, besides three special directions at the instance of the prosecution, and nine at the instance of the defendant, rejecting five of his prayers. Exceptions in gross were reserved to the general charge of the court, and to the instructions in behalf of the state. We perceive no serious objection to either or to any part thereof.

The law was fairly given and all aspects of the case covered. One of the rejected prayers related to the law of murder, and its refusal could not have prejudiced the defendant, as he was found guilty of a lower offense. Another was in reference to a point upon which the court had already given sufficient directions. The remaining prayers, if granted, might have led the jury to believe that the defendant was to be excused for the part he had taken in the fray, if the deceased or his party fired on him first, or if they were unable to tell whether the deceased died from wounds inflicted by the defendant himself.

3. In empaneling the trial jury, two persons who had been summoned on the venire, stated on *voir dire*, that, while they had neither formed nor expressed any opinion as to the guilt or innocence of the accused, and had no partiality for or prejudice against him, yet they had certain impressions resting on their minds in regard to the case, which it would require evidence to remove; that these impressions were not derived from conversations with the witnesses, or with any one who professed to know the facts connected with the killing of Rhodes, but were based on rumor only; and that they could and would decide the case upon the evidence adduced at the trial as honestly and impartially as if they had never heard of the case before. They were declared competent and were excused from serving by the defendant, who afterwards exhausted his peremptory challenges before the jury was completed. 1. Competency of juror.

The entertainment of preconceived notions about the merits of a criminal case renders a juror *prima facie* incompetent. But when it is shown that the impression is founded upon rumor, and not of a nature to influence his conduct, the disqualification is removed. *Dolan v. State, 40 Ark., 460; Polk v. State, 45 Ark., 170.* 2. SAME.

4. One of the eye witnesses of the homicide was Waller, a book agent. He resided in Bradley County at the time; but at the date of the trial, subpœnæs directed to that county, as well as to other counties whither it was supposed he had gone, had been returned "*non est inventus.*" It was admitted by the defendant that the present residence of this witness was unknown and could not be ascertained. But on a previous application of the prisoner for bail, Waller had been legally sworn and examined in the prisoner's presence, and had been cross-examined, and his testimony reduced to writing, read to and subscribed by him, and lodged with the clerk of the circuit court. This deposition was allowed to be read, over the defendant's objections. 3. CRIMINAL EVIDENCE:—Former testimony of absent witness.

It has been several times ruled by this court that a deposition, taken under such circumstances, may be read as secondary evidence on the final trial, if the witness is out of the jurisdiction, or his whereabouts cannot be learned, without any violation of the constitutional right of the accused to be confronted with adverse witnesses. The accused has already enjoyed the privilege of meeting the witness face to face, and of subjecting him to a cross-examination. To prevent a failure of justice, it is permitted to prove what the witness then swore, the same as if the witness were dead. *Hurley v. State, 29 Ark., 22; Shackelford v. State, 33 Id., 539; Dolan v. State, 40 Id., 461.*

4. Postponement of trial.

5. The defendant moved for a postponement of his trial, on account of the absence of Virgil Stockton and Nancy Ann Chant. By these witnesses he had proposed to prove sundry threats of the deceased against the defendant and his party, made in the one case ten or twelve days before, and in the other case in the morning of the same day on which the shooting occurred. It was not alleged that these threats had been made known to the defendant before the homicide. The prosecution agreed to admit that Stockton, if present, would swear as set forth in the application; and the court found that due diligence had not been used in procuring the testimony of Mrs. Chant. This last named witness had been duly subpœnaed, but had been recently confined in child-bed. The want of diligence consisted in not taking her deposition pursuant to an understanding had between the court, the parties and their counsel, two months before, when the cause was continued, on the prisoner's application, for the absence of other witnesses, and was by agreement set down for trial on this particular day. There were sixty witnesses in the case, all residing at a distance of thirty-five or forty miles from the place of trial; and the court had announced that the defendant must take the depositions of such of his witnesses as were unable to attend by reason of sickness.

So the court refused a continuance. The defendant insisted that he was entitled to the personal presence of the witnesses before the jury, and that he could not be forced to rely on the state's admission of what an absent witness would swear, nor to take his deposition.

Whether the statute which gives to the party resisting a continuance the option to admit that the absent witness would testify to the matters contained in the motion, and at the same time, the privilege of controverting by evidence the truth of those matters, was meant to apply to criminal cases; and whether, if so intended, it is not in derogation of the constitutional right of the accused to have compulsory process for obtaining witnesses in his favor, are questions that we prefer not to decide until they are squarely presented and have been fully argued. *Mansf. Dig., secs. 2189, 5108.* They are not so presented, unless the testimony proposed to be adduced is both competent and material.

Upon the competency of uncommunicated threats, compare *Atkins v. State, 16 Ark., 569; Coker v. State, 20 Id., 53; Pitman v. State, 22 Id., 354; McPherson v. State, 29 Id., 226; Palmore v. State, Ib., 249; Harris v. State, 34 Id., 469; Wiggins v. People, 93 U. S., 465; People v. Stokes, 53 N. Y., 164; Wharton's Crim. Ev., sec. 757; 2 Bishop Crim. Pro., secs. 609–11, 619–27.*

If the evidence was competent, it was unimportant, owing to the peculiar facts of the case, or at best cumulative merely. For there was not the least doubt that the Sneed party were the assailants in the encounter which ended in the death of Jacob Rhodes. And considered as to proof of the deceased's hostile temper, that was abundantly manifested by the preparations he had made, which are more significant than any declarations could be. It was notorious that the two families were at declared enmity, and living in a state of undisguised hostility.

Let the judgment be affirmed.

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FORTENBURY v. STATE.

1. CRIMINAL LAW: *Dealing in futures; Statute construed.*
The Act of March 30, 1883, to prohibit dealing in futures is not in restraint of trade. It does not prevent contracts for future delivery when entered into in good faith and with an actual intention of fulfilment, but is intended to suppress mere speculations upon chances, where the grain, cotton or stocks dealt in exist only in imagination, and where no delivery is contemplated, but the parties expect to settle upon the difference in the market.

2. SAME: *Futures; Indictment for dealing in.*
An indictment for dealing in futures in the language of the statute is sufficient.

3. CRIMINAL EVIDENCE: *Dealing in futures.*
The written contracts for future purchase and delivery are not conclusive upon the question of good faith. The real question always is, did the parties intend an actual, *bona fide* sale, or a wager.

4. CRIMINAL LAW: *Broker in dealing in futures.*
One who acts as a broker in dealing in futures is *particeps criminis* and punishable as principal.

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

John McClure and *R. C. Newton* for Appellant.

The indictment is presumed to be founded upon the act of March 30, 1883, which declares:

"That the buying or selling, or otherwise dealing in what is known as futures, either in cotton, grain or anything whatsoever, with a view to profit, is hereby declared to be gambling."

If this statute is to be construed to mean what it says, our position is, that it is in restraint of trade. If it is aimed at those contracts where both the buyer and seller agree, or understand, that no delivery is to take place, but only to pay the difference of price on a certain day, then we say the indictment does not charge such an offense.

There is no proof to sustain the verdict.

The sixth instruction should have been given.

"Sixth. Even if you should find that the purchaser for future delivery did not intend to receive and pay for the grain, but to resell it before the date of delivery, this intention of itself would not render the contract illegal, or a gambling contract, and is not sufficient to authorize the presumption that it was tacitly understood that the contract was not to be performed and was to be settled by a payment of differences. And if you should so find, you will find for the defendant, unless you find from the proof that the defendant assented to and entered into the contract in evidence with the same or a like understanding."

It should have been given, and a refusal to give it is equivalent to declaring that one of the parties could alter or vary the contract without the assent of the other and turn what was originally a valid contract into a gambling transaction at his pleasure.

The seventh instruction is as follows:

"That if the jury find that the defendant did not buy or sell grain to the person named in the contract in evidence, but only acted as a broker, to purchase such grain for and on account of such person, to be delivered in Chicago, Ill., at the time and in the manner mentioned in said contract, this would not constitute a gambling transaction as to the defendant, and you will acquit."

There is proof upon which to base this instruction; in fact none questioning it, and it should have been given.

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

The appellant was charged with dealing in futures, the indictment being in the language of the statute. It is objected in arrest of judgment: 1. That the act is unconstitutional, being in restraint of trade. 2. That no offense is charged.

These are the only questions now urged by the appellant. Both of them are untenable. The words "dealing in futures" have, by usage, a well known meaning. We know that the phrase means a gambling on the fluctuations of the markets, in which gambling no commercial commodities are transferred or expected to be transferred by the betting parties. An act prohibiting this practice, instead of being in restraint of trade, protects it from the malign influence of this parasite of modern commerce. See the meaning in which the word "future" is used in *Thompson v. Cummins, 68 Ga., 124.* It is clear that the act in question never intended to prohibit the making and fulfilling of contracts for the actual delivery of articles in the future. The learned counsel for the appellant admit that two meanings may be given to the term, one of which would make the act legal and the other not. An act must be held constitutional where a constitutional construction can be given it.

In *Com. v. Clock, 2 Ashm. (Pa.),* the motion in arrest was sustained simply because the language of the statute was not followed. In *State v. Comfort, 22 Minn., 271,* it was claimed that the indictment should go beyond the words of the statute and more particularly describe what constituted the over-driving, but the objection was overruled. In *State v. Shaw, 35 Iowa, 575,* the act in question had not given a name to the offense, but stated what act should be punished; the court held that the language of the statute was sufficient. In *Bates v. State, 31 Ind., 72,* the supreme court seem to sustain the position of appellant, but there was a dissenting opinion by Elliot, C. J., which is in accord with the rulings of our supreme court. In *State v. Charlton, 11 W. Va., 392,* the indictment was held defective because the language was in the disjunctive. *1 Bish. Crim. Proc., 2 ed., 628, note 2,* cites *Whiting v. State, 14 Conn. 487,* where it says that following the language of the statute is sufficient and if defendant insists on greater particularity he must show its necessity. In *State v. Bierce, 27 Conn., 319,* when

the pleader used the word "seduce," following the language of the statute, it was held that the term was precise and determinate in meaning and that it was unnecessary to charge in any other language. *5 Pick., 41; 1 Bish. Crim. Proc., 2 ed., 629, note 1,* cites *State v. Pugh, 15 Mo., 50,* as sustaining the doctrine that in certain cases the pleader must expand his allegations beyond the language of the statute when a party was indicted for cruelty to animals. But our own supreme court in two cases, *Grise v. State, 37 Ark., 456,* and *State v. Greenlees, 41 Ib., 353,* where defendants were charged with cruelty to animals held that following the language of the statute was sufficient. See also *39 Ark., 217; 35 Ib., 414; 43 Ib., 178 and 71.*

1. DEALING IN FUTURES: Statute construed.

SMITH, J. The plaintiff in error was convicted of gambling in grain futures and was fined $250. Motions in arrest of judgment and for a new trial were denied.

The indictment charges the offense in the language of the statute, which is as follows:

"Section 1. That the buying or otherwise dealing in what is known as futures, either in cotton, grain or anything whatsoever, with a view to profit, is hereby declared to be gambling."

The second section makes such dealing a misdemeanor, punishable by fine, and for the second offense by thirty days imprisonment in the county jail. *Act March 30, 1880, Mansf. Dig., secs. 1848–9.*

It is argued that this act is void as being in restraint of trade, and it may be conceded that it is loosely drawn. It does not define the offense that was intended to be prohibited except in the most general terms. It does not declare of what a dealing in futures consists, and it does not draw the line between lawful contracts for the future delivery of commodities and gambling ventures.

Certainly the legislature did not intend to impose any restrictions upon legitimate commerce, but only to destroy the

parasite that infests it. Contracts for future delivery, if entered into in good faith and with an actual intention of fulfillment, are as valid as any other species of contract. A farmer may sell and agree to deliver his wheat or his cotton for a stipulated price before it is harvested. Nay, one may sell goods to be delivered at a future day which he has not in actual or potential possession, but which he intends to go into the market and buy.

But this is not what is commonly known as dealing in futures. This phrase has acquired the signification of a mere speculation upon chances, where the grain, cotton or stocks dealt in exist only in imagination and where no delivery is contemplated, but the parties expect to settle upon the difference in the market. When so limited by judicial interpretation, the statute is not inconsistent with public policy. It forbids and punishes wagering contracts; that is, contracts in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event, in which they have no interest, except that arising from the possibility of such gain or loss. *Farcira v. Gabell, 89 Pa. St., 89; Thompson v. Cummings & Co., 68 Ga., 124; Flagg v. Baldwin, 38 N. J. Eq., 219.*

2. Indictment for.

This court has often said that it is sufficient for an indictment to describe a statutory misdemeanor in the words of the statute. If dealing in futures means contracts of sale or purchase for purposes of speculating upon the course of the market, where no actual transfer of property is intended, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, there is no uncertainty in the description of the offense.

A jury was waived and the case was tried by the court. There was no conflict in the testimony. The plaintiff in error kept a "bucket shop" in Little Rock. This term seems, from the explanations of the witnesses, to denote a place where wagers

are made upon the fluctuations in the price of grain and other commodities. The course of dealing corresponded with that described in the note to the case of *Cobb v. Prell*, *5 McCrary*, *85*. A speculator comes to a commission firm and orders them to purchase a quantity of grain or stock for him; he does not pay for it, but simply deposits with the commission firm as a "margin" a proportion, say ten per cent., of the cash value of the grain or stock "bought" for him. The grain or stock is then purchased and held by the commission man, subject to the order of the speculator. If prices advance he orders a sale at the advance and pockets the profits. If prices recede, the "margin" stands as security to protect the commission man, if he is compelled to sell at a loss. If prices go so low as to absorb the entire "margin" more margins are called for, and if the speculator fails to respond, he is "closed out;" that is the commission man sells the grains or stocks at a loss and reimburses himself out of his customer's margin.

Any person, who was able to put up the necessary margin, could buy or sell an unlimited quantity of grain or cotton, without regard to his financial ability to meet such obligations. He was required to sign a printed form, importing on its face a contract for the future delivery of the articles contracted for. But in none of the instances proved at the trial did the customer expect or desire a delivery. The plaintiff in error himself testified that he had carried on the business in Little Rock for six months, selling some days as high as 250,000 or 300,000 bushels of wheat, but that he had never received or delivered any commodity—always paying or receiving the difference. He further testified that he was the manager of S. S. Floyd & Co., at the city of Little Rock. The firm is composed of a member of the New York Cotton Exchange, and of the Stock Exchange, and a member of the Chicago Board of Trade.

"At the office in this city, persons come in who desire to purchase or sell grain for future delivery, and we simply exe-

cute these orders for a commission. We are in no manner interested in the price of grain. We simply execute orders to buy or sell.

"At the close of each day, an account is taken of the number of bushels of wheat we have been ordered to buy. From this is deducted the number of bushels we have been ordered to sell, and a member of the house is then telegraphed to buy enough wheat at the board of trade to cover the difference between the orders to buy or sell. If wheat goes up the margin of those who ordered wheat sold, goes to those who have purchased.

"All we get is a commission for executing the orders of the sellers and buyers. Our house does not sell the grain direct to purchasers.

"We buy as brokers, and have enough grain purchased at all times to cover the amount of our orders, and persons desiring the grain, could and do obtain the same in accordance with their contracts; the deliveries being made by the persons from whom we have purchased for customers. I have never had any other agreement or understanding with any purchaser outside or beyond the contract made with these papers. I have never been told by any purchaser that he did not expect to take the grain or cotton purchased."

3. Evidence of.

The forms of the different contracts entered into were exhibited, but these, of course, were not conclusive upon the question of good faith. The real question upon all such cases is: Did the parties intend an actual *bona fide* sale, or a mere wager? *Rumsey v. Berry, 65 Me., 570; Melchert v. Am. Union Tel. Co., 3 McCrary, 521; Union Nat. Bank v. Carr, 5 Id., 71; Cobb v. Prell, Ib., 80; Gregory v. Wendell, 39 Mich., 337; Whitesides v. Hunt, 97 Ind., 191; S. C., 49 Am. Rep., 441; Smith v. Bouvier, 70 Pa. St., 325; Grizwood v. Blane, 11 C. B. (73 E. C. S. R.), 526; In re Hunt, 26 Fed. Rep., 739.*

In *Bryant v. W. U. Tel. Co., 17 Fed. Rep., 825*, Barr, J., remarked: "It is the general course of a man's business which defines and classifies it." When it is considered that the goods contracted for were not in the possession of the apparent vendors, but that they bought each night to cover the transactions of the previous day; that their customers had no use for the goods, and no purpose to receive them; that no account was taken of the customer's pecuniary ability to pay the whole amount agreed upon; that no delivery ever took place in the numerous transactions that were mentioned, but the uniform custom was to settle upon a system of differences, it is impossible to reach any other conclusion than that the operations of the plaintiff in error were nothing more than wagers.

4. Broker in, guilty as principal.

The court below refused to declare the law to be that the accused was entitled to an acquittal if the proofs disclosed that he only acted as a broker to purchase grain for and on account of his customers, and did not himself sell to them. In *Irwin v. Williams, 110 U. S., 499*, it is held that when a broker is privy to such a wagering contract, and brings the parties together for the very purpose of entering into the illegal agreement, he is *particeps criminis*. And with us all persons who procure, participate in or assent to the commission of a misdemeanor, are indictable as principals. *Foster v. State, 45 Ark., 361.*

The plaintiff in error received, for himself or his principals, a so-called commission of one-fourth of a cent on each bushel of grain bought or sold. This sum represents in reality the odds which the customer gave them in the bet on the future of the market.

Judgment affirmed.

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HOLT v. STATE.

1. INDICTMENT: *Form of.*

It is not necessary that an indictment should state that it was presented by the grand jury "in the name and by the authority of the state."

2. CRIMINAL PRACTICE: *Desired instructions must be asked for.*

If either party desires other instructions than those given by the court, he must ask for them. If he remains silent, he cannot afterwards complain of the mere omission of the court to give what was not asked.

3. PRACTICE OF SUPREME COURT: *Verdict on conflicting evidence.*

When the evidence is conflicting, the verdict of the jury is conclusive in this court.

4. NEW TRIAL: *New evidence to impeach witness.*

Newly discovered evidence going only to the impeachment of a witness, is not ground for a new trial.

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

B. R. Davidson for Appellant.

The verdict in this case is so palpably against the evidence, as "*to shock one's sense of justice.*" *34 Ark., 639.* It is *wholly* unsupported by the evidence.

It was the duty of the court to instruct the jury properly, even though no instructions had been asked by the defendant. *Const., Art. 7, sec. 23; 22 Iowa, 270; 25 Id., 572; 58 Cal., 245; Instructions to Juries (Sackett), p. 13, sec. 4; 37 Ark., 338.*

The indictment fails to charge the crime "in the name and by the authority of the state," as required by law. *Mansf. Dig., sec. 2122.*

Dan W. Jones, Attorney General, for Appellee.

The appellant was indicted for assault with a deadly weapon, and convicted. It is admitted by the appellant that there was evidence both for and against him.

The bill of exceptions fails to show what instructions were given, and no exception to instructions was reserved.

One of the grounds of the motion for new trial was surprise at the evidence of Brantley, a witness for the state, who had not been subpœnaed, and for newly discovered evidence to impeach him. So far as Brantley's evidence was concerned, it was only cumulative of other evidence by the state, and was in regard to the main issue. The appellant could not, therefore, have been greatly surprised and unprepared to meet the testimony.

Newly discovered evidence going to impeach a witness is no ground for a new trial. *Minkwitz v. Stein, 36 Ark., 260.* This court will not interfere to decide upon the weight of evidence.

There was a motion in arrest because the caption to the indictment did not say "in the name and by the authority," etc. This was not material. *Greeson v. State, 5 How., Miss., 33.*

BATTLE, J. Sam Holt was indicted in the Washington circuit court for assaulting Ol. Cowger, with a deadly weapon, with intent to inflict upon his person a bodily injury, when no considerable provocation appeared, and was convicted. He filed motions for new trial and in arrest of judgment, which were overruled, and he saved exceptions and appealed.

1. INDICTMENT: Form of.

The commencement of the indictment is as follows: "The grand jury of Washington county accuse Charley Washington, John Washington and Sam Holt, of the crime of an assault with a deadly weapon, committed as follows." Appellant insists that this commencement is insufficient and the indictment is fatally defective, because it is not stated, in the

commencement, that the grand jury accused the defendants therein named of the crime charged "*in the name and by the authority of the State of Arkansas.*" This is not required or necessary. There is no particular form of indictment prescribed by the statute of this state, which is required to be strictly followed. The constitution of this state says, it shall conclude: "Against the peace and dignity of the State of Arkansas." Further than this no particular form of words is required to be used. The statute says: The indictment *must contain:* "First, The title of the prosecution, specifying the name of the court in which the indictment is presented, and the names of the parties. Second, A statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what it intended." That it must *be direct and certain* as regards: "First, The party charged. Second, The offense charged. Third, The county in which the offense was committed. Fourth, The particular circumstances of the offense charged, when they are necessary to constitute a complete offense." And that it is *sufficient* if it can be understood therefrom: "First, That it was found by a grand jury of a county impaneled in a court having authority to receive it, though the name of the court is not accurately stated. Second, That the offense was committed within the jurisdiction of the court, and at some time prior to the time of finding the indictment. Third, That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case." *Mansfield's Digest, secs. 2121, 2105–6.*

2. Desired instructions must be asked for.

One ground of appellant's motion for a new trial is, the court did not properly instruct the jury. It appears from the bill of exceptions in this case that the court gave the jury instructions which are not copied in the transcript. To those given and copied in the transcript, no exceptions were taken,

and no objections are urged against them here. "It is the province of the court to give in charge to the jury such principles of the law as it may deem applicable to the case." If the defendant or plaintiff desires other instructions, he may ask them, but if he fails to do so and remains voluntarily silent, he cannot complain. *Carroll v. State, 45 Ark., 539.*

3. Conclusiveness of verdict.

It is urged here that the verdict of the jury was contrary to the evidence. The testimony of the witnesses was conflicting and contradictory. It was the province of the jury to determine which of them was entitled to credit, and to find accordingly. This court will not review the evidence for the purpose of passing upon the correctness of their conclusion. There was sufficient evidence to sustain the verdict here. *Main v. State, 13 Ark., 285.*

4. NEW TRIAL: New evidence to impeach witness.

Appellant asked for a new trial because he discovered evidence in his favor since the verdict. The evidence is, that one of the state's witnesses was not present when the assault charged was made. This evidence would only have gone to impeach the credit of the witness said to be absent at the time of the assault. The rule is well settled that such evidence is not a sufficient ground for a new trial.

WILSON V. STATE.

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1. DONATION TITLE: *Obtained by fraud as to improvement.*

A donee, in making the required improvement necessary to perfect his title to donated land, by mistake made it on an adjoining tract, not the property of the state, and then filed with the land commissioner the required certificate of a justice of the peace, of the improvement, and obtained his deed. The state sued in equity to vacate the deed for fraud. Held: That though no fraud was intended, it was a fraud to obtain the title on the false though honest certificate, and a court of equity had power to vacate the deed at the instance of the state.

2. SAME: *Same.*

No one but the state can complain that the donee has not made the improvements required to secure title to donated land.

APPEAL from *Dorsey* Circuit Court in Chancery.
Hon. JOHN M. BRADLEY, Circuit Judge.

The Appellant *pro se.*

There is no evidence of fraud, and none to show that appellant did not act in good faith. The justice's certificate was filed as required by *Sec. 3894, Gantt's Dig.* The certificate is evidence that the donee has complied with the law. *Ib., secs. 3895, 3897.*

Even if the improvements are on a different tract, all the equities are in favor of appellant. He acted in good faith, paid the fees, had the county surveyor survey the land before making the improvement, and has paid taxes for eight or ten years. At the most, it was an *honest* mistake, which the state should not take advantage of, to his injury.

Dan W. Jones, Attorney General, and *W. P. Stephens*, for Appellee.

The deed was executed under *Secs. 4252, et seq., Mansf. Dig.*

Fraud avoids *ab initio. Kerr on Fraud, etc., 41, 152; 22 Ark., 517.* And especially so when donation deeds are procured by fraud, as "these donations are matters of grace." *40 Ark., 246.*

Even though there was no fraud, the donee was guilty of the grossest negligence, which amounted to fraud. But without any regard to their policy or necessity, the donee must comply with the statutory conditions of the grant. *40 Ark., 246.*

The evidence shows: 1. No improvements made upon the land. 2. What improvements were made were upon the land of another. The certificate of the justice was *false.*

COCKRILL, C. J. This is a suit in equity, by the state, to cancel a donation deed executed by the proper state authority to the appellant, who was defendant below. The basis of the proceeding was, that the donee had not made the improvements the statute required to be put upon the land before the title could vest in him. He had complied with the statutory requirements in making his proof before the land department, by filing in the proper office the certificate of a justice of the peace in due form to the effect that the necessary improvements had been made upon the land; but the evidence adduced upon the hearing, convinced the trial judge that the certificate of the justice was, in fact, false. A decree was accordingly entered canceling the deed and re-vesting the title to the lands conveyed in the state. The donee appealed.

It is very clearly established by the proof, that the improvements which the statute requires to be completed before the applicant's right to the donation could become perfect, were not, in fact, made upon the land covered by his application for donation. He appears to have mistaken the lines that bounded the tract he wished to secure, and expended his labor in an attempt at a compliance with the law in improving an adjoining tract. Neither the county surveyor, nor the unofficial surveyor, who testified in the case, both of whom had run the lines recently for the purpose of locating the improvements, was able to place more than a half acre of the improved land upon the donated tract. The other improvements, such as they are, are on lands not claimed by the state.

The justice of the peace who made the original proof of improvements for the donee, testified that he knew nothing of the section lines, and intended to certify only that the improve-

ments pointed out to him at the time, were sufficient to satisfy the donation law.

The appellant's mistake in putting his improvements on the wrong land, was, doubtless, an honest one; and the contention is, that his good faith in the matter should protect his title. His good faith, if proved to the satisfaction of the land department, might cause his application for a purchase or re-donation of the land to be recognized as superior to that of other applicants, but it cannot be held to vest in him a title to land which he has not otherwise acquired a right to. It is the policy of the state to settle its waste lands and encourage the development of its agricultural resources. The donation laws aim to aid in the accomplishment of that end by helping those to a title who in good faith improve the state's lands to the extent pointed out in the statutes. But donations are matters of grace on the part of the state, and the conditions upon which they are made and accepted must be strictly complied with, before the applicant can claim the gratuity. *McCauley v. Six, 40 Ark., 244.* We need not inquire whether there was an attempt on the part of the appellant to make such a permanent *bona fide* improvement as the law required. The proof is conflicting upon that point. But however it may be, the improvements made were not upon the donated lands; the public domain has not been improved, and as far as the state is concerned it is as though no improvements had been made. The certificate of the justice of the peace on which the donee's rights are founded, is therefore untrue. By this false pretense the state was induced to part with her title, and a fraud was thereby committed upon her, whether the parties were wilfully guilty of it or not. *Lytle v. Arkansas, 22 How., 193; S. C., 17 Ark., 608.*

If the state had been content to overlook or condone the fraud, no one could have questioned the donee's title on that score, for in all controversies, except as against her, the donee

is regarded as the owner. *Ratcliff v. Scruggs, 46 Ark.; Steele v. Smelting Co., 106 U. S., 449, 453.* But the state has not seen fit to permit the wrong to go unchallenged, and the right of the courts to overturn the acts of public officers so peculiarly liable to the influence of frauds, false swearing and mistakes, in a direct proceeding for the purpose, is among the most ancient and well established grounds of equity jurisdiction. *Lytle v. Ark., supra; Rector v. Gibbon, 111 U. S., 290.*

Let the decree be affirmed.

RUSSELL ET AL. v. ROWLAND.

FEES AND FINES: *In what payable.*

The fine imposed, and fees accruing in a criminal conviction are payable in the warrants of the county where the crime was committed and the prosecution instituted, notwithstanding the trial and conviction be in another county to which the cause was removed.

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

O. W. Watkins for Appellants.

Under *Act Dec. 14, 1875,* fines, etc., are to be treated as debts accruing to the county, *31 Ark., 46,* and are payable in the scrip of the county. *Mansf. Dig., sec. 1146.*

The financial affairs of the western district of Carroll county are to be kept separate, and revenue of all kinds to be for the benefit of the district where it arises. *Act March 12, 1883, secs. 18 and 19.*

The fines and tax in this case are due to the county where the offense was committed and the prosecution originated. *43 Ark., 270.*

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

SMITH, J. The appellants sought by mandamus to compel the sheriff of Boone to accept Carroll county scrip in payment of their fines and conviction fees in a criminal prosecution which had begun in Carroll, but by change of venue had been transferred to Boone. Their petition alleged that they had made a tender of the amount of the fines and of the statutory conviction fees in the lawful warrants of Carroll, but the defendant demanded Boone county warrants.

The court, as upon demurrer, refused to the petitioners the relief they prayed for.

By statute and the previous decisions of this court, the fine imposed and the fee accruing to the public upon conviction of a crime, are treated as debts due to the county in which the crime was committed and the prosecution set on foot. They are therefore payable in the warrants of that county, notwithstanding the trial and conviction may have been in another county, to which the cause was removed. *Mansf. Dig., secs. 5595, 5860, 1146; McKibben v. State, 31 Ark., 46; Murphy v. State, 38 Id., 514; Independence county v. Dunkin, 40 Id., 329; Washington county v. State, use, etc., 43 Id., 267.*

The court below may have been misled by the accidental circumstance in the last mentioned case that the fines and forfeitures had been collected in the scrip of the county where the trial took place. The contest was not whether they were payable in the warrants of Washington or Benton county; but it was which county was entitled to them after they had once been paid.

Reversed and remanded with directions to award the peremptory writ of mandamus, unless the defendant by answer shall show good cause to the contrary.

DORSEY COUNTY v. WHITEHEAD.

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1. PRACTICE: *Transfer of cause.*

A mere transfer to the equity docket does not make a cause which is properly brought at law, one for equitable relief.

2. AGENTS: *Public; Their contracts beyond authority void.*

The agents of a county have no power to bind the county to pay more in county warrants for labor and materials furnished than their cash value in currency, and all who deal with such agents are bound to take notice of the limitations upon their authority.

APPEAL from *Dorsey* Circuit Court in Chancery.
Hon. JOHN M. BRADLEY, Circuit Judge.

W. P. Stephens for Appellant.

1. The fraud vitiated the whole proceeding, even if there was a technical compliance with the letter of the statute.

2. The commission was not authorized to make a "scrip contract" with Whitehead.. *Amendatory act March 21, 1881; Union Co., v. Smith, 34 Ark., 684; Goyne v. Ashley Co., 31 Ark., 552.*

3. If the county court ordered a bridge built at one point, and the contractor built it at another, the county is not liable.

4. In *Thomason v. Craighead, et al., 32 Ark., 391,* Thomason & Friend, the purchasers, were in no worse predicament than is Whitehead in this case (for Whitehead was violating the statutes); and yet the court refused to confirm the sale, and the supreme court affirmed.

5. There was in fact no contract until ratified by the county court, which has exclusive original jurisdiction of such matters.

6. There was no contract which was binding upon the county court, representing the county, because the contract was

not let to the lowest and best bidder, and because the bond of Whitehead was never presented to the county court for its approval, and because after the bridge was finished the commissioners were not instructed to make a personal examination and report. See *Acts 1875, p. 259, secs. 3, 4.*

7. The recital of the scrip price in Whitehead's bond, taken in connection with the testimony of Wynn, ought to prevent his recovering, notwithstanding the audaciousness exhibited in the affidavit attached to his claim.

8. The county court had the power, upon the principle laid down in *Shirk v. Pulaski Co., 4 Dill., 209,* and approved in *State, use of Izard Co., v. Hinkle, 37 Ark., top of page 541,* to cut down the claim so as to make the allowance accord with the policy of the law, but the court was more liberal than it should have been, and perhaps, itself impinged upon the statutes in its depreciating estimate of scrip.

9. The county court ought to have refused to ratify the report of the commissioners, and had the power to disallow the claim. *Desha Co. v. Newman, 33 Ark., 788; Shirk v. Pulaski Co., supra.*

10. If appellant was not entitled to a jury to try the issues of fact, still the court below erred egregiously in transferring the case to the equity docket, and thus compelling the parties to go to trial upon oral testimony, without any consent or agreement and without depositions, contrary to the established practice in courts of equity. It was an appeal from the county court, however, and equity had no jurisdiction.

11. But it seems the appeal from the county court was made under a misapprehension, and claimant should have appealed from the judgment or final order refusing to confirm the report of the commissioners. Until that report or the letting of the contract is ratified by the county, either on its own motion or under the supervisory order of the circuit court, there is no contract.

12. Error is apparent on the face of the decree rendered by the court below in equity. The finding of the chancellor, following the testimony of Wynn, is for $820 in Dorsey county warrants, and the decree accordingly. (See transcript p. 31.) This decree would doubtless enforce the "scrip contract," but does it not violate the law? Should it not have been for so many dollars and cents?

13. The law makes a distinction between the obligatory effect of the acts of public and those of private agents; and the rule is indispensable, in order to guard the public against losses and injuries arising from fraud or mistakes, or rashness and indiscretion of their agents. *25 Ark., 261.*

Sol. F. Clark & Son for Appellee.

The commissioners pursued their authority exactly.

They did just what they were required to do, and what they did was open and notorious, and the building of the bridge was a public act, visible to all the citizens of the county, and the county now has the bridge in possession and use; and the bridge was tacitly received and put to use some length of time after the contract for its construction was let. If there was any fraud or any one who would have built it for a less sum, or any other objections, they should have been made before the bridge was completed and had been received by the county.

The county has no right to receive and appropriate the bridge and wear it out and then set up these objections.

But all the objections set up in the defense were matters of fact and were submitted to the court as a jury, and the court sitting as a jury passed upon them and found for the plaintiff.

Even if the preponderance of the evidence was against the plaintiff the court will not disturb the finding, if there is any evidence at all to sustain it, and all three of the commissioners

and the plaintiff himself swear to the *bona fides* of the transaction.

The contract here was to be paid in county warrants. Is there any law which prohibits such contracts? We are aware that claims against counties cannot be enhanced from their money value on account of their depreciation of county scrip. *Gantt's Dig., sec. 602; Amendatory Act, March 21, 1881—see Acts 1881, p. 130; Union Co. v. Smith, 34 Ark., 683.*

But the claimant here takes the oath prescribed by the statute. This oath is to the effect that the contract though to be paid in scrip, was at a cash value and there is nothing to show that it was not at a cash value. Witnesses swear only that the price was more than the work was worth in cash, but they do not swear, and there is nothing to show, that this was on account of depreciation of scrip. There is no law that we know of that prevents a county from making an improvident contract, or from paying more for property or labor than the market value.

It must be shown that the county agreed to pay more in scrip than the money value on account of the depreciation of the scrip.

There is no evidence. The fact that the payment was to be in scrip does not prove it, and the evidence of the commissioners and the plaintiff is to the contrary.

Certainly the case is not at all like the case of *Union Co. v. Smith*, nor that of *Goyne v. Ashley Co., 31 Ark., 552.*

SMITH, J. Whitehead exhibited his demand against the county for $820, for the building of a bridge across a stream. The county court declared that the amount charged was exorbitant; that $189 would be a fair price in currency for the bridge; but inasmuch as county warrants were worth only forty cents in the dollar of their face value, it allowed him $472.50. Whitehead appealed to the circuit court; and there the court,

upon its own motion and against the protests of both parties, transferred the cause to equity, and upon final hearing, rendered judgment against the county for the full amount of the claim.

No equitable element was involved in the issue. The county court, in which the action was begun, has no equity jurisdiction. A mere transfer to the equity docket does not make a cause, which is properly brought at law, one for equitable relief. The transfer deprived the parties of their right to a jury trial. If a fair and impartial trial could not be had before a jury of that county, by reason of the interest of the jurors as citizens and tax payers in the result, the claimant should by proper application have changed the venue.

On the trial it appeared, amongst other things, that the contract was let to Whitehead, by three commissioners appointed by the county court, at the price of $820; that the length of the bridge was 126 feet, and it was worth from $1.50 to $2 per linear foot to build the bridge according to the plan and specifications reported by the commissioners and adopted by the court; but the county scrip of Dorsey, which was to be the medium of payment, was very much depreciated.

This case is governed by *Barton v. Swepston, 44 Ark., 437.* It was there ruled that the agent of a county has no right to bind the county to pay more in county warrants than the cash value of the labor and materials used; and all who deal with such agent are required to take notice of the limitations which the law imposes upon his authority.

Reversed and remanded with directions to restore the case to the law docket and to proceed in conformity to this opinion.

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DAVIS, MALLORY & CO., v. MEYER & CO.

SALES: *Delivery; Subsequent bona fide purchaser.*

Tomlinson sold to Meyer & Co., a bill of dry goods, tobacco and two guns, in part payment of his indebtedness to them. The dry goods were packed in a box and placed under the counter, the box not nailed up nor marked. The guns and tobacco were not separated from the balance of Tomlinson's stock. No money was paid, but the bill was charged to Meyer & Co. on Tomlinson's books, and a bill of parcels delivered to them, and Tomlinson was directed to send the goods to a particular warehouse for the purchasers. Afterwards, on the same day, Tomlinson mortgaged his entire stock of merchandise to Davis, Mallory & Co., for a debt he owed them, and delivered them immediate possession. They had no notice of the sale to Meyer & Co., and refused to surrender the goods to them, and sold them under the mortgage. Thereupon Meyer & Co. sued them for the conversion. Held: That there was no such actual delivery to Meyer & Co., no such visible and substantial change of possession, as was necessary to make the sale effectual against subsequent creditors and attaching creditors.

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

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

As between Tomlinson and Meyer & Co., the sale was no doubt complete, but the goods not having been delivered to the buyer, but remaining in the hands of the seller, the transaction is of no effect as against an innocent third party to whom the goods were mortgaged in good faith.

The principle is well settled that in an absolute sale of personal property, capable of delivery, the possession must accompany the title to make the sale effectual against creditors, etc. *Ferguson v. Northern Bank, 14 Bush., 555; Comaitra v. Kyle, Nevada, 1885, 19 Rep., 345; Commercial Nat. Bank v. Gulette, 90 Ind., 268.*

As between Tomlinson and Meyer & Co. there is no doubt but that the sale was complete, but as to subsequent mortgagees without notice, and for value, there was no delivery of possession. The court below made no distinction between sales as between the parties and cases where the rights of third parties intervene. Much confusion is created by the use of the word "delivery." Sometimes it is used with reference to property in the chattel, and at others as to change of possession of the chattel. These distinctions are accurately stated in *Benjamin on Sales, 675.*

To render a sale valid as against subsequent purchasers, attaching creditors, and others standing in like relations, something more is necessary than a sale without delivery. To render a sale valid against them there must be a delivery, actual or constructive, of the property sold. *Benjamin on Sales, sec. 675, note d; Morgan v. Taylor, 32 Tex., 363; Crawford v. Forrestall, 58 N. H., 114.*

When the owner of a chattel sells it to two purchasers, neither having knowledge of the sale to the other, the one who first gets possession will hold it. *57 N. H., 102; 21 Ill., 73; 58 N. H., 238; 85 Ill., 388; 54 Ill., 436; 9 Low. Can., 193; Benj. on Sales, sec. 675, note d; 16 U. C. C. P., 263; 127 Mass., 381.*

The rule of law which requires a change of possession is one of policy. Its object is the prevention of fraud. The policy which dictates it and the prevention at which it aims require its rigid application to every case where there has not been an actual, visible and continued change of possession. *Norton v. Doolittle, 32 Conn., 405; Hull v. Segsworth, 48 Conn., 248.*

No reason can be given for appellees not taking possession of the property bought from Tomlinson. It was not bulky, but capable of easy delivery, and being in fault they must suffer the loss occasioned by their laches.

N. T. White for Appellee.

1. Appellants were not innocent purchasers. The mortgage on its face shows that it was executed to secure pre-existing debts. *Jones on Mortg., sec. 458; 31 Ark., 85; 27 Id., 557.*

2. The selection of the goods by appellees, their separation from the bulk of the stock and putting them in a box, the charging appellees on the books of Tomlinson with the price of the goods, etc., were sufficient to put appellants on inquiry, if not to give them actual notice. *Bigelow on Fraud, pp. 288-9; 11 Fed. Rep., 559.*

3. The sale was complete; nothing remained to be done as to the goods. *19 Ark., 566; 35 Id., 190.* They had been selected, their price agreed upon, and paid for by charging the price to account of appellees. *8 Ark., 213.* And the same were put in a box, separate and apart from the other goods in another place, and Tomlinson directed to send the goods to Hilzheim's warehouse, for shipment to Pastoria to their account. *Graves v. Conway, 43 Ark., 134.*

From this time Tomlinson became the bailee of appellees. His possession was their possession, they had actually received the possession of the goods but left them in the store to be sent to the warehouse. *Andrews v. Cox, 42 Ark., 473; L. R. & Ft. S. Ry. v. Page, 35 Ark., 304.*

4. The attorneys for appellants insist upon the doctrine as held in a number of the states of the Union: "That when goods are sold and the possession thereof allowed to remain in the hands of the vendor, it is a fraud *per se*," and no evidence is admissible to explain that possession. *Thompson v. Yeck, 21 Ill., 73; Capron v. Porter, 43 Conn., 383; Benjamin on Sales, sec. 675, note d,* where the whole subject is discussed and decisions from almost all the states are cited and commented upon.

Whatever may be the law in some of the states, the better opinion is that the retention of the possession of property by the vendor is only *prima facie* evidence of fraud and may be explained. *L. R. & Ft. S. Ry. Co. v. Page, 35 Ark., 304; Fairfield Bridge Co. v. Nye, 60 Me., 372; Goodell v. Fairbrother, 12 R. I., 233; Ball, assignee, v. Loomis, 29 N. Y., 412; Claw v. Wood, 5 S. & R., 275; Collins v. Myers, 16 Ohio, 547; Mansf. Dig., sec. 3372.*

In almost all these cases the courts have held that when the evidence shows that the transaction was free from fraud, and the sale in good faith made for a valuable consideration, and without any intention to defraud other creditors, the sale will be upheld against creditors and subsequent purchasers, although the possession of the property remained with the vendor.

SMITH, J. Frank Tomlinson, a merchant of Pine Bluff, was indebted to both of the parties to this action. On the 20th of October, 1883, he sold to Gabe Meyer & Co. a bill of merchandise amounting to $140.15, and consisting of dry goods, tobacco and two guns. The dry goods, which were of the value of $101.77, were packed in a box and placed under the counter. The tobacco and guns were not separated from the rest of Tomlinson's stock. No money was paid, it being understood that the amount of the bill was to go as a credit on the debt due the purchasers; and the items were charged on the debtor's books, Meyer & Co. being furnished with a bill of parcels. Tomlinson was directed to send the goods to a certain warehouse in the town.

Afterwards, on the same day, and before the goods were removed from the store, Tomlinson executed a mortgage upon the entire stock of merchandise in his store, to Davis, Mallory & Co., as security for the debt he owed them, and placed them in immediate possession. They had no knowledge of the previous sale to Meyer & Co., and when informed of it, refused to

recognize the transaction, or surrender the goods to Meyer & Co., but took the goods out of the box, which had never been nailed up or closed in any manner, replaced them upon the shelves among the general stock, and sold them under their mortgage.

Meyer & Co. now brought suit for the conversion of the goods; and upon a trial without a jury the circuit court held that they were entitled to recover the value of the goods that had been separated from the remainder of the stock, but not the value of the tobacco and guns, and gave judgment accordingly. Davis, Mallory & Co., have appealed.

It is superfluous to inquire whether the effect of this transaction was to transfer to Meyer & Co. the title or property in the goods, as against Tomlinson, so as to enable them to maintain replevin if he had withheld them, or to throw upon them the loss if the goods had been destroyed by fire. For, as we understand the law, in order to make the sale effectual against subsequent purchasers, or attaching creditors, there must have been actual delivery; a visible and substantial change in the possession. These goods were not ponderous, nor bulky, but could have been easily delivered. *2 Schouler's Personal Property, secs. 270, 395; Ferguson v. Northern Bank of Ky., 14 Bush., 555.*

We attach no importance to the fact that Tomlinson furnished to Meyer & Co. a bill of parcels. This was like a bill of sale, and insufficient evidence of a completed sale unless accompanied by actual possession of the things sold. *Dempsey v. Gardner, 127 Mass.. 381; McKee v. Garcelon, 60 Me., 165; Solomons v. Chesley, 58 N. H., 238.*

The only circumstances tending even remotely, to show that Tomlinson had parted with his control of the goods, was that he had segregated a portion of them from the remainder of his stock, had boxed them up and set them aside. This was evidence of his intention to select and appropriate them to the

use of the plaintiffs. But it is not shown that the plaintiffs were even present, in person or by agent, when this was done. The box was not nailed or closed. Neither it nor the goods were marked with the plaintiffs' name or initials. The plaintiffs did not take charge of the package; nor were they to send and get the goods, but Tomlinson was to convey them to the warehouse. The plaintiffs, therefore, had no possession; and before anything further was done, Tomlinson resold the same goods to the defendants, who had no notice of the prior sale, and who took possession. The defendants thereby obtained the better title. *Crawford v. Forrestall, 58 N. H., 114; Allen v. Carr, 85 Ill., 388; Veazie v. Somerby, 5 Allen, 280; Garman v. Cooper, 72 Pa. St., 32.*

Reversed and remanded for further proceedings.

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DAWSON V. PARHAM.

1. EJECTMENT: *Evidence of title.*

A plaintiff in an action for the recovery of real property must succeed upon the strength of his own title, and not upon the weakness of his adversary's; and until he proves title and a consequent right of possession the defendant needs not to offer any evidence in support of his own right.

2. SAME: *Same; Administrator's deed.*

An administrator's deed of his intestate's land, made without an order of a court of competent jurisdiction, is a nullity, and no evidence of title in the grantee.

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

Geo. H. Sanders for Appellants.

The deed from Johnson's administrator to Pool and Dawson was the only missing link in appellant's title. This is supplied by J. H. Dawson's testimony.

The finding of the court was contrary to the evidence.

An execution deed is *prima facie* evidence of its recitals concerning levy, notice, sale and compliance of the officer with his duties, but it is not and can be no more evidence of title in the execution defendant than if it did not exist. *16 Ark., 543; 22 Id., 529; 22 Id., 579.*

The presumption of law is, that the existence of a deed being proven, it was correctly and regularly made, its execution being an official act. *25 Ark., 314; 12 Wheat., 70.*

Weatherford & Estes for Appellees.

If Johnson's administrator made a deed, under the law in force it must have been pursuant to an order or decree of the circuit court. *Gould's Dig. pp. 135-6.* No law makes the *recitals* in such deed evidence; the deed must be *proved.* A *foundation* must be laid for such evidence, which presupposes more search than a simple letter of inquiry. *1 Gr. Ev., 558; 1 Stark Ev., 336; 2 Sneed (Tenn.), 683.*

BATTLE J. H. B. and T. C. Dawson sued John Parham and Anna W. Parham, in the St. Francis circuit court, for a tract of land. They aver, in their complaint, that they are the owners of and entitled to the possession of the land and that defendants hold possession thereof without right, which defendants deny.

The issues of fact arising in the action were, by consent of both parties, tried by the court.

To prove title, plaintiffs introduced as evidence in the trial a certificate of purchase executed by a land agent of the State of Arkansas on the third day of December, 1853, certifying that G. V. C. Johnson was the purchaser of the land in controversy, and also introduced J. H. Dawson, as a witness, who testified: G. V. C. Johnson sold the land in controversy and

other lands to John Dawson and J. H. Pool and executed to them a bond for title. G. V. C. Johnson died and John C. Johnson was appointed his administrator. John Dawson and Pool paid the purchase money, and the administrator of G. V. C. Johnson, under an order of a court, conveyed the lands to them by deed. He, witness, did not see the order of the court, or remember what court made it, but some one told him the order had been made. John Dawson and Pool divided the lands conveyed to them between themselves, and he purchased Pool's part. The land in controversy was set apart to John Dawson in the division. When he purchased from Pool, Pool handed him the deed executed by Johnson's administrator, and he gave it to the clerk to record and paid him for recording. He did not see it recorded, and cannot say that it was. He thinks the clerk afterwards returned it to him and that he sent it to his brother in Tennessee, but that he is not certain that he saw it again after he filed it with the clerk, or when, if he did. He does not know what became of the deed. He has searched for it and cannot find it. The records in the clerk's office have been destroyed since the deed was filed. John Dawson died at his home in Maury county, Tennessee, in 1875 or 1876, leaving J. A. Dawson, H. A. Dawson, N. G. Frierson, T. D. Barrow, E. G. Long, C. A. Kittrell, M. Dawson, M. P. Dobbins and Jacob H. Dobson, his only surviving heirs.

Plaintiffs also introduced as evidence the deeds of the heirs of John Dawson, deceased, conveying the land in controversy to them.

The court found, in effect, that plaintiffs had failed to prove that they were the owners of and entitled to the possession of the land sued for, and rendered judgment in favor of defendants; and plaintiffs appealed.

1. EJECTMENT: Plaintiff must succeed on his own title.

As a general rule plaintiffs in actions of ejectment, or other real actions, can recover only upon the strength of their own titles and not upon the weakness of their adversary's. For

possession is always *prima facie* evidence of title, and a party cannot be deprived of his possession by any person but the rightful owner, who has the *jus possessionis*. The defendant, therefore, needs not show any title in himself, until the plaintiff has shown some right to disturb his possession. Until the plaintiff "shows a paramount title, the defendant is entitled to a verdict, and this without producing the evidence on which his right is based." *2 Greenleaf on Evidence, sec. 331.*

Prior to the time when defendants took possession of the land in controversy, the evidence does not show that any one, at any time, had actual possession. It was, therefore, incumbent on plaintiffs to prove that they had the legal title and were thereby entitled to the possession. To do this they attempt to prove the existence of a deed executed by Johnson's administrator to Dawson and Pool in pursuance of a contract made by his intestate, and that the same had been lost or destroyed.

2. EVIDENCE OF TITLE: Administrator's deed.

In order to show that a valid deed was executed by Johnson's administrator it was necessary for plaintiffs to prove that the same was executed in pursuance of an order or decree of a court of competent jurisdiction. Any deed made by Johnson's administrator without such an order or decree was a nullity and conveyed nothing.

There was no competent evidence of an order or decree of any court authorizing Johnson's administrator to convey the land to Dawson and Pool. The witness, Dawson, had never seen any such order or decree, but had been told that there was one. The deed being a nullity, if any was ever executed, could not be evidence of its recitals, if it contained any; and there was no evidence that it contained any. *Mansfield's Digest, sec. 668.*

There was no evidence introduced in the trial to prove that any action was ever instituted by any one to compel Johnson's administrator to convey the land in controversy. There was no

competent evidence, even, to show the contents of the bond for title mentioned by the witness, that there was any search made for it, or that it was lost or destroyed.

Then, again, the court sitting as a jury was the judge of the credibility of the witness, Dawson, and it is manifest from its findings, for reasons unnecessary to mention, did not believe his testimony.

We find no error prejudicial to plaintiffs in the judgment of the court below, and it is affirmed.

MOORE & CO. v. KELLEY ET AL.

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ATTACHMENT: *Jurisdiction as to garnishee.*

Since the adoption of the civil code the jurisdiction of the circuit court over the funds in the hands of a garnishee does not depend upon the amount of his indebtedness to the debtor, and it is error to dismiss the garnishee because his indebtedness does not exceed one hundred dollars.

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

H. A. Parker for Appellants.

Appellants claim that in actions of this kind, where an attachment is issued and garnishments served on different parties who owe defendant, that the garnishment is only incidental to the main suit between plaintiff and defendant; and that is even so in judicial garnishment.

From the time the garnishment is served, the property that is in the garnishee's hands is in the custody of the law, and, as was said by the supreme court of the United States in the case of *Brashears v. West, 7 Peters, 608,* "the said garnishee is not at liberty to change the property or effects, or to convert it into

money, or to exercise any acts of ownership over same. In all such cases the garnishee is merely the agent of the court, and is entitled to hold the same until the question of his liability only is determined." *Drake on Att., pp. 453, 691, 693.*

The garnishees have nothing to do with any question as to proceedings, regularity or jurisdiction; all that is necessary or proper for them to do is to learn whether there is a valid judgment against the defendant or not; and all this points out very clearly that the garnishment is entirely incidental to the main action between the plaintiff and defendant.

From the incipiency of this character of actions they are dual in their nature; *i. e.*, they may be personal, or they may be against the property of defendant, or both.

A garnishment is nothing more than an action against the property of the defendant in the hands of a third person, and is truly termed by Mr. Waples, "an ancillary proceeding;" and he also terms it an "added incident" to the main suit, and this is clearly the case from the fact that if the main issue or suit between the plaintiff and defendant falls, all garnishments and ancillary proceedings go with it, but the converse is not true. *Waples on Attachment, pp. 4, 13, 68, 418.*

This question has been virtually settled by *Flynn v. State, 42 Ark., 320.*

The circuit court had jurisdiction of the main case, and the garnishments are but incidents of that suit, regardless of the amount named in the writ of garnishment, or the answer of garnishees.

COCKRILL, C. J. The appellants brought an action in the Monroe circuit court, on a money demand against Alfred Owens, and caused an attachment to issue under which D. W. Kelley and W. W. Spence were summoned as garnishees. After the appellants had obtained judgment *in personam*

against the defendant, and the attachment had been sustained, the garnishees appeared and answered; the one that he was indebted to the defendant in the sum of $64; the other, $50. When the court was apprised that the indebtedness of each garnishee was less than the amount of which circuit courts entertain jurisdiction, an order was made dismissing the garnishment proceeding.

This was error. When the garnishee has been summoned and appears, after a judgment obtained against the defendant, and discloses that he is indebted to the defendant in an amount then due, it is the duty of the court to enter an order requiring the garnishee to pay the amount of his debt into court, to be applied to the satisfaction of the judgment. *Mansf. Dig., secs. 342, 347.*

1. Jurisdiction as to garnishee.

The jurisdiction of the court over the fund in the hands of the garnishee is not dependent upon the amount of his indebtedness. The service of the garnishment upon the defendant's debtor is only an attachment of the debt. It is simply a form of levy upon the defendant's property in the hands of a third person, and the jurisdiction of the court is no more affected by the value of such property, than by the value of specific articles actually seized by the sheriff under the attachment.

Under the system of judicial garnishment which obtained in this state before the adoption of the code of civil procedure, the primary object of the proceeding was to obtain a personal judgment against the garnishee, enforceable by execution, and under that system it was ruled by this court that the proceeding involved all the incidents of a suit, and that the amount claimed of the garnishee was the measure of jurisdiction. *Moore v. Woodruff, 5 Ark., 214; Woodruff v. Griffith, Ib., 354; Tunstall v. Worthington, Hemp. (C. C.), 662.*

But no judgment against the garnishee can be reached under the code procedure; it is not instituted to settle disputes

between the debtor and third persons; that must be done in an ordinary action. The radical difference between the two methods is distinctly pointed out in the case of *Giles v. Hicks, 45 Ark., 271.*

Reverse and remand for further proceedings.

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STATE, USE MCCREARY, V. ROTH.

1. ADMINISTRATION: *Rights of creditors and distributees.*
The claims of creditors of an estate are paramount to those of distributees, and the latter can assert no claims to assets which are needed to pay creditors.

2. SAME: *Same.*
The probate court is the tribunal to determine who are creditors of an estate and when there is a sufficiency of assets to pay their claims without resort to a particular fund claimed by the distributees.

3. SAME: *Action on administrator's bond.*
No action can be maintained upon an administrator's bond for a *devastavit,* either by creditors or distributees, until an order of the probate court, directing payment of the amount found due to the plaintiffs upon settlement there, has been violated.

4. RES JUDICATA: *Final judgment on imperfect pleading.*
A final judgment against the distributees of an estate, solely on account of the omission of material allegations in their complaint against the administrator and his sureties for a *devastavit,* will not bar another action for the same cause if the omitted allegations are supplied.

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

J. M. & J. G. Taylor for Appellant.

The court erred in dismissing plaintiff's complaint. Under no circumstances should the court have done more than dismiss the complaint without prejudice as prematurely brought. *Mansfield's Digest, 5102.* No one questions the insufficiency of the third paragraph of the answer. *34 Ark., 144.*

This case differs fron *Baker v. State, 21 Ark., 462,* and *Tate v. Norton, 94 U. S., 758.* The allegations of the complaint constitute such a *devastavit* as would warrant a suit by the State for the use of the heirs or distributees for the amount so converted. The case should be decided upon the doctrine of *Jones v. State, 14 Ark., 170.*

The allegation of conversion of assets is sufficient to warrant a suit by the heirs. The case being treated as upon a demurrer to complaint, rights of creditors are not considered. This court has decided that this suit could not be prosecuted by the creditors of McCreary without alleging an order on the administrator to pay debts, and his refusal. *Outlaw v. Yell, 5 Ark., 468.*

The heirs of McCreary do not require an order of the probate or any other court to give them a right to sue for their inheritance, it is a right given them by the statute of distribution and descents. No court has ever required an order of court upon one having converted the property of one's ancestor, to produce the property or pay its value before suit could be brought for such conversion.

The court erred in its judgment upon the demurrer. It should not, in case the complaint was demurrable, have gone further than dismiss the suit after plaintiff had been given a chance and had refused to answer the complaint, there being merit in the complaint. *Boyd v. Jones, 44 Ark., 314; Buck v. Eddins, 23 Ark., 307; Mansfield's Digest, 5102, sec. 5.*

Harrison & Harrison and *N. T. White* for Appellees.

Upon Vaughan's ceasing to be administrator he or his legal representatives should have accounted to his successor for all assets in his hands, which duty the probate court might have enforced by attachment, *Mansfield's Digest, sec. 42;* and in case of Vaughan's failure to do so, his successor had the right to sue, as he did, on his bond. *Ib., secs. 43, 199.*

It does not appear that the court ever ordered Vaughan or his representative to account for or pay over the amount in his hands. The complaint does not show a cause of action in appellants; no averment was made of an order for the payment of distributive shares, nor that the creditors had been paid; or that there was a sufficiency of assets to pay them; or that no demands had been probated. The claims of creditors are paramount, and unless so ordered by the court the administrator is not authorized to pay distributive shares. *Mansfield's Digest, secs. 148, 153; 38 Ark., 261; 2 Id., 382; 11 Id., 10; 21 Ark., 405; 22 Id., 6; 96 U. S., 222; Redf. on Wills, vol. 3, 422; 2 Kent Com., 420; 5 Ark., 433.*

The rule that a demurrer relates back to the previous pleading, and that the court will consider the whole record and give judgment for the party who, on the whole, appears to be entitled to it, prevails as well in pleading under the code as at common law. *Green's Pl. and Pr., sec. 927; Bliss on Code Plead., sec. 417; Newman's Pl., 651.*

COCKRILL C. J. The question presented by the record in this case is as to the sufficiency of the complaint. The action was brought in the name of the state for the use of the children of Spruce W. McCreary, deceased, against John Roth, R. H. Stanford and Henry Nathan, sureties in the bond of J. F. Vaughan as administrator of said McCreary's estate. The bond was in the penal sum of $2000, and was executed on the 19th day of February, 1875.

The breach of the condition of the bond assigned was, that upon the examination and confirmation of his final account and settlement, filed in the probate court on the 24th day of July, 1877, but which was not finally acted upon until the 23d day of April, 1880, Vaughan was found indebted to the estate, on account of assets which had come into his hands, in the sum of $2266.25; and that he had converted the said assets to his own

use. The complaint contained no averment that the creditors of the estate had been paid, or that there were no debts; nor did it allege that an order for the payment of distributive shares had ever been made by the probate court.

The defendants interposed an answer to which the plaintiff demurred, but the court conceived that the complaint was insufficient and sustained the demurrer to it and dismissed the action.

The allegations of the complaint do not establish an interest in the matter in controversy in the parties for whose benefit the action was brought. It is not alleged, as the counsel for these parties assumes, that the administration has been closed, nor is there an allegation that the amount in the administrator's hands had been adjudged by the probate court to them. The allegation is simply that upon the coming in of the final account of the public administrator, it was adjudged that he was indebted to the estate in the sum stated. It is immaterial whether this indebtedness arose from a conversion of the assets of the estate or otherwise; it remains a final judgment against the administrator and fixes the extent of the liabilities of the sureties upon his bond if he refuses or neglects to account for the amount. If he has wasted or converted the assets, his liability becomes a chose in action belonging to those entitled to the estate as creditors, legatees or distributees. *State, use Oliver, v. Rottaken, 34 Ark., 144, 150; Baker v. State, 21 Ib., 405.* But the claims of creditors are paramount to those of distributees, and it is only when the assets are not needed in the course of administration that the rights of the latter can be asserted. The probate court where the administration is pending is the tribunal to determine who are creditors of the estate and when there is a sufficiency of assets to satisfy their claims without resort to the particular fund desired by the distributees. *Mansf. Dig., sec. 148 et seq.; McDearmon v. Martin, 38 Ark., 261; Wheat v. Moss, 16 Ib., 254-5; Schouler on Exrs. and Admrs., secs. 207, 508.*

1. Rights of creditors and distributees.

2. SAME.

3. Action on bond.

It is accordingly the law of this state that there can be no *devastavit* which will sustain an action on an administrator's bond, until an order of the probate court directing payment of the amount found due upon settlement there to the parties entitled to it, has been violated; and this is true whether the party entitled to the fund be a creditor or a distributee. *George v. Elms, 46 Ark., 260; Hall v. Brewer, 40 Ark., 433.*

The order of the probate court in this case, according to the allegations of the complaint, settles nothing except the amount of the administrator's liability.

There is no allegation that it has ever been adjudged that there is a sufficiency of assets to complete the administration without the fund here sued for, but such adjudication is the crucial test by which the right or title of the distributees is to be determined.

4. Res Judicata: Final judgment on imperfect pleading.

It is argued that the cause should have been dismissed without prejudice. If the essential allegation which is omitted from the complaint in this case is supplied in a second action, the plaintiff's present failure on demurrer will not be a bar to that action, and the appellants are not, therefore, prejudiced by the judgment any more than if the right to bring the second suit had been expressly reserved. *Gonld v. E. & C. R. R. Co., 91 U. S., 526.*

Affirm.

Huffman v. Gaines.

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1. Execution Sales: *Errors and irregularities.*

A mistake in the notice of a sale under execution, or even a failure to give notice, or errors or irregularities in the proceedings which do not render the writ a nullity, will not invalidate a sale to an innocent purchaser.

2. Same: *Same; Purchase by attorney.*

An attorney of the plaintiff who purchases property sold under the plaintiff's execution, is charged with notice of the vices and infirmities of the judgment and

process, and stands in no better attitude than a stranger who buys with actual knowledge of the same facts.

3. SAME: *Same; May be waived by debtor.*

A debtor may waive an improper notice of the sale of his property under execution, and does waive it when he suffers the execution to be satisfied, and accepts the surplus of the proceeds of the sale and retains them, after notice of the irregularity.

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

John M. Harrell for Appellant.

The court finds that the alleged sale under the judgment, for cash, was rendered valid by the acceptance by appellant of part of the proceeds. *Mansf. Dig., sec. 3056; Ib., sec. 5171.* All sales by order of court must be on credit. *27 Ark., 292.* The court erred in directing the sale to be made for cash in hand. The sale should have been on a credit of not less than three months, nor more than six. *31 Ark., 236.*

R. G. Davies for Appellee.

The sale was made on a credit, but the purchaser elected to pay cash. Appellant waived his right to object, by receiving and retaining the purchase money.

COCKRILL, C. J. Huffman has appealed from a judgment in ejectment against him in favor of Mrs. Gaines, awarding her the possession and rents of a lot in the city of Hot Springs. Mrs. Gaines claimed to have acquired Huffman's title to the property, by conveyance from two sources, viz.: First, by a sheriff's execution deed, and, second, by a deed executed to her by a trustee, in pursuance of a purchase made by her at a public sale, had under a mortgage with power to sell on default

of payment, executed by Huffman on the premises in question. No objection is made here against the trustee's deed, except upon facts which the court below, in the absence of a jury, upon competent evidence, specially found against the appellant on the trial, when the deed was sustained. But if the appellant could successfully attack this deed, what would it avail him while the sheriff's deed stands? For if either conveyance is good it is sufficient to sustain the judgment of recovery. The judgment against Huffman, upon which the execution issued, was a valid subsisting judgment of the circuit court of the county where the land lay, and the validity of the execution, and the levy under it, have not been questioned. The validity of the advertisement of sale by the sheriff is alone attacked. The premises were advertised to be sold for cash, but were, in fact, sold as the statute directs, upon a credit. R. G. Davies, the attorney for the plaintiff in execution, became the purchaser. He paid the amount of his bid at once to the sheriff, who satisfied the execution out of the proceeds, and several weeks thereafter tendered the residue to Huffman. He accepted the amount and executed the following receipt:

"Received of J. H. Nichols, sheriff, the sum of $417.40, being balance of money received from sheriff's sale of lot No. 8, block 85, due me; said sale being made to satisfy an execution dated May 28, 1883, in case of W. H. Gaines v. J. M. Huffman, execution No. 218, said sale being made on the 30th of June, 1883, and said property sold to R. G. Davies, as per return filed herewith. Hot Springs, July 28, 1883.

J. M. HUFFMAN."

The premises described are the same here sued for, and all the data as to the sale are correctly recited in the receipt. Huffman does not claim to have been misled or deceived in any manner, and has never offered to return the money received by him on the purchase.

The certificate of purchase which the sheriff executed to Davies was assigned to the plaintiff in this action, after Huffman accepted the purchase money. When the period of redemption expired, the deed relied upon was executed and delivered to her.

1. EXECUTION SALES: Errors and irregularities.

It is the established rule of this court, that the statute requiring notice of execution sales to be given, is directory merely, and that a mistake in, or even a failure to give notice, will not invalidate a sale to an innocent purchaser. *Files v. Harbison, 29 Ark., 307, and cases cited.* The rule operates also to protect the title of the purchaser against errors or irregularities in the proceedings, which do not render the writ a nullity. Where the attorney for the plaintiff in execution becomes the purchaser, however, he is charged with notice of the vices and infirmities in the judgment and process, and he is held to stand in no better attitude than a stranger who buys with actual knowledge of the same facts. As to whether the same presumption of knowledge of infirmities that arise from a defective execution of the power conferred by the writ, after it goes into the hands of the sheriff, is indulged against the attorney, (as to which, see *Byers v. McDonald, 12 Ark., 218, 273,*) or whether the defendant could avail himself of the defect in the notice in this collateral proceeding, even if the purchaser were shown to have had actual notice of it, are questions not material to the issue here presented. Whatever may have been the effect of the improper notice of sale given by the sheriff, the debtor had the right to waive it. *Turner v. Watkins, 31 Ark., 429.* Is there room to contend that his acts do not clearly indicate an intention to do so? He had actual knowledge that the sale was to take place before it was made. So far from making an effort to prevent it, he permitted the purchaser to pay his money, allowed the sheriff to satisfy the execution debt out of it, and with full knowledge of all the facts now known, as the judge trying the case specially found, he accepted the surplus of the purchase money, and has never

2. Purchase by attorney. Notice.

3. Irregularities may be waived.

intimated a willingness to disgorge. The bill of exceptions does not contain the positive evidence that Huffman knew that the notice of sale was defective at the time the purchase money was paid to him, nor is there any evidence that he was ignorant of the fact. But, be that as it may, it is certain that after he knew the fact he continued to hold the money, without any manifestation of an intention to disaffirm the sale or make the purchaser whole. If the right existed to disaffirm the sale, this was an election to ratify it, and he must now abide by his election. The purchaser cannot be made the sport of a trick which would enable the debtor to hold the land, or the money, or both, at his will. It has been held that even where the sale is void (not voidable merely), receiving the purchase money by the debtor would make it valid. As to the several points ruled, see *Adlam v. Yard, 1 Rawle, 174; Furness v. Ewing, 2 Pa. St., 479; Maple v. Kussart, 53 Ib., 348; Sherman v. McKeon, 38 N. Y., 266; Southard v. Perry, 21 Iowa, 488; Freeman on Ex., secs. 340, 286; Allen v. McGaughey, 31 Ark., 260; Hare v. Hall, 41 Ib., 372.*

Let the judgment be affirmed.

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WILLIAMS v. STATE.

1. PRACTICE IN SUPREME COURT: *When no bill of exceptions.*

When there is no bill of exceptions in the transcript the review of the supreme court is limited to errors apparent on the record proper, disregarding what took place at the trial, though there is copied in the transcript the testimony of witnesses and instructions of the court to the jury.

2. INDICTMENT: *Form; Contra pacem, etc.*

Each count of an indictment must conclude "against the peace and dignity of the state," or it will be defective.

3. SAME: *Same.*

In an indictment for being interested in the sale of liquor without license, it is not necessary that the offense be stated in the caption. It is sufficient to charge it in the body of the indictment.

APPEAL from *Craighead* Circuit Court.
Hon. W. H. CATE, Circuit Judge.

The Appellant *pro se.*

Said indictment is insufficient in law. Two offenses were charged and the court should have required the State to have elected which she would try appellant for. *36 Ark., 58.*

There was no evidence to sustain the verdict.

Dan W. Jones, Attorney General, for Appellee.

There being no bill of exceptions, appellant must rely solely upon the motion in arrest which questions the sufficiency of the indictment.

The indictment is full and meets all the requirements of *Sec. 4507, Mansf. Dig.*

SMITH, J. The first count in the indictment charged an unlicensed sale of a compound of ardent liquor, and was in the usual form except that it did not conclude *contra pacem.* The second count was in these words:

"And the grand jury aforesaid, in the name and by the authority of the State aforesaid, accuse said Robert Williams of the crime of being interested in the sale of liquor without license, committed as follows, viz: The said Robert Williams, in the county and district aforesaid, on the 10th day of March, 1885, was unlawfully interested in the sale of a compound of ardent liquors, called 'lemon ginger,' without first procuring a license from the county court of said county authorizing him to sell the same; against the peace and dignity of the State of Arkansas."

A trial was had upon the plea of "not guilty," and there was a general verdict of guilty. Motions for a new trial and in arrest of judgment were overruled.

A record entry recites that a bill of exceptions, signed by the presiding judge, was filed. But no such paper appears in the transcript, although certain testimony and instructions to the jury are copied. Hence our review is limited to errors apparent on the record proper, disregarding what took place at the trial.

The first count is defective. *Sec. 49 of Art. 7, Constitution of 1874*, requires all indictments to conclude "against the peace and dignity of the state." And as each count in an indictment must be complete in itself, and capable of standing alone if the other counts are quashed, the practical effect is that this formula must be repeated at the end of every count. *State v. Cadle, 19 Ark., 613; State v. Hazle, 20 Id., 156.*

But the second count seems to be good in form and substance, and is sufficient to uphold the verdict and judgment. *Brown v. State, 10 Ark., 607; Howard v. State, 34 Id., 433; Cooper v. State, 37 Id., 412.*

It is not important that, in the caption, the defendant is accused of being interested in the sale of liquor, whereas, in the charging part of the count, he is accused of being interested in the sale of a compound of ardent liquors. The particular offense of which the defendant was accused was made distinct and certain by the statement of the circumstances of its commission, in the body of the count. *Lacefield v. State, 34 Ark., 275; Johnson v. State, 36 Id., 242.*

Affirmed.

STATE v. BLEDSOE.

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1. INDICTMENTS: *Disturbing religious worship; Duplicity.*

An indictment for disturbing religious worship "by talking and laughing" and by indecent gestures, is not bad for duplicity. It charges but one offense; the words "by talking and laughing" being mere surplusage.

2. PRACTICE: *Motion in arrest; What it cures.*

Under a motion in arrest of judgment the sufficiency of the testimony cannot be questioned, but only the sufficiency of the indictment; or, at most, only such errors as appear of record.

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

Dan W. Jones, Attorney General, for Appellant.

The court erred in arresting the judgment. *Mansf. Dig., sec. 1894; 31 Ark., 688; 41 Id., 410.*

B. R. Davidson for Appellee.

Talking and laughing and acting in an offensive manner, does not constitute an offense under the statute *Mansf. Dig., sec. 1894; Stratton v. State, 13 Ark., 688; State v. Horn, 19 Id., 578.* The indictment charges talking and laughing and a certain act (of which there was no proof), but does not allege that the words or act were calculated to disgust, insult or interrupt. *State v. Hinson, 31 Ark., 638, 641.*

SMITH, J. The indictment charged that the defendant "unlawfully, maliciously and contemptuously, did disturb and disquiet a congregation assembled at Dunkard Church, in said county, for religious worship, by talking and laughing, and by

taking a lady's hat and placing it under him, as if he was then and there using the same as a chamber-pot; against the peace, etc."

The defendant pleaded "not guilty," was tried by a jury, convicted, and his fine assessed at $20. But the court arrested the judgment upon his suggestion that the facts stated in the indictment did not constitute a public offense. And the State has appealed.

The court may have been of opinion that the indictment was bad for duplicity, as including in one count two or more distinct offenses. But the allegations of talking and laughing are to be rejected as surplusage, (*State v. Horn, 19 Ark., 578,*) and the offense charged is the disturbance of the congregation by the use of an indecent gesture, which is one of the methods specified in *Section 1894 of Mansfield's Digest,* by which this offense may be committed.

Defendant's counsel, however, who was also counsel below, suggested that the talking and laughing were not alleged to have been calculated to disgust, insult, or interrupt the congregation; and that there was no proof of the obscene act charged. But a motion to arrest is not the proper way to reach a defect in the proof. That brings up only the sufficiency of the indictment, (*Mansf. Dig., sec. 2302,*) or, at the utmost, only such errors as appear of record, (*Lacefield v. State, 34 Ark., 275*); and, for this purpose, the evidence is no part of the record. *Strawn v. State, 14 Ark., 549; Carter v. Bennett, 15 Howard, 354; Bond v. Dustin, 112 U. S., 604.*

The order arresting the judgment is reversed and vacated, and the cause remanded for further proceedings. The circuit court may, in its discretion, give judgment on the verdict or grant the defendant a new trial.

CRISCOE v. HAMBRICK.

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1. MARRIED WOMAN: *Her deed without acknowledgment.*

Since the adoption of the constitution of 1874 a wife may convey her separate estate as a *femme sole* without acknowledgment of the deed. Acknowledgment is necessary only for registration and notice to subsequent purchasers and incumbrancers.

2. PARTITION: *Plaintiff must have possession or admitted title.*

Unless a tenant in common is in possession or his title is admitted, he can not maintain a bill in equity for partition. He must first establish his title at law and then bring his action in equity.

APPEAL from *Cross* Circuit Court.
Hon. W. H. CATE, Circuit Judge.

Geo. H. Sanders for Appellant.

It is immaterial whether Mrs. Hays was married before or after the adoption of the constitution of 1874, or whether she inherited the land in 1873 as alleged in the complaint.

The *Constitution of 1874, Sec. 7, Art. 10,* says: "The property of any *femme covert* in this state, acquired either before or after marriage," etc.

The case of *Shryock v. Cannon, 39 Ark., 434,* has been overruled in principle by *Stone v. Stone, 43 Ark., p. 160; Donohue v. Mills, 41 Ark., 421.*

Any defects of acknowledgment are cured by *Act March 8, 1883,* and *March 14, 1883; Johnson v. Richardson, 44 Ark., 365; Green v. Abraham, 43 Ark., 422.*

The question involved was a question of law upon the construction of the deed, and no motion for new trial was necessary. *26 Ark., 662; 39 Id., 258; 43 Id., 398.*

N. W. Norton for Appellee.

1. The acknowledgment of Mrs. Hays is fatally defective. *39 Ark., 434.*

2. The curing acts cannot validate the acknowledgments of married women. *39 Ark., 124; Wood's Retroactive Laws, pp. 261–2.*

3. Appellant must first establish his title at law, before he can bring suit for partition. The answer denied his title, *44 Ark., 334*, and he was not in possession.

SMITH, J. In the year 1873, Samuel Hambrick, of Cross county, died intestate, seized and possessed of 400 acres of land and leaving him surviving a widow and eight heirs at law. One of these heirs, Sarah C. Hambrick, was married in September, 1874, to J. H. Hays. And in 1875 Hays and his wife conveyed all their right, title, interest and claim in and to these lands to a trustee, as security for the payment of a debt which Hays owed to G. W. Criscoe. The deed was duly acknowledged by Hays; but in regard to the wife, the officer before whom the acknowledgment was taken only certifies that she, in the absence of her husband, signed the deed and relinquished her dower in the lands, of her own free will and without compulsion, etc.; omitting the customary words "for the purposes therein set forth."

Pursuant to a power of sale contained in the deed of trust, the trustee, in 1882, after default in the payment of the secured debt, sold and conveyed the trust property to Criscoe, the beneficiary, who afterwards exhibited in the circuit court his petition for the partition of the premises. He made the widow and heirs of the deceased intestate parties defendant, except Mrs. Hays, whose share he claimed to have acquired by purchase at the trust sale. The petition stated that from the death of Hambrick to the institution of this suit, his widow had continued to reside upon the lands, with some or all of Hambrick's heirs.

The answer of the widow denied the petitioner's title, but prayed for an allotment of her dower, in case partition was decreed. Mrs. Hays also intervened for her interest, alleging that she was in possession and that she was not bound by the trust deed and sale thereunder. And the court decreed that Criscoe had no title and dismissed his petition.

The action of the court evidently proceeded upon the notion that Mrs. Hays was still the owner of her former interest, notwithstanding the execution of the trust deed and its subsequent foreclosure by advertisement and sale; and that the certificate of acknowledgment was fatally defective, as it showed only a renunciation of dower in the wife's own lands, and did not in other respects conform to the requirements of the statute.

1. Married woman's deed without acknowledgment.

Before the adoption of the present constitution, which authorizes a married woman to convey her separate estate the same as if she were single, her acknowledgment of the instrument of conveyance, before some one of the officers designated by law to take it, was essential to the operation of her grant. This is no longer the case, at least in the transfer of her separate statutory estate. Acknowledgment is now requisite only for purposes of registration and notice. As between the parties and all others, except purchasers or incumbrancers without notice, the deed is good without it. The difference between the former law and the present law on this subject may be seen by a comparison of the cases of *McGehee v. McKenzie, 43 Ark., 156,* and *Stone v. Stone, Ib., 160.* See also *Roberts v. Wilcoxson & Rose, 36 Id., 355; Donohue v. Mills, 41 Id., 421; Bryan v. Winburn, 43 Id., 28; Simms v. Hervey, 9 Iowa, 273, per Dillon, J.*

The court below may have been misled, as Mrs. Hays' counsel certainly has been misled, by the case of *Shryock v. Cannon, 39 Ark., 434.* But, there, although the conveyance by the married woman was made in 1878, yet the land had been acquired by her in 1867, after her marriage, and her husband had a vested interest which could not be divested by

legislation. Consequently it was not her separate property; and *Sec. 7, Art. 9, Constitution of 1874,* did not empower her to convey it as if she had been a *femme sole.*

But in the present case, the inheritance came to Mrs. Hays in 1873. and was her separate estate. *Constitution of 1868, art. 12. sec. 6; Act of April 28, 1873, sec. 2.*

She could mortgage her lands for her husband's debts. *Petty v. Grisard, 45 Ark., 117,* and cases cited.

And even if a formal acknowledgment had been necessary to pass title in 1875 (which was not the case), the Act of March 8, 1883, would have healed the defect. *Johnson v. Richardson, 44 Ark., 365.*

2. PARTITION: Plaintiff must have possession or admitted title

But there is one ground upon which the judgment must be affirmed. There is no averment or proof that the petitioner ever got possession under his purchase; and his title is not recognized by his co-tenants. So far as the record discloses, the lands are held adversely to him; he is excluded from any participation in the rents and profits; and his title is in dispute. He must, therefore, resort to ejectment, to establish his title, as an action for partition is maintainable only by a party in possession, or whose title is admitted. *London v. Overby, 40 Ark., 155, and cases cited; Moore v. Gordon, 44 Id., 334.*

The case of *Trapnall v. Hill, 31 Ark., 345,* and *Davis v. Whitaker, 38 Id., 435,* are apparent, but not real, departures from this rule; for the intervention of a court of chancery was necessary for the complete ascertainment of the rights of the parties, in the first named case by the taking of a long and complicated account, and in the other by the construction of a will. And the court having possession of the cause for one purpose, acted upon its maxim of not doing justice by piecemeal, but settled the whole controversy in one suit.

The affirmance, however, is without prejudice to the right of Criscoe to litigate his title in an action of ejectment, and

when he shall have recovered the share that would have gone to Mrs. Hays, but for her alienation of it, to have that share set out to him in severalty upon a proper bill or petition exhibited for that purpose.

CANTRELL v. CLARK COUNTY.

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1. COUNTIES: *Liability for services to paupers.*

Our statutes for the aid of the poor, imply no promise by the county to pay for services rendered by a physician or surgeon, even in cases of emergency, if there has been no judicial ascertainment that the person treated is a pauper.

2. SAME: *Same; Presumption.*

It is presumed that a physician's or surgeon's services to the poor and indigent are bestowed as a charity, or that he looks to the patient for his pay, and when such is his intent he cannot afterwards charge the county with liability.

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

G. W. Williams for Appellant.

It was agreed that deceased was a pauper. He thus came within the purview of *Sec. 1112 Manf. Dig.* The plain and unmistakable intention of our law, as shown in this and the two preceding sections, is, that any person, whether a resident or not, shall receive care, and that the person giving it shall be paid. The railroad did not engage the services of the surgeon. Either Hempstead or Clark county is liable.

The supreme court of Pennsylvania, in the case of *The Overseers of Versailles v. the Overseers of Mifflin, 10 Watts, 360,* said: "If a pauper has no settlement in the state, the expense of maintenance remains on the township in which he was when he required relief. They were bound to maintain him; he

comes within the equity of the act." The deceased was mortally hurt in Mifflin township and removed to Versailles township, where he died in a few days. The court held the township of Mifflin liable. The same court held, in the case of *Overseers v. McCoy, 2 Pa., 432,* where a non-resident pauper was hurt in Fermanah township, and removed to Milford township, that the removal was a fraud on Milford, whether so intended or not, and that there could be no recovery against Milford. The statutes on which these decisions are based are substantially the same as ours. See, *Act Pa., 9th March, 1771, pp. 340–2–3. Gunn v. Pulaski county, 3 Ark., 427.* Gunn had never been declared a pauper, and the county was held liable. *Hart v. Howard county, 44 Ark., 560; Brem v. Arkansas county, 9 Ark., 240.* This case is altogether different from *Lee county v. Lackie, 30 Ark., 765.* There the deceased was a resident, and there was opportunity for him to have been declared a pauper if he was one.

COCKRILL, C. J. Gersche, a pauper and non-resident of Clark county, was run over by a railroad train, at Arkadelphia, in that county, and his leg crushed; and he was taken on the train to Hope, in Hempstead county, the nearest place to a surgeon, and was there treated and his leg amputated by Dr. Cantrell, who afterwards presented to the county court of Clark county a bill for his services. His bill was rejected and he appealed to the circuit court, where the judgment of the county court was affirmed, and he appealed to this court.

1. County's liability for services to pauper.

It is the established construction of our statutes, for the aid of the poor, that they imply no promise by the county to pay for services rendered by a physician or surgeon, even in cases of emergency, if there has been no judicial ascertainment that the person cared for is a pauper. *Lee county v. Lackie, 30 Ark., 764; Prewett v. Mississippi county, 38 Id., 213.*

Gunn's case in *3 Ark., 427*, and Brem's case in *9 Id., 240*, were not pauper cases, and the law under which they were determined was long ago repealed.

It would seem that humanity required that the statute should make some provision for emergencies arising when the county court is not in session, at least, but it has not done so, and it is not the province of the courts to extend even the beneficial design of such statutes to cases not within their provisions. *Mansfield v. Sac county, 60 Iowa, 11.*

2 SAME: Presumption, etc.

The judgment is right, for another reason. Relief is most commonly given to the poor and indigent as a charity, and by no class more frequently than by physicians. It is not to be presumed as a matter of law, that the physician intends to charge his charity practice ultimately to the account of the county that might perhaps have been made liable for the maintenance of the poor patient. The presumption is that he bestowes his services as a gratuity, or looks to the patient for his pay; and when such is his intent when rendering the service, he cannot afterwards change the account and charge the county with liability. *Blakeslee v. Directors, etc., 102 Pa. St., 274.*

There is nothing in the agreed statement of facts in this case to indicate that the surgeon expected to charge the county when his services were required.

Affirm.

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BENTON V. MARSHALL.

JURISDICTION OF J. P.: *Whether title to land involved.*

Upon rescission of a parol contract for the sale of land the vendee may recover money paid upon the contract; and a justice of the peace has jurisdiction if the amount is within his jurisdiction. The title to the land is not involved in the action.

ERROR to *Dallas* Circuit Court.
Hon. JOHN M. BRADLEY, Circuit Judge.

M. M. Duffie for Appellant.

No question of title to land was involved. It was simply a suit for money paid on a contract which was afterwards disaffirmed by the vendor. *Martin v. Chapman, 6 Porter (Ala.), 344; 2 Cal., 584; 15 Serg. & R. (Pa.), 227; 2 Pars. on Cont., 191; 20 Ark., 426.*

R. C. Fuller for Appellee.

Contends that the suit involved the title or possession of land, and that the justice had no jurisdiction. *Const. 1874, art. 7, sec. 40.* It was necessary for the justice to determine the question whether appellee had a good title to the land at the time of sale, to determine this suit. Thus the title to the land was unavoidably in issue.

COCKRILL, C. J. The appellant brought his action against the appellee before a justice of the peace to recover the sum of $55 which he had paid him under a parol agreement for the purchase of land. The ground of the action was that the contract of sale had been rescinded by mutual consent. This theory of the matter seems to have been conceded by the defendant, the appellee here, for he appeared, as the justice's record recites, and entered "a plea of settlement, payment and set-off." Upon judgment against him he appealed to the circuit court, and there was no attempt there to raise any other issue; but when the plaintiff had put the outline of his case in evidence, the court conceived that the title to land was involved and dismissed the action for want of jurisdiction in the justice.

The court mistook the issue. The plaintiff was not bound to prove or disprove title to land in order to establish his right to recover. If the oral executory contract of sale had been rescinded by the vendor or by mutual consent of parties, the purchaser could maintain his action for money had and received to recover what he had paid under it. *Desha's Exrs. v. Robinson, 17 Ark., 228; Bellows v. Cheek, 20 Ib., 424; 1 Whart. Cont., sec. 285.*

The question in such case would be, not who owned or was in possession of the land, but, had the contract of sale been rescinded.

The fact of rescission seems to have been conceded by the appellee, for his answer, as we conclude from the recital of the justice's record, was in confession and avoidance of the appellant's claim, and presented no question of the title or possession of or lien upon land.

Let the judgment be reversed and the case remanded for further proceedings.

HASKINS V. STATE.

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1. CRIMINAL PRACTICE: *Information; Removal from office.*

A sheriff can not be removed from office by information, for permitting a prisoner, convicted of a misdemeanor and placed in his custody to be hired out until the fine and costs are paid, to go at large without paying the fine and costs. The proceeding must be by indictment.

2. SAME: *Same.*

When an alleged cause of removal from office is a matter not cognizable by a grand jury, *e. g.*, incompetency, drunkenness, immorality, etc., then the state's attorney may proceed upon his own motion, by information filed under oath; but if it is for an indictable offense the proceeding must be by indictment.

APPEAL from *Mississippi* Circuit Court.
Hon. T. P. McGovern, Special Circuit Judge.

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

The *Bill of Rights, sec. 8*, declares that: "No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury." The exceptions do not touch this case.

This is a criminal charge, both in form and in fact. *State v. Whitlock, 41 Ark., 406; 1 Bishop Crim. Pro., sec. 141; Bouvier Law Dict.; Van Meter v. People, 115 Mass., 142; Comm. v. Intoxicating Liquors, 122 Id., 8.*

Dan W. Jones, Attorney General, for Appellee.

Appellant is charged with a violation of *Sec. 1777, Mansf. Dig.* See also, *Sec. 1771.*

The circuit court has jurisdiction to remove county and township officers from office, by information, for malfeasance, misfeasance, nonfeasance, etc., in office. *Const., art. 7, sec. 27; State v. Whitlock, 41 Ark., 403.*

Offices in this country are not regarded as grants or contracts, the obligation of which can not be impaired, but rather as trusts or agencies for the public. *Allen v. State, 32 Ark., 241, 243.*

Appellant violated a law of the state, and the question of whether he wilfully or intentionally did so is immaterial; it was misfeasance in office, at the least, and he was fairly and properly convicted; he has no ground of complaint. *McClure v. State, 37 Ark., 426.*

The supersedeas was improperly granted in this case; *Sec. 2464, Mansf. Dig.*, has no application to appeals from judg-

ments upon criminal information, but proceedings are regulated by the common law. *State v. Whitlock, supra.*

SMITH, J. The prosecuting attorney for the Second judicial circuit filed an information in the circuit court against Haskins, the sheriff of Mississippi county, charging him with malfeasance in office, and praying for his removal. The accusation was, that one Hollowell, having been convicted of a misdemeanor and placed in his custody to be hired out until fine and costs were paid, had been permitted by Haskins to go at large notwithstanding the fine and costs had not been paid.

A demurrer to the information was overruled, and the case was tried before a jury which found the defendant guilty. The court made an order removing Haskins from office, and directing him to turn over all things pertaining to his office to one Faber, who was appointed sheriff *ad interim* until the governor should make an appointment. Motions for a new trial and in arrest of judgment were denied; and Haskins has appealed to this court, giving a supersedeas bond.

1. INFORMATION: Removal from office.

Section 8 of the Bill of Rights, Constitution of 1874, declares that "no person shall be held to answer a criminal charge, unless on the presentment or indictment of a grand jury," with certain specified exceptions that do not touch this case. By *Sec. 27 of Art. 7,* of the same instrument, it is provided that "the circuit court shall have jurisdiction, upon information, presentment or indictment, to remove any county or township officer from office, for incompetency, corruption, gross immorality, criminal conduct, malfeasance, misfeasance or nonfeasance in office."

These provisions are, to some extent, in apparent conflict, and it is the office of construction to reconcile them, giving effect to each, so far as may be done, and carrying out the intentions of the constitutional convention which framed the

whole instrument. Two interpretations are possible: 1. That when the alleged cause of removal is a matter not cognizable by a grand jury, *e. g.*, incompetency, drunkenness, immorality, etc., then the state's attorney may proceed upon his own motion, by information filed under oath. But if it is for an indictable offense, the proceeding must be by indictment. 2. That when the object is to punish an offender by the infliction of the penalties which the law denounces against crime, the prosecution must originate in the grand jury room; but that an information for removal is not of this character, the consequence of a conviction extending only to a removal from office, and the primary object being, not punishment, but the protection of the public against inefficient and worthless officers.

The former is, in our opinion, the true construction. Haskins was charged with voluntarily suffering a prisoner in his custody to escape. This is a criminal charge. The information confessedly counts upon a violation of *Section 1777 of Mansfield's Digest.* A prosecution could not be set on foot in the circuit court against Haskins for this offense without the previous sanction of a grand jury. It would be an infraction of the bill of rights.

There is nothing contrary to this view in *State v. Whitlock, 41 Ark., 403; T. & St. L. R. R., v. State, Ib., 488;* and *State v. Sib Jackson, 46 Id., 137.* In the first-named case the head-note of the reporter is too broad. All that was really decided, bearing on this question, was that county and township officers might be removed for incompetency upon information.

It follows that the court below had no jurisdiction. Its judgment is reversed and the cause remanded with directions to dismiss the information.

TAYLOR v. MISSISSIPPI MILLS.

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1. FRAUD: *Purchase with intent not to pay.*

A debt is created by fraud where one intending not to pay for goods induces their owner to sell them on credit. The purchaser in such case takes only a defeasible title, and on discovery of the fraud the vendor may disaffirm the contract and reclaim the goods unless they have passed into the hands of a *bona fide* purchaser. An attaching creditor of the fraudulent vendee is not a *bona fide* purchaser for value as against the defrauded vendor.

2. SAME: *Evidence of fraudulent intent.*

The fraudulent purpose of a vendee not to pay for goods purchased can rarely be proved by direct evidence, such as declarations to that effect. It is usually established by circumstances from which a jury may infer the intent.

3. SAME: *Same; Test of the fraudulent intent.*

The test of a fraudulent purchase is the preconceived intention to get the goods without paying for them, and not a mere legal or constructive fraud.

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

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

The permitting a false rating of their standing on the books of Dun & Co., calculated to give them credit, was not a fraud. There is nothing to show that the purchasers had anything to do with that, or that the plaintiffs had ever seen or relied upon it, or that it was not true when made, or that it was made to deceive. *23 Barb., 561.*

2. It is not every misrepresentation that will avoid a sale. To have that effect the representations must be vital, must relate to the transaction in question, and must induce the purchaser to part with his property. *Bigelow on Fraud, 14, 18, 23, sec. 4, p. 65, sec. 6, p. 87; 13 Wall., 383.*

A sale is not necessarily fraudulent because the vendee at the time of purchase is insolvent, and knew himself to be so,

and does not communicate this circumstance to the vendor, who is ignorant of it. *9 Gill & J., 220.*

A debt is created by fraud where one intends not to pay for goods, and induces their owner to sell them to him on a credit, by fraudulently representing, or causing the owner to believe, he intends to pay for them, or fraudulently concealing his intent not to pay. *Stewart v. Emerson, 52 N. H., 301.*

The intention of the buyer at the time of buying, not to pay for the goods, together with his insolvency at that time, and his knowledge of it not communicated to the seller will not avoid the sale. In order to avoid the sale, there must have been artifice intended and fitted to deceive. *Smith v. Smith, 31 Penn. St., 367; Backentoss v. Seicher, 31 Id., 324.*

There must be some evidence of an improper motive. *Patton v. Campbell, 70 Ill., 75.*

Mere concealment of the fact by the buyer that he is insolvent will not avoid the sale. *Mears v. Waples, 3 Houston (Del.), 582.*

The mere knowledge of his insolvency on the part of the buyer will not avoid the sale. In order to produce that effect some dishonest purpose must be shown. *Garbutt v. Bank, 22 Wis., 392; Nicholls v. Pinner, 18 N. Y., 299; Rodman v. Thalheimer, 75 Penn. St., 232.*

If the vendor would rescind the contract for the sale of the goods on account of a fraud of the vendee, it must appear that deceptive assertions and fraudulent representations were made to induce him to part with his goods. The mere insolvency of the vendee, and the liability of the goods to immediate attachment by his creditors, though well known to himself and not revealed to the vendor, will not be sufficient to avoid the sale. *Cross v. Peters, 1 Greenl., 343.*

A buyer who procures goods on a credit, knowing at the time of his insolvency and inability to pay for them, but being

without a preconceived design not to pay, is not guilty of such fraud as will avoid the sale. *19 Mo., 36; 43 Conn., 324.*

The fact that G. & H. were hopelessly insolvent does not avoid the sale. Their knowledge of the insolvency must be shown. *4 Seld., 133; 7 Greenl., 376; 10 Am. Dec., 78.*

The sale of goods on credit is void for fraud if induced by false representations on the part of the vendee as to his pecuniary ability to pay; but the buyer is not bound to disclose his pecuniary circumstances unless asked to do so. *33 Cal., 620; 25 Vt., 687.*

Fraud must be proved affirmatively. *18 N. Y., 300.*

Brown & Sandels also for Appellant.

Collins & Balch for Appellee.

The facts in this case justified the court below in avoiding the sale for fraud. Aside from the false representations made by the vendees in this case, as to their solvency, ability to pay, etc., there is sufficient in the record to have warranted the trial court in finding that in purchasing the goods they did so with the intention not to pay for same. *Talcott v. Henderson, 31 Ohio St., 162.*

SMITH, J. This was an action of replevin by a corporation of the State of Mississippi for the recovery of certain goods which it had sold to Goodman & Howitz. The defendant was the sheriff of Crawford county and had seized the goods as the property of Goodman & Howitz under sundry writs of attachment.

The cause was tried before the court without a jury upon the following agreed statement of facts:

"That on the 24th day of November, 1884, the plaintiff, a wholesale merchant doing business in the state of Mississippi,

by its authorized agent went to Messrs. Goodman & Howitz, retail merchants doing business in the town of Van Buren, Arkansas. After having made some inquiries about the commercial standing of the said Goodman & Howitz, and after an examination of the report made by R. G. Dun & Co's commercial agency reports, which the said Goodman & Howitz knew to be in existence, which said report shows that said Goodman & Howitz were at the date of said report, to-wit: October 1, 1884, worth five thousand dollars over and above their liabilities, said plaintiff solicited the said Goodman & Howitz for the purpose of selling them a bill of goods; but not being fully satisfied, had another conference with them when plaintiff proposed to sell them. Goodman & Howitz asked the terms, whereupon plaintiff replied, that to perfectly good men their rule was two and four months time. Goodman & Howitz replied, "we reckon we are good; we discount most of our bills before maturity." The plaintiff, believing these statements to be true and acting upon them, sold them the property in controversy. Goodman & Howitz at the time reserving the right to discount said bills before maturity. Said goods were received by said Goodman & Howitz on or about the 15th day of December, 1884. On the 27th day of December, 1884, Goodman & Howitz made a voluntary assignment to Berkley Neal for the benefit of his creditors. Said deed of assignment, with the list of creditors and indebtedness attached to the same, is admitted as evidence on the trial of this cause, the same as if here set out word for word. Goodman & Howitz, at the time of said purchase owned no real estate and no personal property, except their stock of merchandise and notes and accounts, which altogether was worth about the sum of $8000. After the purchase the said Goodman & Howitz continued in business until the date of said assignment. They paid little or nothing of their indebtedness after the purchase made of the plaintiff, except clerk hire and running expenses. After the said purchase made of the plaintiff, they purchased about $600 of goods from other parties. Their stock

of merchandise, notes and book accounts, amounted in the aggregate to the sum of $6000 at the time they filed their assignment. They delivered no money to the said assignee and claimed to have none. The said stock of goods and book accounts was all the property they claimed to have, except their household goods and wearing apparel, which amounted to but little. The defendant, William L. Taylor, as sheriff of Crawford county, was in possession of the property in controversy at the institution of this suit, by having levies on the same, by virtue of the several writs of attachment in his hands, as alleged in his answer to the complaint. The said property was, at the time of the said levy, in the possession of Goodman & Howitz. The said defendant had no knowledge of any lien or right that the plaintiff claimed to said property at the time he made his levy.

"The property mentioned in the plaintiff's complaint is the property in controversy and the same property that was sold by plaintiff to the said Goodman & Howitz. The plaintiff, prior to the commencement of this action, made a demand of the defendant for said goods, alleging that the same had been obtained by fraud.

"The property, it is admitted, was, at the commencement of the suit, of the value sworn to in the plaintiff's affidavit and complaint.

"The several writs of attachment aforesaid, and returns of inventories made by said sheriff, are admitted as part of this agreement of facts, and to be read in evidence; and also all papers, proceedings and records connected with the same, and all suits and papers connected with the same, against said Goodman & Howitz."

The deed of assignment, referred to in the statement of facts, showed the indebtedness of the firm, on the 27th of December, 1884, to be $23,508.43.

There was no other testimony in the case.

The circuit court found that "said goods having been obtained from plaintiff by fraud, the sale was voidable, and that having not been transferred by said Goodman & Howitz to any third person for value, but being in the possession of the sheriff under attachments by creditors of Goodman & Howitz, that plaintiffs were entitled to rescind the contract of sale and bring their action to recover possession of the goods."

And judgment was rendered for the plaintiff. The only question is, whether such finding and judgment are according to the evidence and the law.

1. FRAUD:—Purchase with intent not to pay.

A debt is created by fraud, when one, intending not to pay for goods, induces their owner to sell them on credit. The purchaser in such case, takes only a defeasible title. On discovery of the fraud, the vendor may disaffirm the contract and reclaim the goods, provided they have not passed into the hands of *bona fide* purchasers. But to avoid a sale on the ground of fraud, a dishonest intention must exist at the time in the mind of the vendee; an actual intention to cheat, or to do an act the necessary result of which will be to defraud the seller. *Benjamin on Sales, 4 Am. ed., secs. 429, 430, 433, 440; Ex parte Whittaker, L. R. 10 Ch. App., 446; S. C. 14 Moak's Eng. Rep., 722; Donaldson v. Farwell, 93 U. S., 631; Biggs v. Barry, 2 Curtis, 259; Stewart v. Emerson, 52 N. H., 301; Hoffman v. Noble, 6 Metc. (Mass.), 68; Cross v. Peters; 1 Greenleaf, 343; Nichols v. Pinner, 18 N. Y., 295; Merritt v. Robinson, 35 Ark., 483; Bridgford v. Adams, 45 Id., 136.*

So also the purchaser may avoid the contract for false and fraudulent representations of the seller. *Plant v. Condit, 22 Ark., 454; Morton v. Scull, 23 Id., 289; Rightor v. Roller, 31 Id., 170.*

As against a deceived vendor, an attaching creditor of the fraudulent vendee is not an innocent purchaser for value. *Wiggin v. Day, 9 Gray, 97; Hoffman v. Strohecker, 7 Watts, 86.*

The fraudulent purpose of the vendee not to pay for the goods can rarely be proved by direct evidence, such as declarations to that effect. It is usually established by circumstances from which the jury may infer the intent. 2. How proven

One circumstance that was relied on as indicating fraud in this transaction was, that Goodman & Howitz knowingly suffered a false rating of their financial condition and resources to be carried on the books of a mercantile agency, calculated to give them credit. 3. SAME.

In *Lindauer v. Hay, 61 Iowa, 663; 17 S. C. Cent. L. Jour., 411*, such conduct on the part of an insolvent purchaser, who, three days after receiving the goods, made an assignment for the benefit of his creditors, was held sufficient to warrant a verdict against the assignee.

In the present case, it is not shown that Goodman & Howitz had any connection with the making or publication of the statement, or that it was false when it was made. If it was correct at the time, and the insolvency occurred afterwards, to require of a tradesman to advertise to the world his failing circumstances is too exacting. Nevertheless, such evidence, along with other indicia of fraud, is proper to be submitted to a jury; though, if it stood alone, we think it would hardly suffice to justify a verdict for the vendor, when we remember that, in this class of actions, the final test is a preconceived intention to get the goods without paying for them, and not a mere legal or constructive fraud. 4. Test of the fraud

But it was further admitted that Goodman & Howitz were, at the time of the purchase, hopelessly insolvent, and could not reasonably have expected to pay for the goods; that they represented themselves to be solvent, when in fact they owed about $23,000, and had only $8000 of assets; and falsely asserted that they were in the habit of discounting their bills before maturity; and stipulated for the privilege of so discount-

ing the bills given on this purchase. These facts authorized the court, which sat in the place of a jury, to find that they never intended payment.

Affirmed.

WILLIAMS v. NICHOL.

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1. JURISDICTION: *Lex rei situs.*

The law of the *situs* of immovable property governs exclusively as to all rights, interests and title in and to the property, and as to the capacity or incapacity of a testator, and the extent of his power to dispose of it, and the descent and heirship thereof, and the manner of its disposal for the payment of debts.

2. SAME: *As to legacies charged upon lands.*

Courts of equity in the state in which lands are situated have exclusive jurisdiction as to legacies charged upon them.

3. WILLS: *Legacy charged upon lands.*

The acceptance of a devise of land renders the devisee personally liable for a legacy charged upon the land.

4. TRUSTEES: *When removable by chancery.*

Courts of equity have power to remove trustees for neglect or breach of duty, but will not remove them for every mistake or neglect of duty, but for such only as endanger the trust property, or show a want of honesty or capacity to execute their duties, or a want of reasonable fidelity.

5. SAME: *Removal for insolvency.*

A trustee appointed by a testator will not be removed for insolvency, nor required to give bond, when the testator has not required a bond and the bill does not show that he is less solvent than when he was appointed.

APPEAL from *Jefferson* Circuit Court in Chancery.
Hon. JOHN A. WILLIAMS, Circuit Judge.

Sol. F. Clark, *Sam. W. Williams* and *Met. L. Jones* for Appellants.

There was no jurisdiction in the court below, neither over the subject nor the parties, and if the court did have jurisdic-

tion there was no equity in the bill. The will was made in Tennessee, and the testator domiciled there. The estate was domiciled in Tennessee and was being administered there. No debts are shown to be due in this state, to necessitate an ancillary administration. Had there been our courts would have control for the purpose of payment of such debts, but not for the payment of foreign debts or legacies. *34 Ark., 117, 132.* The fact that the legacy was secured by a lien on lands in Arkansas, did not give the court here control of the legacy. The legacy was a personal gift, and was properly a subject of administration in Tennessee. The administration was not closed. The debts had not been paid, and suits were pending. The jurisdiction of the domicile was exclusive. *3 Redf. on Wills, p. 20, sec. 2; 1 Williams on Ex., 264; 4 Johns. Ch., 460; 3 Redf. on Wills, pp. 75–6, sec. 6, par. 22; 2 Barb. Ch., 381.*

But the trustee had been guilty of no dereliction of duty. He had received none of the legacy, and he and McH. Williams, as executors, were authorized to hold the legacy until the estate was settled. *2 Redf. on Wills, pp. 465, 477, sec. 32; Ib., sec. 31; Ib., sec. 30.*

The legacy could not be paid until it was ascertained the estate was solvent, which was a matter exclusively for the Tennessee courts. *27 Ark., 482; 3 Mass., 513; 11 Id., 256; 9 Id., 337; 16 Ark., 257.*

The court erred in removing the trustee. It had no discretion to remove the appointee under the will, except when the appointee dies, or refuses or neglects to serve, or is incapable or dishonest, etc. *5 Paige, 46; 8 Id., 295; 2 Hen. & Mun., 12; 6 Ala., 75; 2 Sandf. Ch., 336; 2 Barb. Ch., 381; Hill on Trustees, marg. p. 181, note 3.*

Insolvency was no cause of removal, nor the failure to give bond. He was no more insolvent than when appointed, nor did the will require him to give bond; on the contrary, expressly dispenses with it. The want of a bond, unless where

the statute requires it, was never a cause of removal. *9 Barr, 416; 2 Hen. & Mun., 11.*

The loan to Neel seems to be a judicious one, in accordance with the will.

John H. Williams was not entitled to the $12,000, and was not in default previous to the settlement of the estate by the executors. *14 Ark., 149; 16 Id., 154; 17 Id., 113.*

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

While insolvency is not always a ground of removal, it is in many instances. *Fieldeman Real Prop., sec. 509.*

His removal was a matter of discretion with the court. See *101 Mass., 239; 118 Id., 217; 96 U. S., 419; 41 N. Y., 122.* Where the trustee is insolvent, and it appears that money will come to his hands, and he is proved to be negligent, he will be removed. *3 McCrary, 161.* Or he may be required to give bond. *29 Hun., 271.* It is a matter of discretion. *81 N. C., 233; Hill on Trustees, 191; 6 How. Pr., 216.*

The court had jurisdiction. Even if a suit for the same purpose had been pending in Tennessee, it would neither have hindered or delayed this suit. *118 Mass., 217.* As it was to enforce a charge against lands in this state it could only be brought here. *27 Ark., 482; 9 Wall., 23; Green v. Byrne, 46 Ark.* As the appellee and her trustee differed as to the construction of the will, she had a right to file a bill to have the will construed. *38 Ark., 439.*

The Neel mortgage was not before the court. After the commencement of the suit the trustee could do nothing in regard to the trust, save what might be necessary to protect the trust fund, without the order of court. *3 Hare, 245; 1 Beavan, 468.*

The appellants are not injured by the decree of the court below. McH. Williams asserts that the Neel mortgage is an

ample security for the fund. The transaction not having been approved by the court, he will be in a position to enforce the security for his own benefit, as on a proper application to a court of chancery he will be subrogated to the rights of the mortgagee. *Waggoner v. Lyles, 29 Ark., 7; Valle v. Fleming, 29 Mo., 152; Johnson v. Robertson, 34 Md., 165; Payne v. Hathaway, 3 Vt., 212; Howard v. North, 5 Texas, 291; Sellect v. Phelps, 11 Wis., 380; Tompkins v. Sprout, 55 Cal., 31; McLaughlin v. McDaniel, 8 Dana, 183.*

BATTLE, J. Willoughby Williams died, at his late residence in the State of Tennessee, on the 8th day of December, 1882, leaving a last will and testament, which was duly admitted to probate, in the State of Tennessee, and in the county of Jefferson in this state. He devised by his will, to his son, McH. Williams, his plantation in Jefferson county, Arkansas, known as the "Bankhead Place," and charged it with legacies to his children and grandchildren, as follows: He directed McH. Williams to pay to his son John H. Williams, as trustee for his daughter Nannie W. Nichol (the plaintiff), wife of C. A. Nichol, the sum of $12,000, in four annual instalments from the date of the testator's death, with six per cent interest on the same from that date; and the said John H. Williams was appointed trustee for the said daughter. Second, to pay to the children of the testator's son, Robert N. Williams, the following sums, to-wit: To Jennie Williams $1000, to Morgan Williams $1000, and to the two younger children of said Robert $2000 each upon their arriving at twenty-one years of age. Such legacies were to bear interest from the death of the testator at six per cent. The will then proceeds:

"I wish my son John H. Williams to accept the position of trustee for my daughter, Nannie W. Nichol; to receive the $12,000 and interest from my son McH. Williams, and invest it in a home for her when *she and the said John H.* may deem it

best for her interest, or to invest the same in some good, well-secured, interest-paying first mortgage bonds; and the said legacy of $12,000, and whatever property it may be invested in and all the profits and interest thereon, are to be received by the said John H. Williams and held for her sole and separate use, and to be absolutely free from all the debts, contracts and liabilities of her husband, C. A. Nichol, or any future husband she may hereafter have; the said interest and profits to be paid to her for that purpose by my son John H. Williams, as received by him."

In another clause of the will the testator bequeathed 30,000, out of 40,000 shares which he held, of the stock of the Memphis and Hopefield Real Estate Company, and directed it to be divided by his executors between his daughters, Mary Jane McNairy, Ellen W. Lewis, and Nannie W. Nichol (the plaintiff), share and share alike. The portion given to plaintiff, or the proceeds of any sale thereof, to be held by said John H. Williams as her trustee, in the same manner and with the *same power of disposition* as directed in regard to the legacy of the $12,000; and in still another, the seventh clause, he devises his Memphis and Fort Pickering property, and *any residuum of property of which* he might die seized, to be sold by his executors, and the proceeds, after paying debts, to be equally divided between his children, and the share going to the plaintiff he directs to be held in trust by the said trustee, John H. Williams, in the same manner as the other bequests to her.

John H. Williams and McH. Williams were nominated executors of the will, and after the death of the testator qualified as such.

Mrs. Nannie W. Nichol commenced this action, in the Jefferson circuit court, against John H. and McH. Williams, as executors, and in their own rights, and the other legatees and devisees named in the will. After setting out the foregoing facts in her complaint, she alleges that the property mentioned

in the seventh clause of the will has been sold as directed, *the debts all paid*, and each of the legatees mentioned in the seventh clause of the will have been paid their share of such proceeds, but that no part of the proceeds have been paid to the plaintiff, nor has she received anything on account of any bequest of the will; said John H. Williams declaring that nothing, by the terms of the will, is to be paid to her, but that all the moneys that came to his hands, as trustee, under said will, are to be held by him for re-investment, and that he is not authorized to pay to the plaintiff the interest accruing on the fund set apart in said will for her use and benefit.

She alleges that said trustee has never taken any steps to collect any part of said money, except by the sale of the property mentioned in the seventh item. That he has utterly neglected to take any steps towards carrying out the trusts devolved upon him, though often requested to do so, and that he has been acting as such trustee, and received money as such, without having given bond or other security; and that he is wholly insolvent.

She prays that the will may be construed; that all its trusts for the benefit of the plaintiff may be enforced against said land and other property, and against the trustee and the executors; and that if the court should be of opinion that any investment should be needed for the benefit of the plaintiff, under the provisions of the will, *the court may proceed to have the same made under its own order and direction for the protection of the plaintiff.* That the court may cause the *interest* and the *increase* that may be due *to the plaintiff* under the will to be paid to her. That an account might be taken of whatever money or property she was entitled to under the will, and that all of her rights thereunder might be accurately settled and defined. That said trustee, Williams, might be removed, and another trustee appointed to act in his stead.

The defendant, John H. Williams, in his own right, demurred to the complaint, because the court did not have jurisdiction, and because it did not state facts sufficient to constitute a cause of action; which was overruled.

McH. Williams, in his own right and as executor, filed an answer. He admits the will and its probate, as alleged. Says, in substance, that he was one of the executors appointed under the will and a beneficiary; that he is advised that the estate or interest going to the plaintiff under the will, was given to the defendant, John H. Williams, in trust, to be collected and invested for her by defendant as trustee; and that there was no estate cast upon her by the will, except through the intervention of such trustee and in the manner set out in the will, and that there is no power to set aside or adjust the will so as to avoid the terms and limitations of it as a devise. Defendant also says, that two years had not elapsed after the death of the testator to the commencement of this suit, and he is advised that two years, under the laws of Tennessee, must elapse before suit can be brought to cause the executors to account. Alleges that the claimant in the present case is a non-resident of Tennessee, and that there are other resident claimants against the estate, to wit, Logan H. Roots, and others, and they are entitled to five years to settle and adjust their claims before any equitable proceedings, except in the probate court of Tennessee, can be tried. Says that Lehman, Abraham & Co., of New Orleans, has a claim of $7000 which has been duly presented and refused, and suit upon the same in the courts at Nashville, Tennessee, is now pending, and which can not be adjusted or settled for the present. Says that the Hopefield stock at Memphis, mentioned in the will, has not been, and cannot now be disposed of, but still exists as part of the trust, and the courts of Tennessee, at Nashville, are the proper courts to settle all the questions mentioned or shown in this action. That application upon all claims or legacies should be first made to the forum of the domicile. That there are other lega-

cies charged on the lands mentioned in this suit, in favor of the minor children of Robert N. Williams and his widow and heirs. That he should be protected, and the trust estate so adjusted as to protect them and himself. That he brings into court all sums due plaintiff and asks the protection of the court.

Afterwards McH. Williams filed a supplemental answer, in which he, in substance, states:

That since his former and original answer he has paid to John H. Williams, the trustee named in the will, as declared in the pleadings in this case, not being restrained by the court, the money charged against the Bankhead plantation in favor of the complainant, and taken his receipt therefor, and he is informed and believes that the said John H. Williams, the trustee, has proceeded in strict and apt compliance with the said trust in him so reposed by the will, to invest the fund so paid, in good, well-secured, interest-paying first mortgage bonds, solvent and in such form as to avoid any litigation, by lending the money to C. M. Neel, of Jefferson county, Arkansas, at eight per cent. per annum, payable semi-annually, and by taking for the purpose of securing the same a first mortgage, in favor of M. L. Bell, as trustee, on Lake Dick plantation, which is worth more than thirty thousand dollars in cash, and that in this payment and said instrument, nothing has been done or suffered to impair the said funds, and that by this the said Bankhead plantation is absolved of said lien, but sure as he is of this, that he is willing, notwithstanding, to let a future decree be made, holding the Bankhead plantation as a guaranty of the correctness of the instrument, and its collection, if it should be finally ascertained by judicial investigation, that the investment was not a judicious one.

To this supplemental answer the plaintiff filed a demurrer, which was sustained. As the defendants did not plead further, a final decree was rendered in favor of plaintiff, declaring that

the bequest of $12,000, with six per cent. interest from December 8, 1882, was a charge on the Bankhead place, and removing John H. Williams from his position as trustee for the plaintiff and appointing another in his place. The defendant, McH. Williams, was directed to pay into court, for the separate use of the plaintiff, within thirty days, six thousand dollars and interest, so much of the $12,000 and interest as was then due, and the remaining installments as they should severally fall due. Reference was made to a master to ascertain the best manner of investing the money, with authority to examine the plaintiff on the subject, separate from her husband. If the master should be of the opinion that the money should be invested in a home for the plaintiff, he was directed to report his opinion as to the best property to be purchased for that purpose, and the state of the title thereto. If the money should not be paid as required, it was ordered that the Bankhead place be sold. It was decreed that such sale should be made subject to the lien of the installments of the twelve thousand dollars not due, and to all other trusts and charges imposed on the place by the terms of the will, which were expressly excluded from the operation of the decree.

John H. Williams and McH. Williams, as executors and in their own rights, have appealed to this court.

1. JURISDICTION: *Lex rei sitæ.*

The first question presented for consideration is, did the court below have jurisdiction of the subject of this action? Appellants insist it did not.

It is a well settled principle of law, that the law of the *situs* governs exclusively in regard to all rights, interests and titles, in and to immovable property. It governs as to the capacity or incapacity of a testator and the extent of his power to dispose of it, and the descent and heirship thereof, and the manner in which it shall be disposed of for the payment of debts. No court, state or federal, can reach or confer title, or sell, under decree, lands situate in a state in which it does not sit. Every

attempt of a court to found jurisdiction over such lands must, from the very nature of the case, be utterly nugatory. In regard to legacies charged upon lands, the courts of equity in the state in which the land lies have exclusive jurisdiction. *Clopton v. Booker, 27 Ark., 482; Story Eq. Jur., sec. 602; Story on Conflict of Laws, secs. 424, 463, 474, 483, 550, 555.*

2. SAME:—As to legacies charged upon land.

In this case the legacy in question was made a charge upon the lands of the deceased in this state, which were devised to McH. Williams. A lien was expressly retained by the will upon these lands as a security for the payment of this legacy. The will directed and made it the duty of McH. Williams, and not the executors, to pay it. By accepting the devise to him of the lands designated in the will as the Bankhead place, McH. Williams became personally bound to pay it.

3. WILLS:—Legacies charged upon.

Mr. Justice Earl, in delivering the opinion of the court in *Brown v. Knapp, 79 N. Y., 143*, said: "It is well settled that when a legacy is given and is directed to be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy. And the rule is the same when the legacy is directed to be paid by the executor who is the devisee of real estate. *2 Redf. on Wills, 209; Mensch v. Mensch, 2 Lans., 235; McLachlan v. McLachlan, 9 Paige, 534; Wood v. Wood, 26 Barb., 356; Dodge v. Manning, 1 N. Y., 298; Reynolds v. Reynolds, 16 Id., 257; Gridley v. Gridley, 24 Id., 130; Harris v. Fly, 7 Paige, 421; Olmstead v. Brush, 27 Conn., 530.* If the devisee, in such case, accepts the devise, he becomes personally bound to pay the legacy, and he becomes thus bound even if the land devised to him proves to be less in value than the amount of the legacy. If he desires to escape responsibility he must refuse to accept the devise. If he does accept, he becomes bound to pay the whole amount of the legacy which he is directed to pay. Here, William S. Brown, the executor, was directed to pay this legacy, and he was the devisee of the real estate; and hence the land not only was charged with the

legacy, but the devisee became personally liable to pay it—principal as well as interest.

"The payment of such a legacy can be enforced by a suit in equity against the real estate, or by a common law action directly against the devisee upon the implied promise to pay it—a promise implied by his acceptance of the devise."

McH. Williams accepted the devise to him of the Bankhead place. He offered to bring into court the money due on the twelve thousand dollar legacy, and invoked the protection of the court. As said by Chancellor Kent, in *Glen v. Fisher, 6 John Ch., 34, 36*: He "has no right to require security to refund before payment of the legacy, for he does not pay the legacy in a representative character. The devise was given to him on condition of paying such a legacy to the plaintiff, and if he accepts of the devise, he takes it *cum onere*. This is the case of a devise, creating a charge on *the person* of the devisee, in case of his acceptance of the gift, according to the distinction noticed in the case of *Jackson v. Bull, 10 Johns. Rep., 148*. He did accept the devise, and he became thereby absolutely and personally bound to pay the legacy. He has no right to create any condition precedent to the payment, and the law makes none. He who accepts a benefit under a will, must conform to all its provisions, and renounce every right inconsistent with them. This is an obvious and settled principle in equity. He accepts the devise under the condition of conforming to the will, and a court of equity will compel him to perform the condition, for no man, says Ch. Baron Eyre (*Blake v. Bunberry, 1 Vesey Jr., 523*,) shall be allowed to disappoint a will under which he takes a benefit."

But it is said, that the executors cannot be held to account or settlement, or controlled, by any of the courts of this state, and, therefore, the court below did not have jurisdiction. There was no effort made by the court below to hold the executors to an account and settlement, or to fix the extent of their liability as

such, or to control them in any manner. The decree is wholly confined to the enforcement of the payment of the legacy of twelve thousand dollars and the trust created by the will in connection therewith. This legacy was not made payable by the executors, but by McH. Williams, in his individual capacity. It was not made payable to the executors, but to John H. Williams, as trustee, the trust not being annexed to his office of executor. It was not to be paid out of the Tennessee assets, but it was made a charge on lands in this state. This being true, the fact that John H. and McH. Williams were also executors, could not defeat the jurisdiction of the court. *Clopton v. Booker, supra; Case of Elizabeth Baird, 1 Watts & Serg., 288; Johnson's Appeal, 9 Barr, 421; 1 Perry on Trusts, sec. 281.*

4. TRUSTEES: When removable in chancery.

Plaintiff insists that John H. Williams should be removed from his trusteeship under the will, so far as relates to the bequest of twelve thousand dollars, because he has wholly neglected to take any steps toward the execution of the trusts devolved upon him, and that he is insolvent, and has been acting as such trustee without having given bond or other security, and declares that nothing is to be paid to her, but that all money which has or shall come to his hands as trustee under the will is to be held by him for reinvestment, and that he is not authorized to pay to her the interest accruing on the fund set apart in the will for her use and benefit.

It is well settled that courts of equity have power to remove trustees for neglect or breach of duty. It is not, however, "every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity." If a trustee fails in the discharge of his duties from an honest mistake, or a mere misunderstanding of them, or from a misjudgment of them, it is no ground for removal, unless such

failure shows a want of the proper capacity to execute the duties. *2 Story Eq. Jur., sec. 1289; 2 Perry on Trusts, sec. 817; 1 Perry on Trusts, sec. 276; Lathrop v. Smalley's Executors, 8 C. E. Green, 192; Thompson v. Thompson, 2 B. Mon., 175.*

5. SAME: Removal for insolvency.

It is alleged that the trustee, Williams, was insolvent, and had given no bond for the performance of the trust. But there is no allegation that he was more insolvent than he was when he was appointed trustee. The will did not require him to give bond. On the contrary, it expressly provides that he and his co-executor should not be required to give bond as executors. It is evident that his testator did not intend that he should be required to give bond. The testator had a right to appoint him trustee and authorize him to act as such without bond. His wishes should be respected.

The will authorized the trustee, Williams, to collect the twelve thousand dollars as it became payable, and directed him to invest it according to his discretion, for the benefit of plaintiff. A personal confidence was reposed in him by the testator. By the terms of the will, plaintiff, or her husband, was not to have any control over the investment or disposition of the fund. While it was the moral duty of the trustee to consult plaintiff, in order to learn her necessities and ascertain her wishes, he was not required to make any investment, except such as he thought was to her best interest. All she was entitled to was the interest on the money bequeathed for her use, when it was collected. In case he and she thought it best to invest all or any portion of the fund in a home for her, she was to be consulted.

The only neglect of duty in respect to the bequest of twelve thousand dollars, charged in the complaint against the trustee, is the failure for about ten months to collect the first installment thereof and interest. In order to constitute this failure a sufficient cause for removal it must have been such as to endanger the trust property or show a want of honesty or reason-

able fidelity. It does not appear that the trust fund was endangered. For aught that appears it was safely invested when left as a charge on the Bankhead place. The only injury, probably, suffered by plaintiff, was the loss of interest. He might, without intent to do her a wrong, have withheld from her the interest to be collected from McH. Williams as the installments fell due, and insisted that it should be reinvested by him, since the will is susceptible of such a construction without doing violence to its language. We can see in this failure no dishonest, selfish, or improper motive, or any inducement therefor, unless it be a mistake of duty. He accepted the trust. He insists that he had no right to enter upon the execution of it, because the administration of the estate in Tennessee was not closed, and the statutory period for closing it had not expired. This probably accounts for the delay. We do not think he should be removed on this account.

It is insisted that the loan to C. M. Neel is a sufficient ground for removal. Be this as it may, there is nothing to show that such a loan was made by John H. Williams, except the statements contained in the supplemental answer of McH. Williams and the exhibits thereto, and they are not admissible as evidence against and cannot affect John H. Williams. *Ringo v. Woodruff, 43 Ark., 498.*

The trustee should not now be removed, but if he shall, hereafter, neglect the performance of his duties, the denial of this relief should be without prejudice to a future application for his removal.

McH. Williams states in his supplemental answer, that he has paid the legacy of twelve thousand dollars to the trustee, and that the trustee had loaned it to C. M. Neel on good security; and insists that the lands devised to him were thereby released from any liability for the legacy. It appears that this payment and loan were made long after the commencement of this action, and after the court had acquired jurisdiction of the

persons of John H. and McH. Williams. This occurred after McH. Williams had answered and offered to bring into court money to pay so much of the legacy as was then due, and submitted to its jurisdiction. Within ten days thereafter, if his statements are true, he paid the legacy.

The relief sought by this suit was the construction of the will of Willoughby Williams, deceased; the enforcement of the payment of so much of the legacy of twelve thousand dollars as was due; the payment to Mrs. Nichol of the interest due on the legacy; and to secure the safe investment of so much of the principal of the legacy as was due, under the order and direction of the court. This relief was within the jurisdiction of the court. The court, in the exercise of it, had a right to require the instalments and interest due on the legacy to be paid into court, with a view to a safe investment of the principal thereof by the trustee under the control of the court. The court having acquired this jurisdiction, the action of defendants cannot render it powerless to afford the relief clearly within its power and defeat it in the exercise of its jurisdiction. Unless the loan, if any was made, was a safe investment in interest-bearing bonds secured as required by the will, and was made in good faith, on terms advantageous to Mrs. Nichols, it and the payment of the legacy should be wholly disregarded, and the Bankhead place and McH. Williams held liable to the same extent they were before any payment was made. For the purpose of ascertaining whether or not such an investment was made, a reference should be made to a master, with authority to take testimony. If it be ascertained that such an investment was made, it should be permitted to stand, except as to so much thereof as may be interest collected on the legacy. If, on the contrary, it be ascertained that such an investment was not made, the amount due on the legacy should be ordered paid into court within a time specified, and in default of the payment thereof, within the time allowed, the Bankhead place should be sold, under an order of the court, by a com-

missioner appointed for that purpose, subject to the lien thereon for the payment of the installments of the twelve thousand dollars not due, and all other charges imposed on the land by the will; and the proceeds of the sale thereof, or enough to pay the amount due on the legacy, should be paid into court. *The Attorney General v. Clack, 1 Beavan, 468; Cafe v. Bent, 3 Hare, 245.* When the legacy, or any part thereof, is paid into court, if the trustee and Mrs. Nichol shall agree that it will be to her best interest to invest the principal of the legacy, or any part thereof, in a home for her, then it should be so invested by the trustee; otherwise, it should be invested in first interest-bearing bonds, well secured by mortgage or deed of trust, by the trustee, on terms considered by him most advantageous to Mrs. Nichol; and whatever investment shall be made, it should be in the name of the trustee for the use of Mrs. Nichol, free from all the marital rights, claims and control of her present, or any future husband she may have, and free from all debts or liabilities of either of them, and should be made under the control of the court, it seeing that the trust is faithfully executed and the interests of Mrs. Nichol well protected. The interest due on the legacy should be paid to Mrs. Nichol, and if it has not been paid, or shall not be paid within a specified time, the Bankhead place should be sold to pay it.

The decree of the court below is reversed, and this cause is remanded with instructions to enter a decree according to this opinion and for other proceedings.

TOWN OF SEARCY V. YARNELL.

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1. CORPORATIONS: *Their existence not assailable collaterally.*

The existence of a corporation once formed can be questioned only by a direct proceeding; and that at the suit of the state.

2. SAME: *Breaches of conditions subsequent to organization.*

The failure of stockholders to pay their subscriptions, the failure to hold elections for directors, and similar omissions, are not sufficient grounds for the destruction of a corporate existence, even at the suit of the state, where the by-laws and the law of the state provide that the directors named in the charter shall serve until their successors are elected and qualified.

3. ESTOPPEL: *In pais.*

One who deals with an ostensible corporation, whereby rights become vested in it, can not afterwards question its corporate character.

4. CORPORATION: *Railroad, must have five stockholders.*

There never has been a time since the adoption of our general incorporation laws when railroad corporate rights could be owned and exercised by a sole owner. There must be five owners or there is no franchise to own; and a corporation stockholder in another corporation, though composed of many individuals, is, as a stockholder, but one person.

5. TRUSTEE: *Sale to himself; Whether void or voidable.*

There is a distinction between the case of a sale to a sole trustee and the sale to one of several trustees. Even in the case of one trustee selling the property of his *cestui que trust* to himself, the rule seems to be that the sale is void, or only voidable, according to the circumstances of the case.

6. MUNICIPAL CORPORATIONS: *Power to sell corporate property.*

A municipal corporation has power to dispose of property held for general convenience, pleasure or profit.

7. SAME: *Estoppel; Ultra vires.*

A contract of sale by a municipal corporation, which is fair and lawful and fully performed by both parties, cannot afterwards be avoided by the corporation on the ground of *ultra vires.*

8. RAILROADS: *Power of stockholders to sell.*

A majority of the stockholders of an incorporated railroad company can not sell the property of the company against the wishes of the minority and thus defeat the objects for which the company was formed.

9. SAME: *Same; The franchise.*

The directors of a railroad company may, by unanimous consent of the stockholders, sell the corporate property, and thus denude themselves of the power to exercise the rights of the franchise, and can not afterwards avoid the sale by pleading the inalienable character of the franchise; only the state can question that.

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

Clark & Williams and *W. R. Coody* for Appellant.

The city of Searcy never bore any relation to this railroad except that of a stockholder, and though she might, as she held a majority of the stock, authorize a sale of the road, yet it could only be through or by operation of a sale of its shares. The franchise continues under the control of the shareholders. If such sale should work a forfeiture of the franchise, still no such forfeiture has been claimed by the state and the franchise continues. *Pierce on Railroads, pp. 9, 10.*

But continues in whom? Of course in the stockholders, and the city holds the stock. See *Comm. v. So. Mass. Turnpike Co., 5 Cush., 509.*

Even under a forced sale, under execution or foreclosure of mortgage, the franchise does not pass unless by express statute, and we have no such statute in Arkansas. *Rogun v. Atkins, 9 Lea (Tenn.), 609.* No sale of the *corpus*, either judicially or otherwise, could be made; and in England such is the law now. *Furness v. Cottenham Ry. Co., 25 Beav., 614.*

And a railroad cannot be sold out as a whole even on a mortgage or fieri facias. *2 Kent Com., pp. 352–3.* And the same is the law here as to any voluntary or private sale. It is only by statute that it can be sold on mortgage or execution, although some of the states have held that it may be judicially sold independently of any such statute. See *Allen v. Montgomery Ry., 11 Ala., 437,* and *Redfield on Railways, 507, secs. 9, 17.*

There can be no pretense that Yarnell took anything under his purchase more than the possession and use of the road during such time as the stockholders should see fit to let him use it, unless the transaction can be construed as an equitable assignment of the stock; we know of no rule of law for such a construction. But, moreover, the parties never treated the sale as a transfer of the stock. Such stock was never assigned on

the books; no stockholders' or directors' meetings were ever held after the sale to Yarnell. The corporation was not used, but abandoned, from that deed; undoubtedly the state could claim a forfeiture for non-user or abandonment from the date of that sale. *Pierce on Railroads, 10, and cases cited in note 8*, especially *Comm. v. Mass. Turnpike Co., 5 Cush., 509; White v. Campbell, 5 Humph., 38.*

Passing from this view of the case, the sale to Yarnell was made, or purported to be made, by a board of directors of the Searcy Railroad Company. Now a board of directors has no power to sell the *corpus* of the company, even if the stockholders would have the power in a stockholders' meeting to do so, and there is no claim of any authority to do so by a regular stockholders' meeting; it requires the vote of a majority of the stock in a regular stockholders' meeting to borrow money and pledge the property in mortgage for its payment. No board of directors has any such power; that is to say, that the directors may sell and buy and mortgage articles of property, are rights not essential to the trust, transactions and continual existence of the corporation, and they cannot, without special authority, alienate property or rights which are essential to the transaction of the corporate business and existence. *16 Wall., 390; 33 Barb., 578; 18 Gratt., 819; 7 C. E. Green, 130, 407; 9 Id., 455; 48 Penn. St., 29; Pierce on R. R., 33.*

Yarnell was a member of the board when the sale was made and the sale was void. He was a trustee, and a trustee cannot purchase the trust property, nor deal with trust funds, or make any gain whatever out of the relationship. *Pierce on Railroads, p. 36 et seq.; 3 Watts Ac. and Def., pp. 466–7; Field on Corp. (Wood), secs. 154–5–7; 21 Wall., 616; 41 Ark., 269; 38 Id., 26; 26 Id., 445.*

But it may be argued that Yarnell was not a director at the time of the purchase. The records of the board of directors exhibited show that he was such; he fails to deny it by his

own evidence; and the only proof is that of B. M. Jones, who states that Yarnell, after he concluded to purchase the road, told the board that he would resign and become the purchaser, but no action was taken by the board as to his resignation, and from the records and in fact he was a director at the time. But suppose he was not a director at the immediate time; he was one of the committee charged with the sale of the road, and had been a director up to the time not only when it was concluded to sell the property and it had been offered for sale, but up to a time when, after a failure to sell, Yarnell signified his wish to buy the property if he could get it for $500 and his brother would join him in the purchase; and up to the time when the offer to take $500 from him had been agreed upon in the directory he was one of the directors, and then only stated that he would resign for the express purpose of accepting the offer and becoming the purchaser of the road. Now, if the duties and obligations imposed by law on trustees could be thus easily avoided, they might be ignored at pleasure, and evaded at the will of the trustee; in fact, it would be no law at all. Yet the chancellor below seemed to put no stress upon this proposition. See *Field on Corp.* (*Wood*), *sec. 157; European Railway Co., v. Pour, 59 Me., 277; Dobson v. Racey, 3 Sanf. Chy., 62; Peckett v School District, 25 Wis., 552; Cumberland Coal Co. v. Sherman, 30 Barb., 553; Boyd v. Blakeman, 29 Cal., 19; Aberdeen Railway Co. v. Blaikie, 1 McQueen, 461; Flint Ry. Co. v. Dewey, 14 Mich., 477; Fuller v. Dane, 18 Pick., 472; 33 Ark., 575.*

That directors are trustees, see *Butts v. Woods, 38 Bard., 188; York & Midland Railway Co. v. Hudson, 19 Eng. L. & Eq., 365; Scott v. Depeyster, 1 Edw. Chy., 513; Verplank v. Mercantile Insurance Co., Ib. 85; Great Sexembourg Railway Co. v. Wagner, 25 Beav., 586.*

But it is argued that the city of Searcy is estopped by its acts and conduct with reference to the sale, and that seemed

to be the main ground upon which the chancellor based his decision of the case below. But how can this be short of the full period of the statute of limitation, which is seven years as to this character of property, when no such time has elapsed? The city has done nothing that would estop her from asserting her title to this property; she has simply omitted to bring her suit for some time, the reasons for which are fully shown in the evidence of Sowell, McGinnis and others.

Here, the town being fully authorized to take stock in the railroad, issued bonds and levied taxes to pay the same under an act of the legislature, approved July 23, 1868. See *Pamphlet Acts 1868, p. 210, sec. 18; Field on Corp., Wood, secs. 52–3; 3 Wall., 327.* And no mode being pointed out as to the exercise of the authority, the matter was submitted to a vote of the citizens of the town, under an act of the legislature with reference to the subscription of stock by counties, approved July 23, 1868. *Acts 1868, pp. 312–13.*

The town, being the only stockholder who paid up its stock, was the sole owner, and the council, without the consent of the people for whose benefit it was built and paid the taxes, *had no power to sell or dispose* of the road. They could only manage it for the purposes of its creation, to-wit: To advance the welfare, etc., of the town. *Mansf. Dig., sec. 764; Field on Corp., secs. 57, 199, 207; 31 Ark., 464–5; 10 Rich. (S. C.) Law, 491.*

A municipal corporation cannot dispose of its property. *2 Dillon, secs. 445–7, 450–1; 30 Iowa, 94; 2 Dill. Corp., secs. 493 to 498; 45 N. Y., 234; Grant on Corp., 129, 134.*

The sale was *ultra vires. Green, ultra vires, p. 37; 63 N. Y., 68; 43 Iowa, 48, 65; 38 Cal., 300; 35 Mich., 22.* Said sale was void *in toto*, and the people cannot be estopped by the same. *1 Dill. Corp., secs. 383–4; 16 Cal., 282; 2 Clifford, C. C., 590–6.*

F. W. Compton for Appellant, with whom are *Cypert & Reeves.*

1. In subscribing to the capital stock, issuing bonds, etc., the town exceeded her powers, but having done so, the transaction, although *ultra vires*, being *executed*, she became the owner of the stock. This did not vest the title of the road in her; she was simply a stockholder, the title being in the company.

2. The deed to the purchasers of the road was properly executed. The rule of law is, that where the deed of a railroad corporation *purports* to be the deed of the corporation, the fact that it is not signed by the corporate name, but by an officer having the power to execute the deed in behalf of the company, in his individual name, does not invalidate it as the deed of the corporation (*Jones on Railroad Securities, sec. 86*); and such power (that is, to execute a deed of conveyance,) may be delegated by the board of directors to the president of the company. *Pierce on Railroads, p. 34.* Testing the deed in question by this rule, there can be no doubt of its validity. The deed not only *purports* to be the deed of the Searcy Branch Railroad Company, as expressed in the body of it, but is also signed in its name by the president of the company, who was authorized by the board of directors to do so.

3. The sale, as made and carried into effect by the railroad company, with the consent or subsequent ratification of the appellant, through her common council, is valid; notwithstanding the absence of any provision in their respective charters authorizing the exercise of such a power. The appellant being the only stockholder whose stock had been paid, and as such, the only claimant of a subsisting interest in the road, the object of the ordinance above mentioned was to express her consent to sale, by the company who held the title; and that she not only consented to the sale, but subsequently ratified it,

is abundantly established, independent of the ordinance itself, by the proceedings of the common council, as shown by its minutes. After the sale, with full and exact knowledge of all that had been done, she received the five hundred dollars, that part of the consideration that was to be paid in cash; and through her common council granted the appellees the privilege of erecting depot buildings within her corporate limits, and the right of way along and upon her streets. Indeed, evidence of consent and ratification pervades the whole record, and leaves no doubt on the mind. Under such circumstances, a sale is valid, as held by the supreme court of the United States, in *Chicago, Rock Island and Pacific Railroad Company v. Howard, 7 Wall., 392.*

Where a contract has been entered into by a corporation, which is *ultra vires*, though it cannot be enforced while executory, yet if executed by one party, the other, who has received the benefit of it, will not be permitted to set up such want of power as a defense; and where the contract has been fully executed by both parties, the law does not allow either party to take advantage of such want of power. *63 N. Y., 62; 22 N. Y., 494; 14 N. Y., 93; 17 Barb., 378; 125 Mass., 339; 96 U. S., 341; 98 U. S., 621; 29 Ohio St., 330; 44 Iowa, 239; 47 Ind., 407.*

This rule is for the protection of rights acquired under a completed transaction, and applies to public or municipal as well as to private corporations. *Tash v. Adams, 10 Cush., 252; Alleghany v. McCluskan, 14 Penn. St., 81; Fuller v. Melrose, 1 Allen, 166; Thompson v. Lambert, 44 Iowa, 230.* See also *39 Iowa, 267.*

It is also contended for the appellant that, as W. A. Yarnell was a director of the road at the time of the sale, the purchase by him and his brother involved a breach of trust, and for that reason the sale should be avoided, and they required to account as trustees.

The railroad company does not seek to avoid the sale, and the proof shows that while efforts were being made to sell the road, Yarnell, before he submitted his offer to purchase, resigned his position as director; but, waiving any discussion as to this, and treating Yarnell as a director when the sale took place, still, under the circumstances attending the transaction, the proposition contended for cannot be maintained.

The contracts and transactions of a director which involve a breach of trust are not void, but are voidable only, at the election of the complaining party as to whom he stands in the trust relation; which right of election must be exercised in a reasonable time, and is lost by ratification or acquiescence. *Hayward v. National Bank, 96 U. S., 6 Otto, 611; Omaha Hotel Co. v. Wade, 97 U. S., 7 Otto, 13; Twin Lick Oil Co. v. Marburg, 91 U. S., 1 Otto, 587; Credit Co. v. Arkansas Cent. R. Co., 15 Fed. Reporter, 46.*

Appellant is estopped by her long acquiescence and by her subsequent ratification of the sale.

Hon. HENRY G. BUNN, *Special Judge.* In 1871, when the Cairo & Fulton, now St. Louis, Iron Mountain & Southern railway, was being located through this state, various efforts were made by the citizens of the town of Searcy, in White county, to induce the railroad people to diverge from the contemplated route so as to touch their town; and all these efforts proving fruitless, on the 21st July, 1871, some of them, nine in number, signed articles of association and caused the same to be filed in the office of the secretary of state, they having subscribed the necessary amount of stock, named their directors, their commissioners to open subscription books, and did other things required by law entitling them to file the same.

They thus became a railroad corporation under existing laws and immediately caused books of subscription to be opened and a survey of their contemplated tap or branch road to be made,

locating the same so as to have its western terminus at the town of Searcy and its eastern terminus or junction with the Cairo & Fulton railway at a point they named Kensett, a short and immaterial distance from the point named in the charter or articles of association. The full amount of stock was subscribed, and the principal portion, amounting to twenty thousand dollars, was taken and subscribed by the town of Searcy in its corporate capacity, after the will of her citizens, qualified to vote, was taken by means of an election in itself regular; and to pay the same the bonds of the town were issued, sold, and subsequently redeemed by money raised by taxation. Except a small amount expended for surveys, no other money was ever paid for stock subscription except that paid by the town.

Thus, under its corporate name of "The Searcy Branch Railroad Company," this corporation proceeded to build, according to the provisions of its charter and by-laws, a wooden tramway from Searcy to the Cairo & Fulton road at Kensett, and did complete and put the same in operation, employing the requisite number of coaches drawn by horse-power, at an expenditure of about eighteen thousand dollars. Notwithstanding the fact that none of the stockholders except the town had paid anything for their stock, the affairs of the company continued to be managed by the directors named in the charter, except two who early became lessees of the road, their places being filled by the advice and consent of the town, the only *bona fide* stockholder.

The revenues derived from the annual lease of the road, amounting to about fifteen hundred dollars, less an amount expended on repairs, continued to be paid over to the town by the company. In the early part of the year 1877, owing to rapid and increasing decay of the timbers used for the superstructure and the usual wear and tear of other portions of the road and property, it began to appear to the directors and the citizens of Searcy, that very soon the expense of repairing would absorb

and ultimately more than absorb the rents and profits of the road. The greater portion of that year was spent in efforts to dispose of the road in a manner that would save the town and the company from loss and yet serve its original purpose, and finally it was proposed to sell it on certain terms named, and failing to effect a sale after repeated efforts, the appellee, W. A. Yarnell, then one of the board of directors of the road, proposed to purchase the road on the terms previously named, with some immaterial modifications, if his brother, another one of the appellees, would unite with him in the purchase.

After consulting with his brother and finding him willing to make the purchase, W. A. Yarnell resigned his place as one of the directors and purchased the road from the other directors for the sum of five hundred dollars in cash, and for the further consideration that they, the Yarnells, should extend the road to West Point, at the head of navigation on Little Red river, a point about four or five miles east of Kensett, making the whole line about twice as long as originally established between Searcy and Kensett, and to equip the whole line with iron rails, and proper coaches drawn by steam power, and to keep the same in operation perpetually; a maximum rate of charges for freight and passengers being fixed in the contract of sale. A deed was made by the president, by direction of the company, to the Yarnells. The Yarnells having extended the road and done other things in accordance with their contract, associated with themselves the other appellees, presumably to make the requisite number of persons, and then filed articles of association in the office of the secretary of state, and thereby became a railroad corporation under the name of "The Searcy & West Point Railroad Company," and at the institution of this suit were thus owning and operating the road, having expended almost thirty thousand dollars in the extension and equipment of the same under the conditions of their contract of purchase.

The corporate authorities of the town of Searcy instituted this action in September, 1882, to annul the sale of the road to

the Yarnells, raising sundry issues of law affecting the validity of the sale and transfer of the road, and setting up the foregoing facts in support of its complaint, denying that the town ever assented to the sale, and alleging that W. A. Yarnell, by reason of his position and influence, gained an undue advantage over the town, and that the town was powerless to assert her rights until she did so.

1. CORPORATIONS: Their existence not assailable collaterally.

There is little controversy as to the facts in this case; the controversy is mainly upon the effect of admitted facts and the questions of law applicable thereto. The appellant denies that the town of Searcy, as the sole stockholder, assented to and authorized the sale, but we think it is fairly established that she did. And we apprehend that the denial is more upon the admissibility than upon the directions and strength of the evidence adduced. It goes without controversy that up to the time when the town of Searcy became a stockholder in the railroad company, every act had been done by the incorporators, stockholders and managers required by law to acquire corporate rights and powers, and it will scarcely be contended that the railroad company up to that time could not have lawfully entered upon private property against the will of the owner for the purpose of making the necessary surveys and location of its road, and that it could not have procured by judicial sentence a condemnation of private property for its right of way. It had become, in other words, a railroad corporation under the laws of the state, clothed with all the powers conferred by law upon such. This being so, all conditions precedent having been performed by the incorporators, it is simply out of all precedent for the appellant in a collateral proceeding like this, or in any other proceeding, to attempt to show that the corporation was a nullity, by showing that certain conditions subsequent had not been complied with. The existence of a corporation once formed, can only be called in question by a direct proceeding, and that, too, at the suit of the sovereign power—the state.

2. Breaches of conditions subsequent.

Nor are the breaches of conditions subsequent alleged by the appellant, such as a failure of the stockholders to pay up their subscription, the failure to hold elections to elect directors, and breaches of a similar character, sufficient grounds for the destruction of a corporate existence, even at the suit of the state, where the by-laws, and of course where the law, provides that the directors named in the charter shall serve until their successors are elected and qualified as provided by the laws of this state. *Mansf. Dig., sec. 5420; Comm. ex rel. Claghorn v. Cullen, 13 Penn. St., 133; Cahill v. Kalamazoo Mutual Ins. Co., 2 Douglass (Mich.), 124.*

3. Estoppel.

Moreover, the town of Searcy having dealt with the Searcy Branch Railroad Company as an ostensible corporation, whereby rights became vested, cannot be heard to plead its want of corporate character. *Oregon Ry. Co. v. Oregon Ry. & Nav. Co., 20 A. & E. Railroad Cases, 523.* Presumably to make the point that the railroad corporation had ceased to exist by abandonment, and consequently that the town of Searcy, the sole stockholder with paid up stock, was also the sole and exclusive owners of the railroad, the appellant's counsel contend, in argument, that her subscription to the capital stock of the railroad company, the issuance of her bonds and the levy and collection of taxes to redeem the same, were acts expressly authorized by an act of the general assembly approved July 23, 1868; admitting at the same time that laws providing for the carrying of such power into effect were wanting, unless the analogous laws applying to counties be called into requisition, which they say was done in this case.

It is difficult to see the point in this argument. Whether the town was expressly authorized to take stock or not is a question, it seems to us, that has little to do with the town's sole ownership of the road. At all events, the act approved July 23, 1868, was repealed by a subsequent act, once published in

the *Digest of Arkansas*, and more recently copied in *Gantt's Digest*, beginning at *Section 3194*, and including *Section 3202*.

4. Railroads must have five stockholders.

The indisputable fact is, that there never was a time in Arkansas since the adoption of the general incorporation laws, when railroad corporate rights could be possessed and exercised by one sole owner. There must be at least five owners, or there is no franchise to own. Nor does it mend the matter to say, that a corporation stockholder in another corporation, is of itself composed of many individuals, for as a stockholder it is but one person.

5. Sale by trustee to himself: Whether void or voidable.

The next question in order is, whether the sale to W. A. Yarnell and brother was void *per se*, because of his being one of the directors of the company until negotiations between himself and the other directors were already pending, and during which he resigned (the sole purpose of his resignation being to place himself in a position to make the purchase), or was it only voidable?

There is and there should be a distinction between the case of a sale to a sole trustee, and a case of a sale to several trustees. Even in the case of one trustee selling the property of his *cestui que trust* to himself, the rule seems to be, that such a sale is voidable, that is, void or not, according to the circumstances of the case.

Thus in *3 Waite's Actions, p. 468*, cited by the appellant's counsel in their brief, it is said: "But although a trustee cannot purchase of himself, he may, under special circumstances buy from the *cestui que trust* if the latter is *sui juris*."

If it be true that the town of Searcy, as the owner of a majority of the stock in the railroad company, advised, assented to, or afterwards by her acts ratified, the sale of the road to W. A. Yarnell, one of the directors of the company, and if the town of Searcy was at the time *sui juris*, could it be said that the sale was void under the rule quoted above? Again, in *Pickett v. School District No. 1, 25 Wis., 551*, also quoted by

appellant's counsel, it was held: That the contracts of directors made with one of their number are *voidable* in equity; meaning of course, that they are not absolutely void.

There may be isolated cases where sales of trust property by a trustee to himself have been treated as void absolutely, but the weight of authority is decidedly in support of the rule by which such sales generally are treated as voidable only, especially in equity.

6. CORPORATIONS: Power to sell corporate property.

It is contended by appellant that she had no power to dispose of her corporation property, and for that reason the sale of her interest, whatever it was, to the Yarnells, was null and void.

A municipal corporation may be the owner of two classes of property. One class includes all property essential to, or even convenient for, the proper exercise of municipal functions and corporate powers. The other class includes all property held for general convenience, pleasure or profit. It is needless to inquire into the extent of the rights and powers which a municipal corporation has in and over property of the first named of these classes. It may well be admitted that such an inquiry would involve grave doubts. But the Searcy Branch Railroad, and all its property and franchises, belonged to the second class, and our inquiry is solely as to that.

In *Bailey et al. v. Mayor, etc., of New York, 3 Hill, 531*, it was held that: "A municipal corporation, when in the exercise of franchises and the prosecution of works for its emolument or advantage, and in which the state in its sovereign capacity has no interest, is answerable as a private corporation, although such works may also be in the nature of 'great enterprises for the public good,' and 'powers granted exclusively for public purposes belonging to the corporation in its public, political or municipal character.' Powers granted for private advantages, though the public may also derive benefit therefrom, are to be regarded as exercised by the municipality as a private corporation;"

and "municipal corporations in their private character, as owners or occupiers of property, are regarded as individuals." We quote from the syllabus of the case, which seems to be a correct epitome of the opinion.

The same distinction is made, and the same rule announced in *Lloyd v. Mayor, etc., of New York, 5 N. Y. (1 Selden), 369.*

Again, if the power to dispose of her property was nowhere expressly granted to the town of Searcy, it is equally true that it was nowhere expressly withheld, and such disposal nowhere prohibited. The question, therefore, is merely a question of a bare want of power.

7. SAME:—Estoppel: *Ultra vires.*

The contract of sale being otherwise fair and lawful, both parties having performed their respective parts, the plea of "*ultra vires*" cannot and ought not in equity and good conscience to avail anything. See *Hitchcock v. Galveston, 96 U. S., 341;* and *Union National Bank, v. Matthews, 98 U. S., 621.*

8. Power of stockholders to sell.

Again, it is contended, that the company, even by a vote or assent of stockholders, otherwise expressed, could not sell the road with the franchise. It is true that not even a majority of the stockholders in number or amount, or both, can sell the property of the company against the wishes of the minority, and thus defeat the object for which the corporation was formed; and it may be true that the franchise may not be sold at all, and yet the directors, by unanimous vote of the stockholders, can sell all the other property of the corporation, under the theory that one may at all times sell his own, and thus the incorporators may denude themselves of all power and ability to exercise the right of the franchise; and they cannot avoid the consequences of their acts by setting up the inalienable character of the franchise right. The state alone has such an interest in that, as will enable her to sue for its recovery back to herself, not to the appellant. Again, the mere vehicle of conveyance of title to the road from the company to the Yarnells is objected to, as not being in conformity to the

9. Power to sell franchise.

laws of the state insuring perpetual succession in incorporations. This objection is not good, because the stockholders having unanimously parted with all they could part with, there is no one left to claim the succession, and consequently no one left who is in a situation to be heard on such a plea. Besides, the objection is a weak one, even in the minds of appellant's counsel. Why not treat the deed in this case as an equitable assignment of the stock, as suggested by appellant's counsel? It is that if nothing more. Moreover, if there was no other objection to the sale than the mere shape of the instrument by which the title was sought to be transmitted from the company to the Yarnells, this court, on proper application, in furtherance of justice and right, would compel the transfer to be made in proper form, under the rule that what should have been done the court will compel to be done.

We have thus disposed of the merely legal objections to the sale. Some of these would be unavailable as objections in any case, and all of them are unavailable when relied on by one occupying the relative position of the appellant in this case. The facts of the case may be disposed of more briefly.

Granting for the sake of argument, that his fiduciary relation did not cease by reason of his resignation as one of the directors of the company; and yet the evidence in the case fails to sustain the charge that William A. Yarnell, while in this trust relation, and by reason of the same, so managed, or assisted in managing the affairs of the company, as to compel a sale of the road to himself, and to his advantage.

All the testimony adduced tends to show that the wooden tramway, in obedience to natural laws, at the end of four or five years from its construction, was so rapidly going into total decay, that early in the year 1877, the company, the town council, the citizens of Searcy and all persons interested, plainly saw that some disposition of the road must be made, other than renting or leasing it as had been the practice. Un-

der the then existing laws, the town of Searcy, as a corporation, was powerless to render pecuniary aid or grant relief in any way. All seemed to regard a sale of the road as the only way out of the difficulty; the only remedy against the impending ruin. A sale was sought by various methods to be made, to all who might desire to purchase, and finally, when no one else would undertake it, the Yarnells made the purchase upon substantially the same terms as had been repeatedly offered to all others. The original object of the town was to secure connection with the Cairo & Fulton Railroad, for her citizens' profit and convenience; and in the prosecution of this object, and to gain an end so desirable, the town had expended about eighteen thousand dollars. In the course of time the keeping up of the road began to promise a greater outlay than the town was able to make; her management and control of it, always awkward, inconvenient and embarrassing, had now become impracticable; the usual fears of monopolizing demands on the part of the Cairo & Fulton road began to seize the minds of the people, begetting the idea of extending the tap road to West Point, the head of steamboat navigation on Little Red river, so as to destroy or prevent the apprehended monopoly. A sale of the road was not only desired but was inevitable. To carry out the original design, keep up a connection between the town and the Cairo & Fulton road, to substitute steam for horse-power, and to extend the connection to West Point in answer to the demand of the citizens, and by the payment of the sum of five hundred dollars in addition, the Yarnells became the purchasers of the road; and the evidence goes to show, literally complied with their obligations, and in doing so, expended about the sum of thirty thousand dollars. This certainly was not such a want of consideration, such an inadequate consideration, as will cast a shadow of suspicion upon their dealings; certainly not such as would invalidate the sale.

Finally, the town of Searcy—having authorized and made the sale through her acknowledged agents; having stood by

and seen, without warning or objection, the appellees expend their time, labor and means in carrying out their part of the contract, and having waited for a period of nearly five years in apparent acquiescence; when at length the affairs of the road, perhaps under the judicious management of her enterprising citizens (the appellees) had assumed the airs of thrift and prosperity—instituted this action to recover back from them that which she had sold to them, and for which they had paid her such a price. It is not the odious plea of the statute of limitations that is interposed against the appellant's claim. It is a plea of estoppel—a plea that has for its object the assertion of the principle that one is not to be permitted to profit by his own wrong, or to possess himself as his own of the proceeds of another's labor, which he has caused him to expend. The appellant waited until she was no longer able to put the appellees in *statu quo*, if indeed she ever was; and worse still, she does not even offer to do so. There is not equity in a bill which seeks and does not offer to do equity; nor is there equity in the case of a complainant who deliberately waits until he is no longer able to do equity, and then brings his suit demanding equity. Such is the nature of the case under consideration, as it appears to us.

The decree of the White county circuit court in chancery is therefore affirmed at the costs of the appellant.

TILLAR V. CLEVELAND.

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1. USURY: *Shift for.*

Cleveland asked of Tillar the loan of $270 to buy a town lot, offering to pay interest on it at ten per cent. per annum. Tillar replied that his money was worth more to him than ten per cent., and proposed to take the deed for the lot to himself, and to convey to Cleveland upon his paying rent at $30 per month for twelve months. Thls was agreed to, and the deed was executed by the

seller to Tillar; Cleveland executed twelve notes for $30 each, and Tillar executed bond to convey the lot upon payment of the notes; and Cleveland also executed a deed of trust upon the lot to secure their payment. Afterwards, to a bill in equity by Tillar to foreclose the trust, Cleveland by cross-bill set up the above facts, and offered to pay the $270 and lawful interest, and demanded a deed. Held: That the transaction was a shift for usury, and that Cleveland was entitled to the deed upon payment of the $270 and six per cent interest.

2. SAME: *Evidence.*

Parol evidence is admissible to show that a written contract for land was a cloak for usury.

3. HUSBAND AND WIFE: *Title bond to wife.*

When a bond is executed by the vendor for conveyance of land to a wife upon payment of purchase notes executed by her and her husband. and she afterwards dies, the husband can not upon payment of the notes take title to the land to himself. It belongs to the heir of the wife.

4. PRACTICE IN SUPREME COURT: *Infant's appeal.*

This court will protect the rights of infants, though they have not appealed from the decree of the chancellor to their prejudice.

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

McCain & Crawford for Appellant.

1. There was no usury in the transaction. Tillar bought the lot, and sold it to Cleveland at a profit.

2. It was error to admit parol testimony to prove that Harding sold the land to Cleveland instead of Tillar.

3. The court erred in requiring the deed to be made to Cleveland instead of the child. Mrs. Cleveland held the bond for title, and on her death the land descended to her heir.

4. The court could not change the contract and then enforce it. *Waterman on Spec. Perf., sec. 147 note 4.* As Tillar purchased in his own name and with his own money, he could not be held as a trustee for Cleveland. *Reed Stat. Frauds, sec. 822.* See also *32 Ark., 358; Dumphy v. Ryan, 116 U. S., 491.*

N. T. White for Appellee.

1. The entire transaction was a mere cover for usury. *18 Ark., 369.*

2. Parol evidence is admissible to impeach the consideration of a deed, mortgage, deed of trust or promissory note for usury. *7 Ark., 146; 11 Id., 16; 36 Id., 248.* See also *Tyler on Usury, pp. 300–1; Ib., 469; 1 Gray, 431; 8 Wend., 554; 9 Cow., 65; 13 Wend., 570; 12 Barb., 360; 3 Parsons Cont., pp. 108–115; 9 Peters, 418; 12 Ohio, 544; 7 Paige, 615; 4 Hill, 255; 11 Ala., 236; 3 Green, N. J., 255; 27 Miss., 801; Reed Stat. Frauds, sec. 1121.*

3. If it was error to decree that the deed should be made to Cleveland instead of the child, it was not prejudicial to appellant.

4. It was equitable and just to first purge the contract of usury and then enforce it. *18 Ark., 369.*

SMITH, J. It appears from the pleadings and proofs in this case that Cleveland, a clerk in a store of which Tillar was one of the proprietors, had made a parol bargain with the owner for the purchase of a lot in Fine Bluff, upon which stood an unfinished dwelling-house. The price of the lot was $150, and it was estimated that $120 would be required to complete the house. And Cleveland applied to Tillar to borrow these several sums, offering security and the payment of the highest rate of legal interest. Tillar replied that his money was worth more than ten per cent. per annum, but proposed to advance the necessary sum, provided the legal title was conveyed directly to himself, and Cleveland would agree to pay rent for twelve months at the rate of $30 a month; after which he would reconvey to Cleveland or his wife. These terms Cleveland was forced by his necessities to accept. He drew the

money from the book-keeper of the establishment, paid the purchase price, and expended the remainder in the improvement of the property. The lot was conveyed to Tillar, the seller not examining the deed, but supposing all the time that Cleveland was the grantee named therein. Promissory notes were made by Cleveland and wife for the monthly installments of so-called rent; and Tillar agreed and bound himself in writing to make a deed to Mrs. Cleveland when the last of the notes should be paid. The Clevelands went into possession; but the wife soon afterwards died intestate, leaving an infant daughter as her sole heir. Cleveland then surrendered the bond for title which his wife had held to Tillar, received a new bond to himself as obligee, and executed a deed of trust upon the lot to secure the payment of the outstanding notes and also of another debt which he had incurred to Tillar. This last-mentioned debt had been discharged before the commencement of the present suit; and partial payments had been made on the original indebtedness.

Tillar now filed his bill to foreclose this deed of trust, but afterwards amended his bill, setting out the entire transactions between the parties and asking for a decree for the balance due on the notes. Cleveland pleaded usury, alleging that he, and not Tillar, was the purchaser from the former owner; that he had borrowed money from Tillar, and that the conveyance to Tillar was contrived merely as security for the loan and the usurious interest. He made his answer a cross-bill, offered to pay the balance of principal due on the notes, with lawful interest, and demanded a reconveyance. Mrs. Cleveland's infant child was made a party to the bill; and her guardian *ad litem* adopted the answer and cross-bill of her father and co-defendant. Tillar replied to the cross-bill, combating the theory of a loan and security, and contending that the transaction was a purchase in good faith by himself and a re-sale to Mrs. Cleveland at an advance.

The court found that the contract upon which the plaintiff sued was tainted with usury, and it therefore dismissed his bill. But upon the cross-bill it proceeded to decree that Cleveland pay into court the principal sum, with interest at the rate of six per cent. per annum, that was admitted to be due; that this be paid over to Tillar, and thereupon the quit-claim executed by Tillar to Cleveland and tendered with the bill be delivered.

The most material inquiry is a question of fact: Were the alleged contracts of purchase and of resale a mere cover for a loan? Our constitutional provision and statute against usury were never designed to interfere with the ordinary transactions of buying and selling, nor to regulate the amount of profit which might be legitimately made in the course of trading either upon lands or chattels. But they do avoid all agreements for a greater profit in the nature of interest than is allowed by law for the loan of money or forbearance of a debt. This is illustrated by the case of *Ford v. Hancock, 36 Ark., 248*, where one who had agreed to lend another money at usurious interest to buy corn, afterwards sold him instead, corn on a credit at a price sufficiently above its cash value to cover the agreed interest.

There is a decided preponderance of testimony to support the conclusion arrived at by the court below. A treaty for a loan had been pending between the parties. Tillar had never seen the lot, although it was situate in the same town in which he was carrying on business. He had no acquaintance with the owner, and it is doubtful whether he ever had an interview with him, although he thinks he held a conversation with him about the state of the title just prior to the consummation of the trade. But his memory about the whole affair is quite indistinct. In fact, he recollects nothing positively except that he was to make a profit of $90 by the transaction. A profit upon what? Evidently for the use of his money. For the

designation of the installments, by which he was to be repaid, by the name of rents instead of purchase money, indicates that he considered the Clevelands as the real purchasers.

An objection was taken to the admission of parol evidence to prove the sale of the land to Cleveland and not to Tillar, because it seemed to contradict or vary the written contract. A wide latitude has always been indulged by the courts in the proof of circumstances tending to show that a security, apparently unobjectionable, is void for usury. It would be strange if, upon the trial of such an issue, a court could not hear proof of all matters which throw light upon the situation and conduct of the parties and the motives which influenced them. Chief Justice Marshall, in *Scott v. Lloyd, 9 Peters, 446,* speaking of the purchase of an annuity, or rent-charge, which was alleged to be a cloak for usury, uses this language:

"Yet it is apparent that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity for disregarding the form, and examining into the real nature, of the transaction. If that be in fact a loan, no shift or device will protect it."

In courts of equity it is permitted to show that an instrument, absolute on its face, was intended as a mortgage. This is in reality all that is done here.

The court correctly refused its assistance to Tillar in carrying out his illegal contract. Yet, as Cleveland sought affirmative relief, it was proper to impose the usual terms upon which chancery interferes in such cases, viz., that the borrower should pay what he justly owes after deducting the usurious interest. *1 Story Eq. Jur., sec. 301; Ruddell v. Amber, 18 Ark., 369; Pickett v. Merch. Natl. Bank, 32 Id., 346; Anthony v. Lawson, 34 Id., 628; Grider v. Driver, 46 Id., 50.*

It was an error, however, to decree that Tillar should convey to Cleveland, instead of the child. Mrs. Cleveland was, in

her lifetime, the equitable owner of the lot, and at her death her estate descended to her heir. The father could not, by any arrangement entered into with the holder of the legal title, appropriate the property of his minor child.

We do not commonly correct errors committed against parties who have not appealed. But the chancellor is the guardian of all infants, whose rights are drawn in question before him; and it is our duty to see that they are protected.

The decree is affirmed, with this modification—that the conveyance be made to Mrs. Cleveland's infant child; and for this purpose the cause is remanded. As the error was in no way prejudicial to Tillar, the modification will not affect the costs of this court, which must be adjudged against Tillar.

MORRIS, ADM., v. HAM.

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1. VENDOR'S LIEN: *Passes with note.*

A vendor's lien for the purchase money, when reserved in his deed, passes to any holder of the purchase money note, whether transferred before or after maturity, or upon a new or old consideration.

2. VENDOR AND PURCHASER: *Defects in title.*

In the absence of fraud, a purchaser who has been let into possession under a deed, cannot, without eviction, either actual or constructive, controvert his vendor's title, nor defend against payments of the purchase money on account of defects of title; but in a suit to foreclose the vendor's lien, he may have credit for amounts necessarily paid to perfect the title.

APPEAL from *Drew* Circuit Court in Chancery.
Hon. JOHN M. BRADLEY, Circuit Judge.

J. M. & J. G. Taylor for Appellants.

In the absence of fraud, appellee having obtained possession under her deed, and there being no eviction, she cannot controvert the title of the vendor or refuse to pay the purchase price. *16 Ark., 288; 21 Id., 585; 23 Id., 201; 38 Id., 200; 98 U. S., 56.* She must rely on the covenants in her deed, even though they are worthless, or the vendor insolvent. *50 Mo., 252; Id., 511.* A vendee in possession cannot refuse payment of purchase money, on suggestion of a defect or failure of title. *22 Ark., 435; 2 Johns. Ch., 519.* As to the one hundred and sixty acres, it was her duty to perfect her title as cheaply as possible, and she would be entitled to reimbursement for the amount expended. This Prewett tendered her. *12 Peters, 295; 1 Hem, 529; 2 Story Eq., sec., 1219; 23 Ark., 729; 12 How., 24.*

Wells & Williamson for Appellee.

The evidence shows that one hundred and sixty acres of the land were the property of the state, and that Prewett had not afterwards acquired title to same, and she had the right to resist payment notwithstanding her possession. As to the fraud, see *30 Ark., 535, and cases cited.* As to the one hundred and sixty acres, no limitation could run, nor could eviction be had, hence eviction need not be pleaded or proved. *32 Ark., p. 715; 38 Id., 127; 6 Watts Act. and Def., p. 452; 3 Wash. Real Pr., p. 159, sec. 41; 8 Ark., 368; 17 Id., 228–254.*

SMITH, J. Thomas E. Prewett sold and conveyed to Mrs. Ham, in the year 1876, seven hundred acres of land, lying in Drew county, Arkansas, for $3500. The trade was negotiated by the husband of Mrs. Ham, who paid the consideration in cash, personal property and real estate situate in Tennessee, where the parties all resided, except $1400, which was divided into three equal installments, evidenced by promissory notes signed by husband and wife. For the deferred payments a

lien was reserved in the deed. The first of these notes was paid. Upon the second, partial payments have been made. The third was indorsed to C. V. Prewett, whose administrator filed this bill against Mrs. Ham, her husband being now dead, to subject the land to its payment. It was alleged to have come to the hands of her intestate for value before maturity.

Mrs. Ham, in her answer and cross-bill, denies this allegation, asserting that the assignment was after the paper had matured and was made as collateral security for a pre-existing debt, no new consideration having passed. And she set up a failure of title to two hundred acres of the land, denying that her vendor was seized at the time of sale, or has since acquired title thereto; and alleging that the state was owner of a part, and one Hill of the remainder, of these two hundred acres. Thomas E. Prewett was made a defendant to the cross-bill, and it was alleged that he, being a near relative and physician of Ham, had imposed upon him by misrepresentations as to the title, character and value of the lands; that Ham, having no opportunity to examine the lands, had relied upon these representations, and that he was, besides, in such feeble health, and his mind so much impaired, as to be incapable of transacting business. And the prayer of the cross-bill was that the two outstanding purchase notes be canceled, and that she have judgment over against Thomas E. Prewett for damages on account of his fraud and deceit practiced in the sale of the land.

These allegations were specifically denied in the answers of the defendants to the cross-bill; and Thomas E. Prewett produced the note still held by him and prayed for foreclosure of his lien also. In a supplemental pleading, which he offered but was not permitted to file, he stated that he had since discovered that the entry of one hundred and sixty acres of the land by the person under whom he claimed, had been afterwards set aside by the general land office at Washington, on account of its conflict with a previous selection by the state as

part of the swamp land grant, and that he had immediately applied to the commissioner of state lands to purchase the tract, which would have enured to the benefit of Mrs. Ham; but that she, as the last assignee of the original enterer, and by virtue of her possession and occupancy, which she had obtained through the sale by Prewett, claimed and was awarded a preference right to purchase. He therefore offered to refund to her the amount she had expended in perfecting the title.

The circuit court decreed the cancellation of the two purchase notes, and gave judgment against Thomas E. Prewett for $284.17.

It is immaterial whether the note held by C. V. Prewett's administrator was indorsed before or after maturity, and whether the consideration for such indorsement was anterior or new. The lien retained by the vendor's conveyance was available to any holder of the note, unless Mrs. Ham can show some valid reason why the same should not be enforced. *Mansf. Dig., sec. 474.*

We may dismiss from consideration all attempts to impugn the contract of sale for fraud and imposition. The proofs show that Ham was old, a sufferer from dyspepsia, and that he sometimes used morphine to assuage his sufferings. But there is no cause to believe that his mind was affected. He was acquainted with the quality and situation of the lands, having visited and inspected them long before the trade was effected; and as late as 1880, after his death, and after she had been in actual possession for several years, Mrs. Ham appears to have been content with her bargain, for she declined to rescind it.

Now, in the absence of fraud, Mrs. Ham, having been let into possession under a deed, and never having suffered eviction, either actual or constructive, cannot controvert her vendor's title, nor defend against payment of the purchase money, on account of defects therein, real or supposed. She is remitted to the covenants in her deed. This principle has been so

frequently decided that it is only necessary to refer to a few of the cases. *Hoppes v. Cheek, 21 Ark., 585; Crowell v. Packard, 35 Id., 348; Peters v. Bowman, 98 U. S., 56; Noonan v. Lee, 2 Black, 499.*

The application of this rule works no hardship in the present instance. The record shows that Hill, in whom a paramount title to forty acres of the land was alleged to be outstanding, had previously conveyed to Prewett by a deed which, though unacknowledged, was operative to pass the title. And as to the one hundred and sixty acres purchased bv Mrs. Ham of the state, all that she can equitably claim is to have the amount paid therefor deducted from the unpaid purchase money. *Brooks v. Isbell, 22 Ark., 488; Pintard v. Goodloe, Hempst., 502,* affirmed under the name of *Thredgill v. Pintard, 12 Howard, 24; Galloway v. Finley, 12 Peters, 264; Bush v. Marshall, 6 How., 291.*

The decree is reversed and cause remanded, with directions to the court below to enter a decree in favor of Thomas E. Prewett for the balance due on the note still held by him, after deducting the credits indorsed thereon and the expenses incurred by Mrs. Ham in perfecting the title to the tract of one hundred and sixty acres; and a further decree in favor of the administrator of C. V. Prewett for the principal and interest on the other note.

DRIVER, ADM., V. EVANS, GUARDIAN.

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74	206
f76	403
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47	297
78	13
80	522

1. INFANTS: *Pleading and practice.*

The rights of an infant can not be judicially affected except upon proper pleadings and proof. A guardian cannot admit anything prejudicial to his interest.

2. SWAMP LANDS: *Evidence of entry.*

The purchase of swamp land from the state can be proved only by the certificate or deed of purchase, or, in their absence, by certified transcript of the records

and official documents of the proper land office. The certificate of the state land commissioner of what the records in his office show is not admissible.

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

O. P. Lyles for Appellant.

If the land was in fact swamp and overflowed, and of this the evidence is conclusive, the title to the land passed to the state by virtue of the Act of 1850. *24 Ark., 444; 33 Id., 833; 36 Id., 334.*

The Sawyer receipt and the Smithee certificate, with the evidence of the witnesses, that Stewart entered the land and was in possession at the time of his death, was sufficient even in ejectment. *33 Ark., 335.*

U. M. & G. B. Rose and *John C. Palmer* for Appellees.

The Sawyer receipt and Smithee's certificate are not competent evidence. *Mansf. Dig., sec. 2833; Greenl. Ev., vol. 1, sec. 498; 1 Whart. Ev., sec. 120; 33 Ark., 833.*

The patent of the United States is conclusive, unless overthrown by clear testimony. *93 U. S., 169; 39 Ark., 121; 33 Id., 833.*

BATTLE, J. This is a suit in chancery to impeach the validity of a patent issued by the United States to James H. Cannon for certain land in Mississippi county. Plaintiff alleges, substantially, in his complaint, that this land was a part of the swamp and overflowed lands granted to this state by an act of congress, approved the 28th day of September, 1850; that his intestate, James Stewart, purchased it from the state on the 16th day of December, 1851; that the state of Arkansas selected and reported it as swamp land on the 20th day of January,

1860; that James H. Cannon entered it, in the land office of the United States, on the 4th day of November, 1872, as a homestead, under the act of congress entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862; that it was conveyed by the United States to James H. Cannon, by patent, on the first day of June, 1875; and asks that the patent be set aside and defendant be restrained by injunction from holding or claiming the land under the patent, and for general relief.

James H. Cannon was the defendant in this action at its commencement. He died during its pendency, and it was revived against his heirs. They are minors, and defend by a guardian *ad litem*, who answered the above mentioned complaint for them, it having never been answered by Cannon.

At the hearing of this action, plaintiff introduced as evidence, what purports to be a receipt of William W. Sawyer to James Stewart, for a certificate of purchase of the land in question, signed by John C. O. Smith, land agent for the Helena district, and dated the 22d day of July, 1859, and a certificate of J. N. Smithee, commissioner of state lands for the state of Arkansas, certifying that, according to the records and official documents in his office, it appeared the land in question was selected and reported as swamp and overflowed land by the State of Arkansas, on the 20th day of January, 1860; that James Stewart purchased it from the "old board of swamp land commissioners," on the 16th day of December, 1851, and that afterwards, on the 22d day of July, 1859, a "holding certificate, No. 205," was issued to him for it, and that this certificate is still outstanding. No other evidence was introduced to prove that James Stewart ever acquired from the state any interest in this land. Much evidence was introduced to prove the character of the land as to its being wet and unfit for cultivation.

A decree was rendered by the court below in favor of defendants, dismissing the action, and plaintiff appealed.

I. INFANTS:—Not prejudiced by bad pleading

The defendants being infants their rights could not be judicially affected, except upon proper issues and proof. Their guardian *ad litem* had no authority to admit anything prejudicial to their interest; the statutes made it her duty to deny every allegation of the complaint prejudicial to them. The statutes of the state and the denials contained in defendant's answer, therefore made it necessary for plaintiff to prove every material allegation of his complaint. *Mansf. Dig., secs. 4957, 5042; Evans, Guardian v. Davies, Admr., 39 Ark., 235.*

2. Swamp lands.

In order for plaintiff to maintain this action, it was necessary for him to prove by competent evidence that his intestate, James Stewart, purchased the land in question from the state, and thereby became entitled to whatever interest she had in the land, if any. It is unnecessary to decide what interest that was. That question does not arise here and is not considered. If this land was a part of the swamp and overflowed lands granted by congress to the state, and the state never sold or disposed of it, the state alone is competent to impeach the title of defendants, or to complain of any disposition made of it by the United States. *Branch v. Mitchell, 24 Ark., 441; Bohall v. Dilla, 114 U. S., 47; Lee v. Johnson, 116 U. S., 48; Sparks v. Pierce, 115 U. S., 408.*

Evidence of entry.

Plaintiff totally failed to prove that James Stewart purchased the land in question from the state. The receipt of Sawyer and certificate of Smithee were not competent evidence. The receipt was not sufficient to show the existence of a certificate of purchase, nor the certificate of Smithee to prove the contents of the records and official documents in the office of the land commissioner. The proper evidence in the last case, in the absence of the originals, is a copy of the record and official documents duly authenticated. *1 Greenleaf on Evidence, secs. 482, 484, 498.*

Decree affirmed.

MILLINGTON V. HILL, FONTAINE & CO.

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47 301
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47 301
59 258
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47 301
67 328

1. FRAUDULENT CONVEYANCE: *How far good.*

A conveyance to defraud creditors is good as between the parties and their privies, but may be avoided by creditors of the grantor. If they condone the fraud the conveyance will stand against all comers.

2. SAME: *Estoppel of creditor.*

If a creditor of a fraudulent grantor, with knowledge of the fraud, accepts from the grantee the purchase price agreed to be paid for the land, he thereby affirms the sale and waives the right to complain of the fraud.

3. SAME: *Fraudulent grantee without remedy.*

A party bargaining with a debtor with fraudulent intent, does so at the peril of having that which he receives taken from him by the creditors of the debtor whom he is attempting to defraud, without having any remedy to recover what he parts with in carrying out the bargain.

4. ESTOPPEL: *Vendee and mortgagee.*

A purchaser of land who assumes to pay a prior mortgage on it as part of the purchase price is estopped to question the validity of the mortgage for any cause.

5. STATUTE OF LIMITATIONS: *In suits for legacies.*

The rule that the statute of limitations will not bar a suit for a legacy, applies only when the suit is against an executor or another who is charged by the will with an expressed trust in relation to the legacy.

6. SAME: *In equity.*

The statute of limitations is as binding in equity as at law.

7. SAME: *Legacy charged on land.*

The acceptance of a devise binds the devisee personally for the payment of a legacy charged upon the devise. But the obligation is an implied one, not in writing, and an action on it is barred by the statute of limitations of three years.

8. SAME: *Tacking disabilities.*

A married woman cannot tack her coverture to her infancy to avoid the statute of limitations. She must sue within the period allowed by law after coming of age, or be barred, whether married or unmarried.

APPEAL from *Desha* Circuit Court in Chancery.
Hon. JOHN A. WILLIAMS, Circuit Judge.

W. M. Randolph for Appellant.

1. There is no evidence showing the conveyance by Bolton to be fraudulent, certainly none such as required by the rules in *18 Ark., 123, 138, 141, etc.*

There can be no escape from the proposition that the decree in Galbreath's suit in Tennessee has established the validity of the sale of the land by Seth W. Bolton to Mrs. Millington. *Doe v. Oliver, 2 Smith's Leading Cases, top pp. 787, 788, 795, 796, (6 Am. ed., pp. 667, 668); Edwards v. Stewart, 15 Barbour, 67; Bellinger v. Craigue, 31 Barbour, 534; Stevens v. Miller, 13 Gray, 283; Regina v. Hartington, 4 Ellis & Bl., 788, 794, etc.*

2. Galbreath is estopped from pursuing the land or denying Mrs. Millington's title to it, because he has collected and had the benefit of the money she paid for it. *5 Ala. (N. S.), 316; 2 Minn., 291.*

The same principle is decided in *Rennick v. The Bank of Chillicothe, 8 Ohio (Hammond), p. 530; Okie v. Kelly, 12 Penn. St. (2 Jones), 323; Rapalee v. Stewart, 27 N. Y., 310,* and many other cases.

And see generally on the question *Fitch v. Baldwin, 17 Johnson, 161; Rodermund v. Clark, 46 N. Y., 354; Tuite v. Stevens, 98 Mass., 305.*

3. Mrs. Millington is subrogated to the position of Galbreath to the extent to which she has paid his debt, and upon all the authorities, as her money has gone to pay Galbreath's debt against Bolton, which she never owed, she is entitled to the benefit of this present suit of Galbreath's, and to have her money repaid her out of the proceeds of the sale of the land Galbreath is pursuing. *2 Brock. (C. C.), 168; 6 Wall., 299; 57 Miss., 548; 66 N. Y., 363; 11 Wis., 380; 55 Cal., 31; 96 Ill., 224.*

4. The mortgages to Hill, Fontaine & Co., were void for usury in their inception, *41 Ark., 331,* and Mrs. Millington can set up this plea. *4 Peters, 229, 230; Ib., 205; 35 Ark., 217.*

L. Leatherman also for Appellant.

Creditor must show judgment, execution, and return *nulla bona. 11 Ark., 718; 12 Ark., 387; 18 Ark., 589.*

Simply showing outstanding indebtedness, the insolvency of the debtor, and that he intended to defraud, hinder or delay his creditors, is not sufficient unless it is shown that the purchaser participated in the fraudulent design. *Bump. on Fraud. Con., p. 194; Galbreath, Stewart & Co. v. Cook and wife, 30 Ark., 417; Kelly on Cont. of Married Women, top p. 146.*

The purchaser must knowingly participate with a view of aiding the debtor in his purpose of defrauding his creditors. *41 Ark., 325; Rob. on Fraud. Con., 520, 527; 101 U. S. Rep., 499; 104 U. S. Rep., 77.*

A conveyance is not necessarily fraudulent because its effect is to hinder and delay creditors. It must be made for that purpose, and the grantee must be privy to the fraudulent design. *Splawn v. Martin, 17 Ark., 152; 18 Ark., 123, 124.*

Presumptions and circumstances of fraud are expelled by proof of fair consideration. Fraud is never presumed, but must be proven. Circumstances of mere suspicion leading to no certain result are not sufficient proof of fraud. *Daniel & Straus v. Vaccaro, 41 Ark., 325; Bump. on Fraud. Con., (2d), p. 584.*

Accepting deed by Mrs. Millington from S. W. Bolton does not estop her from setting up usury and any other valid defense against the Carder debt. *30 Ark., 393; 52 Penn. St., 400; Hilliard on Vendors, 55.*

Chancellor erred in sustaining the demurrer to the plea of usury. If usurious, the note of Bolton to Carder is absolutely void under *Constitution of 1874, art. 19, sec. 13. German Bank v. Deshon, 41 Ark., —; 2 Yer. (Tenn.), 350; Ford v. Hancock, 36 Ark., 252; 32 Ark., 362, 365; 3 Johns. Ch. Rep., 206, 9 Id., 197.*

Where part is usurious all is void—the note as well as the trust deed securing it. *Marks v. McGehee, 35 Ark., 217; 56 Barb., 430; 24 Iowa, 441; 2 N. H., 333.* A subsequent security, given for a loan originally usurious, however remote or often renewed, is void. *3 How. (U. S,), 62; 54 Ga., 554; 3 N. Y. (6 Tiff.), 55; 9 Iowa, 354.* If a promissory note be made on a usurious contract, it will be void, even in the hands of a *bona fide* holder for a valuable consideration. *4 Mass., 156; 2 Bag., 23; 8 Conn., 669; 2 N. H., 410.* One agreeing to pay, or give new security for, the usurious note of another, may avoid it for original usury. *35 Barb., 96; 12 Iowa, 364.*

The law of Tennessee does not govern this contract though made in Tennessee. The land is in Arkansas, and the law of this state should prevail. *1 Jones on Mort., 661; 10 Mass., 430, 21; 24 Iowa, 9; 6 Hill, 93; 41 Ark., 419.*

She should be subrogated to the purchase of Galbreath's judgment, or be entitled to assignment of the judgment as a resulting trust, and in either case to have the remainder of the proceeds of the acceptances, over and above the amount paid for Galbreath's judgment, to-wit, $282.60, credited on the Bolton debt to Hill, Fontaine & Co. *15 Am. Dec., 553; 43 Am. Dec., 562.*

Her part of the legacy has not been paid, nor barred by the statute of limitations. She was a minor at the death of her father, the testator; married before she became of lawful age, and is yet married; at no time *sui juris.*

The land stands as a security for the amount paid on it by Mrs. Millington. *3 Coop. Chy., 711; Bump. Fr. Conv., 590; 6 Wall., 299; 18 U. S., 686; 1 Johns. Chy., 478; 3 Ohio St., 246; Rob. on Fr. Con., 520, 527; 3 B. Mon., 50.*

Bigelow & Hill for Appellees.

The evidence fully establishes the fact that the conveyance was fraudulent. But it is said, that as matter of law, it must be

shown that the grantee participated in the fraud, or at least knew of the grantor's fraudulent design. We submit to the court—

1. That this question has been distinctly and finally decided by the supreme court of Tennessee, in the case of *Galbreath v. Bolton, Millington, et al.*, and is *res adjudicata.*

2. If, however, the question should be opened to inquiry by this court, we submit that the proof is clear and abundant to show that Wade Millington did have notice of, and did participate in, the fraudulent design of Seth W. Bolton, when she accepted the deed from him.

The conveyance of the land being fraudulent as to creditors, and the fraudulent design having been participated in by the grantee, Mrs. Millington, the creditors so defrauded can follow the land, and the consideration paid where one has been paid, and a court of equity will not aid a fraudulent vendee in recovering back the purchase money any more than a court of law. Equity will only aid such a vendee where there has been no active fraud on his or her part. Galbreath had a right, therefore, to go for both the lands fraudulently conveyed and for the consideration actually paid, until his debt was fully satisfied. *R. R. Co. v. Sonter, 13 Wall., 517; Bean v. Smith, 2 Mason, 252, 298; Pettus v. Smith, 4 Rich. Eq., 197; Strike v. McDonald, 2 Har. & G., 191; Strike's case, 1 Bland, 57, 80; Williamson v. Goodwyn, 9 Gratt., 503; Brooks v. Caughran, 3 Head, 464.*

The court properly sustained the demurrer to Mrs. M.'s plea of usury in the debts secured by the mortgages to Hill, F., & Co. The plea of usury is personal, and does not extend to strangers collaterally affected. See *6 Lea, 346, 347; 32 Ark., 346; Nance v. Gregory et al., 6 Lea, 343; Sellers v. Botsford, 11 Mich., 59; Bank v. Rineud, 1 Mich., 84; Spaulding v. Davis, 51 Vt., 79; Conover v. Hobart, 24 N. J. Eq., 120; Bridge v. Hof-*

fard, 15 Mass., 103; Reading v. Weston, 7 Conn., 413; Stephens v. Munn, 8 Ind., 352; Pickett v. The N. Bank, 32 Ark., 346.

The legacy was a bequest upon a condition subsequent, and the right of action for the money was in the executor and not in the persons to whom this money was to be distributed under the will.

Any suit is barred by the statute of limitations, as appears upon the face of the cross-bill.

The devise of the land and acceptance by the devisee, upon condition that he pay a stipulated sum, creates a personal liability on the part of the devisee, upon which an action at law can be maintained without an express promise. *Gridley v. Gridley, 24 N. Y., 130; Spraker v. Van Alstine, 18 Wend., 200; McLochlan v. McLochlan, 9 Page, 534; Lord v. Lord, 22 Conn., 595; Parish v. Whitney, 3 Gray, 516; Redf. on Wills, part 2, p. 686, sec. 50.* This sort of devise does not create any charge on the land.

COCKRILL, C. J. This appeal grows out of the successful effort of certain judgment and mortgage creditors of Seth W. Bolton to subject a plantation in Desha county, which he had conveyed to his sister, Mrs. Millington, to the payment of their respective claims. The suit was begun by a creditor's bill filed by W. B. Galbreath, a judgment creditor, to which the other judgment and mortgage creditors, Mrs. Millington and her husband, and the administrator of S. W. Bolton, were made parties. Cross-bills were filed by the defendant creditors to settle the priorities of their liens, and by Mrs. Millington to assert the priority over all, of her claims. The plantation was unoccupied and not in cultivation when the bill was filed, and a receiver was appointed by the court to lease the place and collect the rents. Upon the hearing, the court found that Mrs. Millington's purchase was a fraud upon the rights of Bolton's creditors, marshalled the liens, made a distribution of the fund

raised by the receiver, and condemned the lands to be sold to pay off the residue of the claims charged against them. Mrs. Millington and her husband alone appeal.

The history of the transactions connected with the purchase of the plantation, is as follows:

In 1876, Seth W. Bolton resided in Desha county, and was the owner of the plantation in dispute. He was, at that time, indebted beyond his ability to pay. One or more judgments had been rendered, and two actions for the recovery of money were pending, against him. One of these was Galbreath's, to collect a debt of something more than $5000, to which there was no defense. Bolton expressed a willingness to secure this debt, if security was insisted upon; and, at this juncture, left home with the avowed object of conferring with Galbreath about the security and the extension of the time of payment of the debt; but, instead of calling upon Galbreath, he went direct to the home of his sister, Mrs. Millington, the appellant here, in Shelby county, Tennessee, and there, upon a Sabbath night, and with much haste, considering the importance of the transaction, concluded a sale of the place to her. The trade was consummated the next morning by the delivery of a deed reciting a consideration of $10,000. The consideration consisted of an agreement by Mrs. Millington to discharge certain notes held by Hill, Fontaine & Co., amounting, as the deed recited, and the parties agreed, to about $6000, and secured by two mortgages on the plantation, reference being made in the deed to the records of Desha county to identify them; and for the residue of the purchase price and as a cash payment of $4000, Mrs. Millington transferred to Bolton two bills of exchange, drawn by E. M. Apperson upon and accepted by E. M. Apperson & Co., for $2000 each.

Within a few days after this transaction these two bills gave rise to a litigation in the Tennessee courts between Galbreath, Bolton and Mrs. Millington, which has an important bearing

upon the litigation between the same parties here. It arose in this way. Galbreath sued Bolton, in Memphis, for the recovery of the debt already in suit in Arkansas, and impounded the two bills of exchange by causing an attachment to be levied upon them as Bolton's property. Mrs. Millington intervened in this proceeding, claimed the bills as her own, and undertook to show that soon after transferring them to Bolton, she purchased back one of them for $1600 in gold, and that the other was re-transferred to her as indemnity against a further lien that her husband and brother upon further consideration supposed might be established against the land. Galbreath answered that the re-transfer of the bills to Mrs. Millington was fictitious, and part of a general scheme entered into between Bolton and his sister to cheat, hinder and delay the creditors of the brother; the first step in the scheme, being, as he alleged, the purchase of the plantation. Upon this issue a mass of testimony was taken, and the chancellor before whom the cause was heard, found that the whole transaction was concocted in fraud, and by appropriate decree subjected the proceeds of the bills of exchange, which had in the meantime been collected, to the satisfaction *pro tanto* of Galbreath's debt. Mrs. Millington prosecuted an appeal from this decree to the supreme court of Tennessee, where the testimony was reviewed, the facts carefully collated, and the chancellor's conclusions indorsed in strong and unequivocal language by the supreme court commission, and the decree remained undisturbed. It was after the determination of that suit that Galbreath filed the bill that gives rise to this appeal. A transcript of the entire Tennessee record found its way by common consent into this litigation, and is submitted to our consideration.

Counsel who represent the Galbreath interest here, argue that the Tennessee decree renders the questiou of fraud in the purchase made by Mrs. Millington *res adjudicata*, so far at least as Galbreath is concerned; but the effect of Galbreath's proceeding in Tennessee precludes him from inquiring into the question of

fraud, and so ends his litigation here *in limine*. He had charged in his answer to Mrs. Millington's assertion of title to the two bills of exchange in the Tennessee suit, that the purchase of the lands was a fraud on his rights as a creditor of Bolton. Thereupon Mrs. Millington, while denying the fraud, offered to re-convey the lands to Bolton, and permit Galbreath to subject them to the payment of his debt if he would release the bills of exchange from the levy of his attachment. Galbreath declined this, prosecuted his attachment and reaped the benefit of the land sale by appropriating the consideration he alleged was paid for it. The acceptance of the benefit arising to him from the transaction, with knowledge of the surrounding facts, estops him from afterwards questioning the sale.

1. FRAUDULENT CONVEYANCE:—How far good.

A conveyance to defraud creditors is good as between the parties and their privies, although it may be avoided by the creditors of the fraudulent grantor. If the creditors condone the fraud, the grantee's title is good against all comers, and when any creditor, with knowledge of the wrong that has been done him, makes his election to take from the grantee the purchase price agreed to be paid for the land, his conduct is, in effect, an affirmance of the sale and a waiver of the right to complain of the fraud. *Lemay v. Bibeau, 2 Minn., 291; Hathaway v. Brown, 22 Ib., 214; Butler v. O'Brien, 5 Ala. (N. S.), 316; Rennick v. Bank of Chillicothe, 8 Ohio, 529; Frierson v. Branch, 30 Ark., 453; Pickett v. Merchants Nat. Bank, 32 Ib., 346.*

2. When creditor estopped.

There is nothing in the record, however, to debar the other judgment creditors from asserting their claims against the land. But it is argued on behalf of Mrs. Millington, that however fraudulent the intent of her brother may have been in effecting the sale to her, there is nothing to show that she participated in his design or knew of his embarrassed affairs.

Without recounting the facts and suspicious circumstances surrounding the transactions, the *bona fides* of which has been

questioned in these litigations, it must suffice to say we have weighed them carefully, and cannot escape the conclusion arrived at by the Tennessee supreme court commission in the opinion that has been furnished us, reviewing the same testimony that the case is submitted to us upon almost without variation. It is true that the fact at issue in that case was as to the *bona fides* of the transfer of the bills of exchange by Bolton to Mrs. Millington, but the negotiation for the purchase of the land was unearthed with great detail of circumstance, and the good faith of that transaction was considered by the Tennessee court, under the familiar rule that it is competent in this class of cases to show other conveyances than the one attacked to be fraudulent if made about the same time and as a part of the same scheme of fraud. It is upon the same principle that we now weigh and consider the fraudulent attempt of Bolton and Mrs. Millington to place the bills of exchange given as part of the pretended purchase price of the land beyond the reach of Bolton's creditors, the question really decided in the Tennessee case. While the Tennessee decision is not binding upon us, we concur in the conclusion reached, that both transactions are of a piece and fraudulent.

3. Fraudulent grantee without remedy.

It is also urged that Mrs. Millington's money having been appropriated by Galbreath, a creditor of her vendor, to the payment of his debt, the land should not now be taken to satisfy debts that were not liens at the date of her purchase; or, that if it is condemned to pay these debts, she should be allowed to share in the assets as the equitable assignee of the extinguished demand.

It is not true, in the outset, that Mrs. Millington's money has been taken in satisfaction of her vendor's debt. The decree in the suit between her, her vendor and his creditor settled the question that the money was her vendor's. It became his by virtue of her purchase of the lands, and she became the owner of the lands; but, by virtue of the fraud that entered

into the purchase, it was subject to the incumbrance of the debts then existing against her vendor. The largest of his creditors sought to, and did, discharge his debt out of the purchase money she paid for the land and relieved the land to that extent.

On the other hand, we do not deny the principle that where a person pays money for which another is liable, equity will clothe his claim with the garb the contract he has discharged was invested with, but it is never applied in aid of a fraud. It is a maxim that "he that hath committed iniquity shall not have equity," and in accordance with it, it is the settled rule that "a party bargaining with a debtor with fraudulent intent, does it at the peril of having that which he receives taken from him by the creditors of the debtor whom he is attempting to defraud, without having any remedy to recover what he parts with in carrying out the bargain." *Waite Fr. Conv., sec. 192; Railroad v. Soutter, 13 Wall., 517; Pettus v. Smith, 4 Rich. Eq. (S. C.), 197.* Mrs. Millington must be left in the snare her own devices have laid.

4. ESTOPPEL: Vendee and mortgagee.

As a further means of ridding the land of Bolton's debts, Mrs. Millington attacked the validity of the lien of the mortgages already mentioned, upon the ground, as her answer to Hill, Fontaine & Co.'s cross-bill alleged, that the debts they secured were usurious in their inception. A demurrer to the answer was sustained. It is clear that Mrs. Millington was not prejudiced by this ruling.

The mortgages had been executed by Bolton before his conveyance to her, and she had not only purchased subject to the mortgage liens, but had assumed to discharge the mortgage debts to the amount of $6000, as part of the purchase price to be paid by her. Subjecting the lands to the payment of this amount was thus made the mode for the payment of that much of the purchase price. Six thousand dollars of the purchase money, it was agreed should be paid to the parties holding the

mortgage notes. A payment upon these notes would be a discharge *pro tanto* of the purchase money. Bolton thus provided the means with which to pay this $6000, and placed it in Mrs. Millington's hands for that purpose. It is not a matter that concerns her whether the mortgages are void, the debts fictitious, or not. Bolton directed in his deed to whom the purchase money yet due for the land, should be paid, and it is not for his vendee to gainsay him the right to do so. To permit her to hold the lands and repudiate the mortgages, would be to give her the land without exacting the purchase price. If nothing is really due upon the mortgage debts, that fact would enure to the benefit, not of Mrs. Millington, but of Bolton's creditors. *Freeman v. Ault, 44 N. Y., 50; Cramer v. Lepper, 26 Ohio St., 59; Hough v. Horsey, 36 Md., 181; Pickett v. Merchant's Nat. Bank, 32 Ark., 346.*

Bolton's administrator was a party to the litigation, made the same defenses that Mrs. Millington attempted, was defeated upon the merits, and declines to appeal.

When the cause had progressed almost to a hearing, Mrs. Millington filed a cross-bill in which she asserted claim to a one-fourth interest in a legacy of $15,000 bequeathed to her and three others by her father, which she alleged was a charge upon the property in dispute, and which she prayed should be declared a lien in her favor superior to all others. Her father, it was alleged, died in 1863, and although, according to her allegations, Bolton had shortly afterwards accepted the devise of land subject to the charge, this is the first intimation, among all the dealings and transactions between the parties detailed in the record, that this charge was still unsettled. Mrs. Millington, her husband and Bolton, all testified in the Tennessee case, detailing with minuteness the conversations had in the negotiations for the purchase of the land, and no claim was made for any reduction of price on account of this charge, although it was asserted that the consideration agreed upon was

a fair price for the lands. And Mrs. Millington herself testified that she had no information of *any indebtedness* on the part of her brother. It was now alleged however, that her interest in this legacy was a part of the consideration paid by her for the lands.

The allegations of the cross-bill deepen our conviction that the purchase of the land was not in good faith. However, a demurrer to the cross-bill was sustained, and it must be met upon its merits.

Without saying anything as to the allegations that the release of the legacy was a part consideration of the purchase which we find to have been fraudulent, or as to the necessity of bringing in the co-legatees as parties, we may rest the correctness of the chancellor's action in dismissing the cross-bill upon the fact that it shows upon its face that the legacy was barred by the statute of limitations.

5. Statute of Limitations in suits for legacies.

It has been held in England and in this country that the statute of limitations is no bar to a suit to recover a legacy, (see note to *Hedges v. Norris, 32 N. J. Eq., 192,*) but with us this is true only where the suit is against an executor or another, who is charged by the will with an expressed trust in relation to the legacy. The fact that the suit is in equity avails nothing, for the statute where applicable at all is as binding in equity as at law. *McGaughey v. Brown, 46 Ark., 25.* In seeking for the statutory rule that shall govern in such a case, it is necessary to ascertain the legal effect of the devise and consider what are the nearest analogies to it, for there is no statute which in terms bars a legacy.

6. Same in equity as at law.

The provision of the will of I. L. Bolton under which the appellant claims is as follows:

"I give to my son, Seth W. Bolton, my entire interest, both real and personal, in Desha county, Arkansas, by his paying to my estate, or other heirs, the $15,000 I have paid for the places."

7. SAME:—Legacy charged on land.

Seth Bolton accepted the devise and in doing so, he by implication agreed to pay the sum given to the other heirs. *Williams v. Nichol, ante, p. 254.* While the will makes it incumbent upon him to pay the legacy, it does not devolve upon him such duties and obligations as create a direct trust and prevent the statute of limitations from running in his favor. His agreement to pay is an implied contract and not in writing, and is therefore within the letter of the three years statute. *Etter v. Greaawalt, 98 Pa. St., 422.*

But the $15,000 also became a charge under the will upon the land itself, and it is this equitable lien the appellant seeks to enforce. The question is, what statute applies? We can not adopt the analogy that governs suits on mortgages because a mortgage is the conveyance of the legal estate and gives the mortgagee his action for the possession of the mortgaged premises, while the equitable charge created by the will gives no right of possession. It is more nearly allied to the mortgage in those states where the latter is recognized as a security only and as conveying no title. But as the testator evidently intended that Seth Bolton should take the estate only upon paying so much of a consideration for it, we may infer from this that the payment of the legacy was in part at least the consideration of the devise, and from this we derive a strong support for the analogy to the vendor's equitable lien for the unpaid purchase money.

Now, in those jurisdictions where the mortgage conveys no title, the lien is regarded as an incident to the debt merely, and is barred when the debt can no longer be enforced, and the same rule is applied by this court to the equitable vendor's lien. *Stephens v. Shannon, 43 Ark., 464; Waddell v. Carlock, 41 Ib., 523.* And this rule is held to govern the equitable charge of a legacy in the only case in point that has come to our notice. *Yearly v. Long, 40 Ohio St., 27.* There it is held that the personal remedy against the devisee being barred the lien was discharged.

But whatever statute governs, the remedy in this case is barred, for the statute was set in motion in 1863, and if the charge could be regarded as a liability created by "a writing under seal" (as to which see *Wait v. Carniten*, 21 *W. Va.*, 516; *Prewett v. Wortham*, 79 *Ky.*, 287; *Borst v. Corey*, 15 *N. Y.*, 505), and the suit an action to enforce it (*Sec.* 4484, *Mansf. Dig.*), still, more than ten years have elapsed.

8. SAME:—Tacking disabilities.

Mrs. Millington undertook to evade the force of the statute by alleging that she was under age in 1863, and afterwards married and is still covert, but she cannot tack her disabilities in this way. She should have brought her suit within the period allowed her by the statute after coming of age, notwithstanding her coverture.

The only error in the record is as to the Galbreath judgment, and the decree must be reversed with instructions to modify it by disallowing that claim, and it is so ordered.

SUPPLEMENTAL OPINION ON MOTION FOR REHEARING BY APPELLANT.

COCKRILL, C. J. In an application for a rehearing, our attention is directed, for the first time, notwithstanding the elaborate oral and printed arguments, to the fact that the decree condemns the land to be sold on a credit of twelve months, a period longer than is authorized by statute. The record does not show that the decree has been executed, and if a sale takes place after the mandate it may be apprehended that the order of sale is approved as to the credit to be given. It is proper to notice this error to prevent misapprehension.

Also an allowance to B. F. Grace, as administrator of the estate of Seth W. Bolton, to pay expenses of administration, was improper and must be disallowed on the rendition of the new decree.

The decree of this court will be modified in accordance with these directions.

MORRILL v. DANIEL.

REPLEVIN: *Surety's liability on retaining bond.*

A surety on a defendant's retaining bond in replevin is liable for the damages and costs of the suit, as well as for the return of the property.

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

The Appellant *pro se.*

The bond was given under *Section 5042 Gantt's Digest*, and its object was to secure the safe-keeping and return of the property. *Drake Att., 5 ed., secs. 330-331.* The measure of damage on a delivery bond is the value of the property secured by it. The property having been returned the liability of the security ceases. *Ib., secs. 340-1-2.*

C. Armstrong and *W. L. Moore* for Appellee.

The bond is that defendant will perform the judgment of the court. *Mansf. Dig., sec. 5581.* The addition "and return said property, etc.," is surplusage which does not constitute a new condition nor restrict the legal effect of the bond. *Drake Att., 6 ed., sec. 329.* Plaintiff had judgment for costs, and the surety is liable. *Mansf. Dig., sec. 1042.*

COCKRILL, C. J. Daniel sued Bedinger in replevin before a justice of the peace for a mare. To retain possession of the mare Bedinger executed the usual retaining bond, with Morrill as his surety, conditioned to "perform the judgment of the court in this action, and return the property if a return is adjudged." In the justice's court there was judgment for Bedinger, but on appeal to the circuit court the judgment was for

Daniel for the mare or her value and all costs. Thereupon the mare was delivered up by Bedinger, and execution was issued against him for the costs and returned *nulla bona*. This suit was then instituted before a justice of the peace, on the bond, against Bedinger, and Morrill, his surety, for the costs. Bedinger was not served with process. Morrill defended, but on appeal to the circuit court judgment was rendered against him, and he appealed to this court.

The condition of the bond required of the defendant in replevin, to obtain the release of property taken by the sheriff, is "that the defendant shall perform the judgment of the court in the action." This is the language of the statute. *Mansf. Dig., sec. 5581.* The judgment of the court, when in favor of the plaintiff, is for the return of the property or its value, with damages for the detention, (*Ib., sec. 5181,*) and as the plaintiff recovering judgment in every case has a judgment for costs against the defendant, (*Ib., sec. 1042,*) it follows that the surety upon such a bond is not exonerated by the delivery of the property merely, but is liable for the damages and costs as well.

Affirm.

DISMUKES V. HALPERN.

1. ESTOPPEL: *Acceptance of deed imposing obligation.*

The acceptance of a deed imposing terms, binds the grantee to the performance of the terms.

2. STATUTE OF LIMITATIONS: *On implied obligation.*

The obligation to perform the terms of a deed which arises from mere acceptance of it is an implied one, on which no action can be maintained after three years from the time it accrued.

3. PROBATE COURT: *Jurisdiction; Partition.*

The probate court has no jurisdiction in suits for partition to create a lien upon land, or render a money judgment for one heir against another for equality of partition.

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

John C. Palmer for Appellant.

1. That the probate court had no jurisdiction to partition lands. *Constitution of 1836, art. 6, sec. 10; Gould's Digest, chap. 48, sec. 2; Act of March 16, 1871; Gould's Digest, chap. 122, sec. 1; Pomeroy's Equity, sec. 13, et seq.; Myrick v. Jacks, 33 Ark., 425.*

2. That the probate court had no jurisdiction to render a money judgment *inter partes*. Same authorities as above, and *Phelps, et al., v. Buck, et al., 40 Ark., 219.*

3. That the lien of a judgment is limited to three years. *Gould's Digest, chap. 96, sec. 5; Gantt's Digest, sec. 3605; Mansfield's Digest, sec. 3918.*

S. J. Price for Appellee.

The whole of appellant's claim is based upon that partition, and they are estopped from saying the court had no jurisdiction.

The original petition was for assignment of dower as well as for partition of lands, and Charles W. Daniels was one of the principal petitioners.

Appellants should not be permitted to accept the benefits without sharing the burdens of the judgment for partition.

COCKRILL, C. J.: The appellants are the heirs at law of Charles W. Daniels. The latter, in his lifetime, joined with the other heirs of W. H. Daniels in a petition to the probate court of Monroe county to partition lands which they had inherited from W. H. Daniels.

An order for partition was made in the probate court in 1871, in pursuance of the petition, and commissioners were appointed to set off shares to the several heirs and to allot dower to the widow of W. H. Daniels. The commissioners reported to the court, designating by metes and bounds the lands to be allotted to each heir, and to the widow. The widow's dower interest was so laid off as to cover the shares allotted to two of the heirs, and in order to equalize the burden and compensate them, it was recommended by the commissioners and ordered by the court, that the other heirs should pay to the two whose shares were embraced in the lands assigned to the widow as dower, the fair rental value of their shares in annual payments during the widow's life. A special commissioner was appointed by the court to execute deeds to the heirs in accordance with the report of the commissioners. He executed among others, a deed to Charles W. Daniels, the appellant's ancestor, in 1872, conveying his allotted share of the lands to him free from the claims of the other heirs, except the claim for his proportion of the payments to be made to the two heirs who were, by the allotment, deprived of the enjoyment of their shares during the life of the widow, and these payments the deed specified should be made to them by C. W. Daniels annually. The partition was acquiesced in by all the parties; the deed was accepted by Charles W. Daniels, and he or his heirs have ever since enjoyed the exclusive possession of the lands set apart to him under it.

W. W. Daniels' widow died in 1883, and none of the payments provided for in the deed having been made, the appellee, who is the owner of the land covered by her dower interest, and the assignee of the annual installments, filed his complaint in equity to subject the lands allotted to Charles W. Daniels to the payment of the proportion of the charge assessed against them by the commissioners.

The appellants answered, denying that the lands were subject to the charge, and pleaded the statute of limitations in bar

1. ESTOPPEL: Acceptance of deed imposing terms.

of the recovery. The decree of the court was that the lands be subjected to the payment of the installments accruing within seven years of the filing of the bill, with interest, and the owners of the land appealed. They argue that the probate court was without jurisdiction to create a lien upon the land, or to render a money judgment against one heir in favor of another, and that the judgment is therefore without force. To concede the correctness of the legal proposition does not aid the appellants' case. Their ancestor's exclusive right to the land is based upon the commissioner's deed, and they themselves in their pleadings assert title under the same deed. The terms of the conveyance were that Charles W. Daniels should pay to the appellee's assignors the annual sums specified in the deed, and in effect that these sums should be a charge upon the land. In accepting the deed he acceded to these terms, and he cannot now hold to the beneficial part of the conveyance and rid himself of the burden which accompanied it. A party cannot ratify and yet repudiate the same transaction in one breath. He must make his election at the outset, to repudiate it *in toto* or take it *cum onere*, and when once made and acted upon, he is estopped from assuming an attitude inconsistent with his first position and detrimental to the rights of others. *Millington v. Hill, Fontaine & Co., ante, p. 301, and cases cited; Herman Estop., sec. 1057.*

2. Statute of Limitations on implied contract.

The court was right in holding the land for the payment of the debt, but the seven years statute which bars the recovery of possession of real estate has no application to a recovery upon an equitable lien. *Millington v. Hill, Fontaine & Co., supra.* Charles W. Daniels' liability to pay the debt, as well as the charge upon the land, arises by implication alone. The judgment of the probate court is without force in that respect, because the court was without jurisdiction to declare a lien upon land, or to render a personal judgment for the recovery of money against Daniels in a suit for partition. *Myrick v. Jacks, 33 Ark., 425.* The *terms* of the contract are found in the com-

3. PROBATE COURT: Jurisdiction: Partition.

missioner's deed, but the only obligation upon Daniels to comply with those terms is implied from his acceptance of the deed. It was not the deed that created the charge upon the land, because the probate court could not invest the commissioners with that authority. The assent of Daniels is what gives validity to the charge, and as this assent creates an implied liability only, the three years statute governs. *Manfield's Digest, sec. 4478.*

It follows that no recovery could be had of any annual installment except such as matured within three years of the filing of the appellee's bill.

The decree must be reversed with instructions to modify it in accordance with this opinion.

St. L. & S. F. Ry. v. Basham.

Railroads: *Killing stock; Negligence.*

The killing or injuring stock by a railroad train is, under the statutes, presumed to be from negligence; but this may be repelled by proof of due diligence.

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

W. H. H. Clayton for Appellant.

All that the law requires is such vigilant watch and lookout as the other duties devolving upon the engineer and fireman will permit. They are not required to keep a constant and uninterrupted lookout. *19 A. & E. Ry Cases, p. 480; 37 Ark., 591, 598.*

The plaintiff was guilty of contributory negligence in permitting the horse to roam in an enclosed field. *5 Otto, 442;*

101 Mass., 455; 17 Am. Rep., 568; 555 Am. Dec., 663; 36 Id., 721; 50 Id., 261; Wood on R. R. Law, 1549, sec. 418; 36 Ark., 41.

The verdict was contrary to the evidence. All who were eye witnesses testified that there was no negligence. *78 Ky., 621; 41 Ark., 161; 39 Id., 413; 40 Id., 336; 41 Id., 157, 161; 43 Id., 225.* The killing was unavoidable. *41 Ark., 157, 161; 78 Ky., 621; 40 Ark., 336; 19 A. & E. Ry Cases, 497.*

SMITH, J. This was an action for damages against a railway company for killing a horse. The defendant denied any want of due care in the operation of its trains.

The testimony in behalf of the plaintiff proved only the value of the animal; that it was blind or nearly blind of one eye; that it had been turned into a field, which lay on both sides of the railroad track, for the purpose of grazing; and that it had been struck at night by a passing freight train. This was sufficient, under the statute, to raise the presumption of negligence.

But this presumption, which is all that the verdict for the plaintiff has to rest upon, was effectually overturned by the uncontradicted and unimpeached evidence of the engineer, fireman and conductor of the train, the only witnesses of the collision. By them it was shown that the train was running, between 10 and 11 p.m., at a speed of fifteen or eighteen miles an hour; that the headlight of the locomotive was in good order, illuminating the track ahead for a distance of one hundred to one hundred and fifty yards; that the engineer and fireman were keeping a sharp lookout, on account of some obstructions having been recently placed upon the track in that neighborhood; that the horse dashed upon the track fifteen or sixteen feet in front of the engine; that it was discovered as soon as it came upon the track, and could not have been discovered before; that the engineer immediately applied the steam-brakes, but had not time to sound the alarm whistle or

to ring the bell; that the horse seemed to be dazed and bewildered by the headlight and stood facing the engine; that no human agency could have stopped the train before it struck the horse, and that it would have required two hundred yards within which to stop it.

If this testimony is true (and there is no reason to doubt it) the killing was an inevitable accident, and the verdict of the jury was without evidence to support it. The case is like *L. R. & Ft. S. Ry v. Turner, 41 Ark., 161.*

Reversed and remanded for a new trial.

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ST. L., I. M. & S. RY. v. STATE, EX REL. KEITH.

1. TAXES: *Overdue tax act; Assessment.*

The legislature had power to provide, as in the overdue tax act of March 12, 1881, for the assessment of lands by a court of equity which had escaped assessment in any year, and to charge the lands with the cost of the assessment.

2. SAME: *Same.*

The provisions of the overdue tax act of 1881, which requires the court to have the assessment certified to the clerk of the county court, relates only to cases in which the lands were not assessed for the current fiscal year in which the proceedings for their condemnation and sale were instituted.

3. SAME: *Same.*

When lands were assessed for taxes by order of a court of equity under the overdue tax act of 1881, there must have been a levy of taxes extended on the assessment before the court could condemn and sell them for taxes.

APPEAL from *Hot Spring* Circuit Court in Chancery.
Hon. J. B. WOODS, Circuit Judge.

Dodge & Johnson for Appellant.

1. As these lands were never assessed for taxes, no penalty, costs, attorneys' or printers' fees can be collected or enforced as against them.

The decree in this case, decrees and declares that these lands were never assessed for the year 1875. That certain penalties and costs, among which are included attorney's, printer's and clerk's fees, to the extent of several thousand dollars, are liens upon these lands, and with the taxes, must be paid within twenty days after the rendition of the decree, or the lands shall be sold. This was error. *Secs. 1, 8, 9, Acts March 12 and 22, 1881.*

The "overdue tax acts" never did intend or contemplate such a thing. If they did, they are in violation of *Sec. 8, Art. 2*, and *Sec. 5, Art. 16, Const. Ark.*, and the *5th Amendment to Const. United States.*

This suit must be classed under section 8 of the act. All that a court of equity could do, was to assess the lands, and have them certified to the county clerk. Section 9 only applies to lands that had been forfeited for non-payment of taxes. But where there has been no assessment, the object of the act was to have a legal assessment made, and the land put upon the tax books. But no penalty or costs could be attached, as the owner was not in default until there had been an assessment and forfeiture for non-payment of taxes. If no assessment was made neither the owner nor the land was liable for penalty or costs. *Gantt's Dig., secs. 5116, 5117, 2879; Acts 1875, p. 178.*

The costs of assessment of lands are always paid by the state. *Mansf. Dig., secs. 5663–4.* If there is no assessment, no taxes can be paid, and it is the duty to provide in some way for an assessment without cost to the owner or penalty on the land. *Secs. 5134, 5137, 5143, Gantt's Dig;* also *Mansf. Dig., secs. 5699, 5701, 5702, 5709.*

Now, we submit, that if all assessments had to be made at the expense of the state, and section 8 of the overdue tax act

simply provided for an assessment where none had been made, how could the legislature, in view of the inhibition of the constitutional provision above referred to, attach these costs and penalties to the land after the dereliction or neglect of duty on the part of the officer of the state in neglecting to assess the land?

It would be in the nature of a penalty visited upon the land owner because of the state's own default through its duly empowered officers.

Or, more plainly, it would be punishing the land owner for doing that against which there was no law at the time; it would be *ex post facto* in its effects, and clearly violative of all principle of law and fair dealing. See on this subject *23 Ark., 375; 27 Ohio St., 592; 18 S. C., 538; 2 Bradw., 642; 16 Ohio, 532; 11 Minn., 321; 70 Mo., 441; 45 Tex., 317; 58 Ala., 547; 65 Ala., 158.*

No tax is due until it is assessed, and in consequence, the subject of the tax is not in default for non-payment, until the assessment is made. *Nebraska City v. N. C. Gas Light Co., 9 Neb., 339; S. C., 2 N. W. Rep., 872; Miller v. Hale, 26 Pa. St., 432.*

An assessment is so far an inseparable incident to taxation, that no right of action arises until an assessment is made. *State Auditor v. Jackson county, 65 Ala., 142.*

2. The second objection to the decree is that it is contrary to section 8 of the act entitled "An act to enforce the payment of overdue taxes," approved March 12, 1881.

This section makes it the duty of the assessor, after a satisfactory assessment is made, to certify the assessment to the clerk of the county court. *Acts 1881, p. 61; Secs. 5699, 5700, Mansf. Dig.*

3. The decree is erroneous in another respect. The assessment list as returned by the assessor under the order of the

court gives only the values of the lands. The amount of tax is not extended thereon, and no amount is given.

Our view of the whole matter is this: That after the assessment is made under the overdue tax law, and the legal taxes ascertained, then the land owner has until next tax paying day to pay these taxes; and that until he is in default and refuses to pay, no cost, penalty or interest, can be attached to the lands which by some omission, error or neglect, on the part of the former assessor, had never been assessed.

A. Curl for Appellee.

The costs of proceedings under the overdue tax act are to be taxed against the lands. *Act March 12, 1881, Acts 1881, p. 67.* A suit was necessary to ascertain whether these lands were subject to taxation. The appellants contended they were not. The court decided they were, had them assessed, and under the act decreed the taxes to be a lien, and adjudged the costs of the proceeding against the lands. This was proper. *Sec. 1, Acts 1881, p. 64.*

Section 9 expressly authorizes the court to decree the taxes to be a lien, etc. The legislature provided for the taxation of costs, and it had the power to do so.

The decree, in its body, sets out the entire list of lands, the value thereof, and the taxes and costs are extended item by item.

SMITH, J. The present bill was filed while the overdue tax law was in force, to subject certain lands therein described to the payment of taxes for the year 1875. It was alleged that the lands had escaped assessment for that year.

The railway company intervened, setting up its ownership of the lands, and resisted the prayer of the bill, upon the grounds of exemption by its charter and because a patent for

the lands had not then issued from the United States, etc. These defenses need not be more particularly stated, as they have been all abandoned in this court except the following: "That it was not the fault of the company, its agents, servants, or attorneys, that these lands were not assessed by the assessor of Hot Spring county; but that the said assessor failed and neglected to perform his duty in the premises, for which this defendant is in nowise to blame; and it therefore says that no penalty or costs in this proceeding in the matter of assessing said lands can attach to or be levied upon or collected from said lands; and it says that if it is held that the said lands can be assessed, then this defendant is willing to pay such taxes as may be found due in accordance with law."

The cause having been heard on the pleadings and depositions the court ordered the county assessor to assess the lands, approved his assessment, and declared the taxes for the year in question, ascertained according to the rates levied for that year, a lien upon the lands. A commissioner was appointed to advertise and make sale of the lands, upon default in payment of taxes and costs by a given day, and certain fees were allowed to the clerk, printer, commissioner and attorneys for the plaintiff. These fees are not alleged to be excessive in amount, and the only controversy is whether they are properly chargeable on the lands.

The argument is, that until an assessment was had the owner was not in default, no taxes being due; and that until after default, no penalty, nor costs, could be visited upon him. The reasoning is sound, upon the question of penalties. But upon inspection of the decree, we fail to discover that anything in the nature of a penalty, or augmentation of the taxes, for not paying sooner, is denounced against the lands or the owner of them. Then, as to costs, it is urged that it has always been the policy of our revenue laws to make the assessment at the expense of the county in which the land lies, and never to charge the costs thereof against the lands, even where the

owner is delinquent; and that if the county officers had done their duty in the present instance, by placing these lands upon the tax books, the railroad company could have paid its legitimate taxes without being burdened with fees to officers of the court.

But the omission of taxing officers to assess certain property in previous years can not control the power of the legislature. *Vicksburg, etc., R. Co. v. Dennis, 116 U. S., 665.*

1. Over-due Tax Act: Assessment.

The *Act of March 12, 1881, secs. 1 and 8*, provides for two distinct classes of cases: First, where land has been assessed, but by reason of the invalidity of the assessment, or other cause, has escaped the payment of taxes; and, second, where the land, though legally liable to taxation, has for any reason not been assessed. The amount of the taxes is to be ascertained, and the state's lien therefor is to be enforced, in a court of equity, due provision being made for the owner to come in and defend. And if it is adjudged that taxes are due, the costs of the proceeding are saddled upon the land.

2. Same.

It is further contended that all the court should have done in this case was to cause the lands to be properly assessed and certified to the clerk of the county court, to the end that the assessment should be carried to the tax books for the current year, and the back taxes collected in the same manner as other taxes. Counsel for the state seems to concede that such is the proper construction of *Section 8*, which provides: "If the lands shall not be on the assessment list for the current fiscal year, the order shall also require the assessor to assess the lands for such current year, which assessment shall stand as the valid assessment of such lands until the next regular county assessment shall have been made; . . . and when such assessment shall have been made to the satisfaction of the court, the court shall order the same to be entered on its records, and a copy thereof to be certified to the clerk of the county court, who shall forthwith place said assessment on the assessment and tax books of the county."

We understand this provision to relate only to the case where the lands have not been assessed for the current fiscal year. There is nothing in the record to indicate that this state of facts exists here. On the contrary, as the taxes of 1875 are alone in controversy, the fair inference is, that the lands have been assessed and the taxes paid for each subsequent year.

But suppose that at the date of bill filed, or decree rendered, the lands did not appear on the assessor's list, the court was not required to stay its hand, but its plain duty, under *Section 9*, was to proceed to a final decree and to the execution of that decree. After the institution of the suit, and a judicial ascertainment that taxes were in arrears, the court would not loose its hold until those taxes were paid, or the lands sold. The purpose in requiring the assessment to be certified to the clerk, was to get the lands upon the tax books with a view to taxation for the current and future years, and not to suspend the pending proceeding for the collection of back taxes.

3. Same.

The last objection that we shall notice is, that the decree is defective in this, that while the assessor's return shows the valuation placed upon each tract, no levy of taxes is extended thereon, and the owner cannot ascertain the amount of taxes due from the decree, and the commissioner is left to his own judgment to fix the several sums. This objection appears to be well founded. We have looked through the record without being able even to determine what rates of taxation were levied in 1875 for state, county and school purposes. This is a matter about which no uncertainty should exist.

The decree is reversed and cause remanded, with directions that it be referred to the clerk, or some other proper person, to extend the taxes upon each tract, according to the assessor's valuation, upon the basis of the rates levied for the year 1875, and to enter a decree of condemnation in accordance therewith.

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ST. L., I. M. & S. RY. v. WALBRINK.

1. RAILROADS: *Right of way; Diversion of water-course.*

Where a grant of a right of way authorizes a railroad company to change a water-course, the company is not liable for the consequential damages resulting from the change, unless it be unnecessarily or negligently or unskillfully made.

2. SAME: *Fencing track; Cattle-guards.*

A railroad company is not bound to fence its track, nor to construct cattle-guards where its road traverses improved lands.

3. SAME: *Right of way; Damages.*

In the condemnation of the right of way through enclosures, the additional fencing made necessary by the road passing through them is an element of damages to be awarded to the owner; but a grant of the way waives such damages in advance.

APPEAL from *Poinsett* Circuit Court.
Hon. W. H. CATE, Circuit Judge.

Dodge & Johnson for Appellant.

The first cause of action alleged by plaintiff, is the failure to erect "cow gaps" on his line of fencing where the road crosses, by which neglect or failure he was prevented from raising a crop for the year 1882, to his damage one hundred dollars.

This charge plaintiff failed absolutely to sustain by any proof whatever, and it was specifically denied in the answer.

It is well settled that the plaintiff must recover *secundum allegata et probata.* He cannot declare upon one theory, and recover upon another. *Boardman v. Griffin, 52 Ind., 101; Hays v. Carr, 83 Ind., 275; Thomas v. Dale, 86 Ind., 935; Ry. Co. v. Bennett, 89 Ind., 457; R. R. v. Wygant, 100 Ind., 160; Brown v. Will, 1 West. Rep., 130; Hasselman v. Carroll, 102 Ind., 153; Freshour v. Turnpike Co., 2 West. Rep., 328.*

The second cause of action alleged by plaintiff, was the changing of the natural channel of a certain creek, and in the doing so, removing of certain fences and removing a large amount of earth, etc.

This was admitted by the answer. But the defendant justified its action in the matter by pleading the grant, or license, or permission of plaintiff to do so.

If the permission or license contained in the above grant or deed was worth anything, it was most assuredly given to include just such acts as are here complained of.

It is conceded, as held in *Ry. Co. v. Morris, 35 Ark., 626,* "that the grant of the right of way certainly was no license to the company to injure plaintiff by unskillful work."

But, when the grant itself, in specific and direct terms, grants the license to do what has been done in this case and of which plaintiff complains, there can be no possible liability, unless the injury is caused by unskillful work or carelessness on the part of the railway company, and is so charged in the complaint. Unskillfulness and carelessness is specifically denied, although it was in no manner alleged.

E. F. Brown for Appellee.

1. It was appellant's duty to construct fences and cow gaps. *Redf. on Ry's, vol. 1, p. 345; Mills Em. Dom., sec. 212.* The grant or license does not estop appellee from claiming damages. *Mills Em. Dom., sec. 44.* And especially is this so outside of the right of way. *Ib., secs. 294–298.*

2. The evidence sustains the first paragraph of the complaint.

3. The grant or license applies only to the right of way, which is expressly limited by the calls of the deed, and must be used in the proper exercise of its enjoyment; and appellant cannot protect itself in obvious wrong by the improper exercise of

said grant, because it in fairness is bound to use it without unnecessary detriment to appellee's rights. And as to whether appellant made a reasonable use of the grant or license in said deed was a mixed question of law and fact submitted to the jury under proper instructions, and this court will not disturb their verdict. This theory of the case is sustained by the reasoning of Mr. Redfield in his note to the case of *Sweet v. Cutts, 11 Am. Law Register, p. 24.*

The parties, in the absence of anything to the contrary, are presumed to have contracted with reference to the state and condition of the property. The grantor gave the license as the creek then ran, and to construe the right to appellant under it to embrace such changes as might thereafter suit the convenience of appellant, would doubtless defeat the understanding and intention of the parties, certainly of the grantor. And we understand this to be sustained by authority. *Wasburne on Easements, 57 and 338.*

SMITH, J. The complaint in brief charged:

1. That in 1881, plaintiff being the owner of "part of southwest quarter of southeast quarter, section 24, township 11 north, range 3 east," donated to the defendant railway company a right of way over said land.

That under said grant, defendant, in 1882, constructed its railroad tracks over said land. That the right of way donated was of the width of one hundred feet. That in order to construct its roadway, defendant removed the fencing on said land and neglected or refused to replace it, or to erect "cow gaps," or other means to protect the growing crops; by which action plaintiff was prevented from raising a crop for the year 1882.

2. That defendant, building its roadway, without the consent of plaintiff changed the natural channel of a creek across and upon the land of plaintiff outside of the right of way so

granted; and in order to do so, tore down and removed other fencing upon lands outside of and not upon any part of the said granted right of way, and did dig and remove large amounts of soil therefrom. For all of which plaintiff asked one hundred dollars damages.

The defendant justified under a license from the plaintiff.

Evidence was given, tending to show that, before the building of the road, the plaintiff's land was under one and the same enclosure; that the railroad divided it into two parts, leaving his dwelling-house, stable, well and orchard on one side, and a field of four acres on the other side; that the defendant tore down the plaintiff's fences at the points where its line entered and left his land, and did not erect cattle guards at these points, nor rebuild the fences; and that the plaintiff was, in consequence, compelled to build two lines of fencing, parallel to the road, at an expense of $60. Also, that the defendant, in constructing its road-bed and for the protection thereof, had changed the channel of a creek, which flowed in a westerly direction across the land, so as to make it run north; and had put in a bulk-head of plank next to its road-bed, which deflected the water towards the orchard, and abraded the land, the loss of ground by the wash being a parcel sixty-nine feet in length by twenty-two feet in width.

Defendant then read to the jury the following deed from plaintiff to defendant:

"Know all men by these presents: That I, Frank Walbrink, and Sarah Walbrink, his wife, of the county of Poinsett and State of Arkansas, for and in consideration of one dollar to us paid by the St. Louis, Iron Mountain and Southern Railway Company, and in consideration of the benefit to accrue to us from the building of said company's road, do hereby give, grant, bargain, sell and convey to said company, a right of way, being one hundred feet wide, the middle thereof to be the center of the track of said road, with the right of increasing the

width of the same for necessary slopes, embankments and turnouts, and the right of changing water courses and taking a supply of water, and borrowing or wasting earth or stone outside of said limits, and of felling any trees which might endanger said railroad as the said track shall be finally located, through and across the following described lands, lying in the county of Poinsett, and state of Arkansas, to-wit:

"One lot adjacent to the town of Harrisburg, being a part of the southwest quarter of the southeast quarter of section 24, township 11 north, range 3 east of the fifth principal meridian, reserving to myself the right to cultivate such part of the right of way as is not actually used by said railway for more track or switches; and with the stipulation, that no houses or bridges be built thereon, except depot of the company, with the right to enter upon said land and take timber necessary for the construction of said railway through and upon the same; to have and to hold the same to said company, so long as used for the purposes of a railroad and no longer."

The circuit court charged in effect that, notwithstanding his deed, the plaintiff was entitled to recover such damages as the proof showed he had sustained by reason of the acts and omissions complained of; and the jury returned a verdict for $95.

1. Right of Way: Diverting water course

The diversion of the water course was expressly authorized by the terms of the deed; and the defendant is not liable for the consequential damages resulting therefrom, it not being alleged nor proved that the work was done unnecessarily, or negligently, or unskillfully. No man can maintain an action for a wrong where he has consented to the act which occasions his loss. Nor was the company under any obligation, after it had rightfully and properly turned the stream, to observe the action of the water and protect the banks, or take other timely measures to prevent the encroachment of it upon the adjacent lands. *Norris v. Vt. Central R. Co., 28 Vt., 99; Boothby v.*

Androscoggin, etc., R. Co., 51 Me., 318; Hortsman v. Lex. & Cov. R. Co., 18 B. Monroe, 218.

2. Fencing Track: Cattle-guards.

The execution of the conveyance placed the parties in the same relative situation, and gave to each precisely the same rights as if the railroad company had caused the land to be condemned for a right of way and had paid the award of damages. In either case, the company is authorized to do whatever is lawful in the construction and management of its road; and the owner's claim for injury to the rest of his land is released, except as it arises from faulty construction. We have no statute, and there is no principle of the common law, which obliges a railroad corporation to fence its track, or to provide cattle guards where the line traverses improved lands. It is true the additional fencing rendered necessary by the building of the road is an element of damage in estimating the owner's compensation. But where he conveys the right of way by agreement, he waives in advance all such damages, it being presumed that these are included in the purchase price. *North & West Branch R. Co. v. Snauk, 105 Pa., St., 555; Alton & Sangamon R. Co. v. Baugh, 14 Ill., 211.*

3. Right of Way: Damages.

Reversed and remanded for further proceedings not inconsistent with this opinion.

GAMMILL V. JOHNSON.

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FRAUD: *False representations; Relief against.*

Equity will not relieve a party from the consequences of his own inattention and carelessness in relying upon the representations of another, instead of his own judgment, when the means of information are open to both parties alike; but when the representation is of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the other has the right to rely on it, though the means of ascertaining its falsity were fully open to him. It does not lie in the mouth of the declarant to say it was his folly to believe it.

APPEAL from *Lincoln* Circuit Court in Chancery.
Hon. JOHN A. WILLIAMS, Circuit Judge.

J. M. Cunningham, Jr., for Appellant.

Every allegation of fraud must show some injury. It must appear that the fraud and damage sustain to each other the relation of cause and effect, or that the one resulted directly from the other. *Bigelow on Fraud, 451; 5 Vroom, 296.*

It is a principle too well settled to admit of controversy, that a misrepresentation, to constitute a fraud, relievable in equity must be made in regard to some matter constituting a motive or inducement to the act of the other, by which he is misled to his injury; and it must be of something in which the party deceived places a known trust and confidence in the other, and not equally open to both parties for examination and inquiry. *Story's Eq., 197, 205; Smith v. Richards, 3 Pet., 36; Bispham's Eq., 207; Dugan v. Cureton, 1 Ark., 41; Hughes v. Sloan, 8 Ark., 146; Yeates v. Pryor, 11 Ark., 58; Hepburn v. Dunlop, 1 Wheat., 89; 2 Wheaton, 178; 2 Kent Com., 4 ed., pp. 484–5.*

To rescind a contract it is necessary for the complainant to establish, first, the representation and its falsity; second, that he relied upon such representation and was deceived thereby; and third, that it was material to the subject matter of the contract. *Masterton v. Beers, 1 Sweeney, 406; Bispham's Eq., 206; 9 Ind., 488; 38 Ala., 637.*

That a misrepresentation or a misunderstanding of the law will not vitiate a contract, when there is no misunderstanding of the facts is well settled. *Upton v. Tribblecock, 91 U. S., 45; Platt v. Scott, 6 Blackf., 389; Russell v. Branham, 8 Blackf., 277; 33 Ill., 238; 5 Hill, 303; Bisp. Eq., 212; Kerr on Fraud, 90; Law Rep., 7 Exch. Div., 75; Bigelow on Fraud, 70; 27 Cal., 655; 2 Pars. on Cont., 6 ed., pp. 793, 939 note b.*

The burden was on appellee to establish the truth of her allegations, and show fraud and deceit. *Bigelow on Fraud, 493–4; 100 Mass., 448; 15 Gray, 171; 99 Mass., 79.*

D. H. Rousseau for Appellee.

The evidence in this case shows a clear case of fraud, misrepresentation and injury. *1 Story Eq. Jur., par. 120, 121, 122, 207, 211.*

While courts do not afford relief where one makes a mistake of law, where agreements are fairly entered into, and there is no fraud or misrepresentation, but where there has been undue confidence, or where one party obtains an unconscionable advantage over the other, or where one party makes use of false representations, or where his conduct is such that the other party is not on terms of equality, it is a mixed question of law and fact, and courts of equity will relieve. *Story Eq., par. 120; 2 Swanst., 352; 2 Jac. & Walker, 192, 205; Mosely, 364; 3 Swanst., 400.*

The doctrine that parties who deal with each other at arms length, when both have equal opportunities to examine and use their judgment is not applicable here, for the representations were of matters peculiarly within the appellant's ancestor's knowledge. When a single word is dropped which tends to mislead, the rule is different. *22 Pick., 52; 2 Wheat., 178; 2 Bibb, 12; Ib., 47; 1 Story Eq., par. 192; 1 Brown Chy., 546; 6 Vesey, 173; 1 Strobh., 220.*

COCKRILL, C. J. In 1862, Thomas Johnson died intestate, being at the time seized in fee of the tract of land which gives rise to this litigation, leaving him surviving, his widow, Rebecca Johnson, and the appellee, his only child, then an infant. Rebecca Johnson, his widow, and the mother of the appellee,

in the year 1869, conveyed the land to one J. D. Brown in consideration of $150.

In 1881 Brown mortgaged the premises to R. G. Atkinson & Co., and the mortgage was, in the same year, assigned to the appellant's ancestor, (L. C. Gammill), and default having been made in the condition of the mortgage, he, in 1883, prepared to foreclose, and then for the first time ascertained that the appellee had title to the land. Upon ascertaining this fact, and fearing that Brown might seek to take advantage of it, Gammill proceeded to the state of Texas, where the appellee then resided, and obtained a quit claim deed from her to the land. To set aside and cancel this deed for fraud, the appellee brought her suit in the circuit court of Lincoln county in chancery, making Brown a co-defendant with Gammill. No relief was sought or had against Brown, and he did not appear to the suit. The decree finds that Gammill obtained the conveyance through fraud, and directs its cancellation. Gammill appealed, and his death having been suggested, his heirs are prosecuting the appeal.

It appears, from a preponderance of testimony, that when Gammill visited Miss Johnson at her home in Texas to procure the deed, he falsely represented himself as the owner of the land by conveyance from Brown, and appealed to her to confirm her mother's act in selling the land, assuring her it had always been considered, and that he was now advised by counsel, that she had no title to the land, but saying that as matters stood his title might be doubted by a would-be-purchaser when he should desire to sell. Brown's wife was Miss Johnson's cousin; the two families had been intimate and her mother had enjoyed the proceeds of the unauthorized sale.

From these considerations, she expressed a ready willingness to confirm the sale made by her mother and to perfect the Brown title without consideration, and accordingly executed the deed Gammill had already prepared for the occasion. She was not

altogether ignorant of her title, and her intention in executing the deed was, not to confer a bounty upon Gammill, but to perform what she conceived to be an act of justice to Brown, and this determination was brought about by Gammill's statement that he stood in Brown's shoes, or was at least the innocent purchaser of Brown's rights.

Gammill knew that his statement as to the ownership of Brown's rights, whatever they might be, was false. It is apparent that it was believed to be true by Miss Johnson, that it was made with the design of effecting a conveyance of the land and was in fact the main inducement to the accomplishment of that end. These are the elements that control courts in declaring a misrepresentation a fraud for which a contract may be rescinded. *2 Pomeroy's Eq., sec. 876; Fitzhugh v. Davis, 46 Ark., 337.*

But it is argued that Miss Johnson had the opportunity to inform herself of the falsity of the statement, from the fact that she testifies that when Gammill informed her that he was the owner of the land, he held in his hand a paper which he averred was his deed of conveyance from Brown and wife.

1. FRAUD:—False representation.

It is true, that when the means of information are open to both parties alike, so that with ordinary prudence and vigilance each may be informed of the facts and rely upon his own judgment in regard to the thing to be performed or the subject matter of the contract, if either fails to avail himself of his opportunities he will not be heard to say he has been deceived. A court of equity will not undertake to relieve a party from the consequences of his own inattention and carelessness. *Yeates v. Pryor, 11 Ark., 66.* But when the representation is made of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the one receiving it has the absolute right to rely upon its truthfulness, though the means of ascertaining its falsity were fully open to him. It does not lie in the mouth of declarant to say it was folly in the

other party to believe him. *2 Pom. Eq., sec. 895; Mead v. Bunn, 32 N. Y., 275; David v. Park, 103 Mass., 501; Kiefer v. Rogers, 19 Minn., 32; Matlock v. Todd, 19 Ind., 130; Keller v. Equitable Fire Ins. Co., 28 Ib., 170; Reynell v. Sprye, 8 Hare (32 Eng. Ch. R.), 222.*

The appellee was not guilty of negligence in believing Gammill's statement as to his title.

Affirm.

ST. L., I. M. & S. RY. v. HARRIS.

RAILROADS: *Right of way; Change of water-courses.*

A grant of a right of way to a railroad company, with the right "to change water-courses," does not authorize the company to divert streams from other lands upon the land of the grantor, to his injury.

APPEAL from *Poinsett* Circuit Court.

Hon. M. T. SANDERS, Circuit Judge, on exchange with Hon. W. H. CATE.

Dodge & Johnson for Appellant.

This case, in some of its features, is like *St. L., I. M. & S. Ry. v. Walbrink, ante, p. 330.* See our brief in that case.

The gravamen of the complaint is the faulty construction of the road, and damage from changing the course of creeks in an unskillful manner. There was no evidence to prove this.

The first instruction of the court was misleading. All the others, in effect, told the jury they could not find for plaintiff, unless the work was done unskillfully and improperly.

The verdict was against the law and the evidence.

E. F. Brown for Appellee.

We concede the right of appellant to enter upon appellee's

land, and to erect its road-bed thereon in a proper and skillful manner, and to use the right of way for that purpose; but complain because it failed to do it, and show the unskillful manner in which it turned the several creeks on its right of way to the middle of appellee's farm, where, through a culvert, it passed the water safely over its said right of way, where it unbridled it, and turned it loose, to scatter its deposits over forty acres of tillable land, by reason of which appellee lost his crop for the years 1882 and 1883; and that the land was thereby rendered valueless. See *77 Ill.; 194; 28 N. H., 438; Am. Law Reg., N. S., vol. 3, p. 323; Wash. on Ease., 375; 35 Ark., 622; 5 Am. Ry. Cases, 53.*

1. RAILROADS: Right of way. Diversion of water courses.

COCKRILL, C. J. The appellee is the owner of a tract of land in Poinsett county, through which a branch of appellant's railroad has been constructed. Before the road was built his land was dry and tillable, but the road-bed diverted the waters of England creek, which had previously flowed in a westerly direction south of his land, from their natural channel, turned them into a ditch made in constructing the road-bed on the east side of the track, where they were confined until they reached a point about the middle of the appellee's field, when the current was turned west again through a culvert in the road-bed, and the waters permitted to flow over the appellee's land west of the track, without a channel sufficient to confine them. Two creeks on the north of the land were also deflected from their regular course, and by turning them south through a continuation of this same ditch when they reached the road-bed north of this land, they were made to empty into England creek on the appellee's premises, thus making that part of his land west of the road the common reservoir for the three creeks to pour their floods into. None of this water ran upon his land until the road was built. The result is that only about one-half of the tract west of the railroad can be cultivated,

and nearly all of it is subject to overflow and has been damaged by a deposit of clay left by the water.

For this injury the appellee recovered judgment against the company in the sum of $475, and the company has appealed to reverse it.

The defense interposed by the answer was that the right of way over the lands had been granted to the company by the appellee, by and before the road was built, and that the road had been constructed with care and skill.

No effort was made to show a necessity for so constructing the road-bed as to turn the currents of the England and other creeks over the appellee's land, but the company sought to justify its conduct under the appellee's deed for the location of the road, granting among others "the right of changing water-courses and taking water."

While the grant of the right of way to the railroad carried with it a license to do all that was necessary for its proper construction, the company remained liable, nevertheless, for any proximate injury that resulted to the grantor from the want of care or skill in whatever work it undertook in order to effect the construction. Injuries done in the construction of the road, for which the grantor in such a case is precluded from recovering, are those to which he has expressly assented, or is presumed to have assented, in the execution of his grant. *St. L., I. M. & S. Ry. v. Walbrink, ante, p. 330.*

The proof showed, in this case, that it became necessary for the appellee to go a mile out of his way to cross the road-bed on his own land, but the circuit court, by timely action cut him off from the possibility of recovering for this inconvenience, because his deed to the railroad in terms charged him with the duty of constructing crossings. But there is nothing in the deed, or in the nature of the grant, from which it can be inferred that it was intended thereby to give the company the

right to flood the appellee's farm with the waters of one or more running streams, which at the time of its execution did not touch the land. There is nothing in it to preclude the natural presumption that the company, in constructing its road, would not change the customary flow of streams from other lands so as to empty their unconfined waters upon that of the appellee; or that if the water should be carried across his land, the company would in the first instance do all that was necessary to prevent an inundation of his premises. *St. L., I. M. & S. Ry. v. Morris, 35 Ark., 622; L. R. & Ft. S. Ry. v. Chapman, 39 Ib., 463; Jacksonville, etc., R. R. v. Cox, 91 Ill., 500; Hosher v. K. C., St. Jo. & C. B. Ry. 60 Mo., 329.*

If the beds of the streams had been located on the appellee's lands before the road was constructed, and an attempt had been made "to change the water-courses," as the deed has it, it would have been incumbent on the company to perform this work so as to inflict no unnecessary injury upon the appellee, (*cases supra*); and if the right of the company to bring the streams from the lands of others on to the lands of the appellee be conceded, the duty remained upon it of so enjoying that privilege as not to injure the appellee more than would be required in providing a proper channel for the water through his premises. This channel was not provided, and the want of it was culpable negligence on the part of the company. The trial court did no more, in the instructions to the jury complained of here, than to announce these rules.

Other elements of damage were claimed by the appellee, but the court excluded them from the jury without suffering the appellant to be prejudiced thereby.

The record does not present to our consideration the question of the proper measure of damages. That adopted by the court and given to the jury was acquiesced in by the appellant on the trial, and it is now too late for a question to be made

upon it. The amount awarded is within the range of the testimony, and moreover, was not questioned by the motion for a new trial.

Let the judgment be affirmed.

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W. U. Telegraph Co. v. Cobbs.

Telegraphs: *Negligence; Penalty; Damages.*

The stipulation upon the printed telegraph blanks that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message" does not exempt the company from the statutory penalty for negligent delay in the transmission or delivery of a telegram. "Damages" means compensation for an injury; but the penalty is inflicted by law to quicken the diligence of the company, and the plaintiff is entitled to it whether damaged or not.

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

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

That the provision requiring the plaintiff to make demand within sixty days is reasonable and will be enforced is too well settled to admit of argument. *Gray on Telegraphs, Sec. 34.*

The learned counsel for the appellee do not dispute this proposition, but say that it can have no application to an action for a statutory penalty.

Our answer to that is, that the statute only fixes the amount of damages to be recovered in the action; that the liability arises entirely out of the contract voluntarily entered into by the plaintiff; and that there is nothing in the statute in any way interfering with the power of the parties to enter into reason-

able contracts. See *W. U. Tel. Co. v. Jones, 95 Ind., 228; S. C. 48 Am. Rep., 713;* also, *95 Id., 93.*

Geo. H. Sanders and *Joseph W. Martin* for Appellee.

It is conceded that in suits for *damages*, that is, for pecuniary compensation for losses actually sustained by reason of company's negligence, this regulation is binding. *Gray's Communication by Telegraph, p. 62; Young v. W. U. T. Co., 65 N. Y., 163; Wolf v. W. U. T. Co., 62 Penn. State, 83; W. U. T. Co. v. Blancord, 68 Ga., 299; 21 Wall., 264; 57 Wis., 57.*

But these cases do not apply to suits for *penalties* presented by statute. *95 Ind., 18; 87 Ind., 600; 35 Ind., 441; 2 Thoms. on Neg., 841 and note; 6 Wait Act. and Def., p. 16; 49 Ind., 65. Mans. Dig., sec. 6419.*

No *damages* need be alleged or proven. *41 Ark., 79.*

The case of *W. U. Tel. Co. v. Jones, 95 Ind.*, is clearly wrong.

For definition of "Damages" see *Bouvier, in verbum.*

SMITH, J. This action was to recover the statutory penalty of $100 for negligent delay in the delivery of a telegram. The defense was that the plaintiff had not exhibited his demand within sixty days from the time he sent the message. There was a jury trial and the plaintiff had a verdict and judgment.

The message was received for transmission, subject to the following condition, which was printed on the blank form furnished by the company:

"The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message."

And it was admitted that the plaintiff had made no claim before bringing his action, which was six months after the message was sent.

The rejection of the following prayer is the only error assigned here:

"If you find that the plaintiff's message was written upon a telegraphic blank upon which was printed a condition exempting the company from liability unless a demand in writing was presented within sixty days after the sending of the message, and if you find that no demand in writing was presented by the plaintiff within that time, you will find for the defendant."

In *W. U. Tel. Co. v. Jones, 95 Ind., 228, S. C. 48, Am. Rep., 713,* this point was ruled in favor of the telegraph company. It was said that "claims" is a word of very extensive signification, embracing every species of legal demand; that the word "damages" means that which is assessed in the plaintiff's favor as the amount of his recovery; and that the penalty given by the statute is in this sense damages, it being recoverable not by public prosecution, but by a civil action in the name of the sender of the message, in which the public has no interest.

But with due deference to that learned court, we are unable to assent to its conclusion or its train of reasoning. The notice for which the company stipulated was of a claim for damages. By damages we understand the indemnity, or compensation in money, which the law gives to an injured party for the breach of a contract or a duty. In theory they are precisely commensurate with the injury received, except in the case of exemplary damages, or smart money, where some element of fraud, malice, gross negligence, or oppression, enters into the controversy. A penalty, on the other hand, is the punishment, generally pecuniary, inflicted by a law for its violation. It has no reference to the actual loss sustained by him who sues for its recovery. *Field on Damages, sec. 1; 2 Greenl. Ev., sec. 253; Bouvier's Law Dict., sub voce Penalty.*

As the object of the statute is not to recompense the plaintiff for the actual damage he has suffered, but to quicken the

diligence of telegraph companies in the transmission of dispatches, it follows that this cannot be considered an action for damages. The plaintiff does not seek reparation proportioned to the loss or inconvenience to which he has been subjected; but to recover a penalty, the amount of which is fixed by statute, regardless of the fact whether his loss be great or small. He neither alleges, nor proves, actual damages; nor was it necessary to do so. *L. R. & Ft. S. Tel. Co. v. Davis, 41 Ark., 79; W. U. Tel. Co. v. Buchanan, 35 Ind., 429, S. C., 9 Amer. Rep., 744; W. U. Tel. Co. v. Adams, 87 Ind., 598; W. U. Tel. Co. v. Pendleton, 95 Id., 12.*

Nor can the statutory penalty be considered as in the nature of liquidated damages. This phrase is confined to cases where the extent of the damages has been determined by anticipatory agreement between the parties.

The only claim, to notice of which the company was entitled under the clause in question, was a cause of action sounding in damages—not debt for a penalty. The plaintiff had no such claim to present. As the message related to a family matter, it is probable the failure to deliver promptly caused no pecuniary detriment. The necessity for speedy information may exist equally in both cases, viz: to enable the company to ascertain the true cause of the miscarriage, before time has obliterated the facts from human memory. But the language of the stipulation does not cover both cases; and it will not be presumed the parties intended something they have not expressed.

Affirmed.

McREYNOLDS v. DEDMAN.

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ASSIGNMENTS: *Preferences; Releases; Reservation of surplus; Attachment.*

An assignor may make preferences, and exact releases from creditors who assent

to the assignment, but if he reserves to himself, to the exclusion of non-assenting creditors, the surplus that remains, the deed is fraudulent upon its face, and will justify an attachment by a non-assenting creditor, of the property assigned.

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

E. P. Watson and *L. H. McGill* for Appellants.

It is not a fraud on creditors for the debtor to retain exemptions allowed him by law. *Bump Fr. Conv., 403, 245; Burrell on Assign., 284; 31 Ark., 554; 22 Am. L. Reg., 265.*

Releases may be exacted as a condition of preference, or as a condition of participation in the benefits of the assignment. *Burrell Ass., 251; Sec. 3374 Mansf. Dig.; Bump Fr. Conv., 628; 10 Burr. Ass., 270.*

A deed, exacting releases and reserving the surplus against non-assenting creditors, is valid. *3 Price (Exch.), 6; 5 Pick., 28; 2 R. I., 547; 4 Wash. C. C., 232; 2 Binney, 174; 4 Barr, 430; 7 Serg. & R., 510; 10 Ib., 439; 3 Watts, 198; 8 W. & S., 304; 5 Rawle, 221; 7 Pet., 608; 8 Leigh, 271; 8 Gratt, 457; 5 N. H., 113; 1 Curt., 471; 7 Neb., 433; 23 Fed. Rep., 421; Burr. Ass., 276; Bump. Fr. Conv., 399, 400, 401; 22 Am. L. Reg., 264 and notes; 36 Ark., 426.*

U. M. & G. B. Rose, Ellis & McDaniel, H. A. Dinsmore, for Appellee.

The deed is void upon its face.

1. It exacts releases from all assenting creditors, and provides that any surplus remaining after they are paid shall be restored to the assignor. *6 Wall., 299; 2 Kent Com., 534; Bump. Fr. Conv., 436–7, 3 ed.; Burrell on Ass., 4 ed., 291, sec. 209; 3 Md., 49; 17 Vt., 390; 16 Md., 101; 12 Ala., 101, 664; 8 Ind.,*

101; 14 Id., 128; 1 Head, 34; 7 Pet., 608; 3 Watts, 198; 6 Conn., 276; Ware's Rep., 247; 4 Comst., 24; 2 Hill Chy., (S. C.), 443; 1 Am. L. C., 100; 8 Barb. S. C., 125; 36 Ark., 433.

If the deed is valid, a court of chancery must enforce it as written. *2 Seld., 520.*

2. The deed being fraudulent on its face the attachment was properly sustained. *Bump. Fr. Conv., 24; Wait Fr. Conv., secs. 8, 9, 10; 31 Mo., 62; 6 Hill, 438; 15 Fed. R., 338; 5 McCrary, 53; Teah v. Roth, 39 Ark., 66; Hunt v. Weiner, Id., 71.*

SMITH, J. Dedman brought suit by attachment against McReynolds, the attachment being based on an alleged fraudulent disposition of property by the defendant. Claypool interpleaded for the property attached, and the defendant filed an affidavit denying the grounds of the attachment. The interpleader claimed under a deed of assignment executed to him by the defendant, which he sets forth at large in his interplea, and which the court upon demurrer held to be fraudulent on its face; and this fraudulent deed was held sufficient to sustain the attachment.

The deed was an ordinary deed of assignment, except that it contained the following provisions: 1. ASSIGNMENTS

Having conveyed all the property of the assignor, of every kind and description, the deed proceeds as follows:

"To have and to hold, to him, the said H. S. Claypool, his heirs, assigns, executors and legal representatives, in trust and special confidence, nevertheless, that is to say, in trust that he shall within the time and in the manner provided by law make sale of all of said property, mentioned and described in this deed; and upon the further trust, to dispose of the proceeds of said property, when the same shall have been by him collected and reduced to possession, in the manner following:

"1. To pay and reimburse himself all such reasonable costs,

charges and expenses, as may be by him incurred and allowed by the courts in the execution of his trust, together with such commissions to himself as shall be allowed to him by the Benton circuit court in chancery, for the discharge of his duties herein.

"2. To apply the residue of such proceeds to the payment of the claims of said S. D. McReynolds' creditors, as follows: First, he shall pay to the firm of D. H. Woods & Co., of Bentonville, Arkansas, the sum of $2500, who are herein preferred as a creditor to that amount. The residue of the proceeds arising from the sale of the property herein conveyed, to be applied to the payment of the claims of all creditors of the said S. D. McReynolds, *pari passu*, and without preference, who shall agree within ninety days from this date to accept such dividend or dividends as they may severally be entitled to, under this deed, in full satisfaction and discharge of their respective claims against the said S. D. McReynolds, and execute and deliver to the said S. D. McReynolds a legal release thereof.

"3. After payment and satisfaction of the claims of creditors as aforesaid, then to apply the residue of the said trust funds and property to the payment of all the creditors of the said S. D. McReynolds, *pari passu*, and without any preference or priority, upon their executing the release aforesaid, and to pay over the residue, if any, to the said S. D. McReynolds, his legal representatives or assigns."

The interpleader also alleged that the property assigned was worth from $10,000 to $30,000, that the debts due from the assignor amounted to about $80,000, and that creditors representing debts to the aggregate amount of $33,843.50 had accepted the conditions imposed by the deed of assignment.

Reservation of Surplus: Release: Attachments.

The reservation of the surplus to the grantor stamps the deed as constructively fraudulent. To use the language of Ware, Judge, in the case of the *Watchman, Ware's Rep.*, 247,

the grantor prefers himself to a dissenting creditor. An insolvent debtor can reserve no use or benefit to himself out of the property assigned. He may stipulate for a release, but he must dedicate all of his property, not exempt by law, to the payment of all his creditors; not necessarily to the payment of all in equal proportions, for he may prefer such as will execute releases. But the deed must provide for the distribution of any surplus that may remain in the hands of the trustee, after the payment of the preference creditors, amongst the other creditors, whether they assent or not. *2 Kent's Com., 534; Burrell on Assignments, 4 ed., sec. 209; Bump. Fr. Conv., 3 ed., 436–7; 1 Am. Lead. Cases, [*72–3]; Langston v. Gaither, 3 Md., 49; Bridges v. Hinds, 16 Id., 101; Grimshaw v. Walker, 12 Ala., 101; Reavis v. Garner, Ib., 664; Wilde v. Rawlings, 1 Head, 34; Ingraham v. Wheeler, 6 Conn., 276; Leitch v. Hollister, 4 Comst., 211.*

If the assignment is valid, its provisions, including the return of the surplus to the maker, ought to be enforced in a court of equity. Yet this might prevent the court from letting in the non-assenting creditor upon the surplus.

The deed, being fraudulent on its face, was a sufficient ground for an attachment. *Teah v. Roth, 39 Ark., 66; Dodd v. Martin, 5 McCrary, 53; S. C. 15 Fed. Rep., 338; Whedbee v. Stewart, 40 Md., 414; Potter v. McDowell, 31 Mo., 62.*

Judgment affirmed.

SHORMAN V. EAKIN.

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1. VENDOR AND VENDEE: *Estoppel as to title; Public lands.*

As a general rule a purchaser receiving possession under his contract, cannot deny his vendor's title so long as he remains in possession; but where it turns out that the land was public land of the United States, the purchaser is not

estopped to deny the title and refuse payment, though he has perfected his title by entering the land as a homestead under the laws of the United States.

2. ESTOPPEL: *Acts against public policy.*

No one can estop himself from taking advantage of that which is contrary to public policy.

3. LIEN: *For debt on homestead.*

No lien can be fixed upon land entered under the homestead act of the United States, for any debt contracted before the issuance of the patent for the land.

APPEAL from *Hempstead* Circuit Court in Chancery.
Hon. C. E. MITCHEL, Circuit Judge.

Smoote, McRae & Hinton for Appellant.

Appellant, in the absence of fraud, cannot contest the title nor resist the payment of the purchase money, until he surrenders the possession obtained under the sale by Burke to him. *27 Ark., 61; 38 Id., 200; Hempst., 503; 40 Ark., 420; 23 Id., 590; 24 Id., 456.*

The homestead entry cannot change the result. Appellee cannot set up the defense, under Section 2296, Revised Statutes of the United States, that it is against public policy.

This is a proceeding to foreclose for the purchase money in which *the title is not involved.* The statute was not meant to apply to equitable proceedings to foreclose for purchase money.

A. B. & R. B. Williams for Appellee.

The pretended sale was a fraud. Burke had *no* title, nothing to convey, and the sale was void. *38 Ark., 127.* This is an *executory* contract. See distinction in *21 Ark., 235.*

Under the laws of the United States Eakin *could not* procure a title which could inure to the benefit of any one but himself. See the oath. *U. S. Dig., sec. 2290.*

The cases in *Hempst., 503,* not in point. The possession of land under a void sale is no consideration. *38 Ark., 127,* citing *21 Ark., 235.*

A covenant to make a "good and perfect deed" is not complied with by making one good *in form only.* The title must be *good. 13 Sm. & M. (Miss.), 275; 5 Seed. (N. Y.), 535.*

BATTLE, J. On the first day of March, 1878, Fleming Burke was in possession of the land in question, and sold it to John M. Eakin, on a credit, for the sum of $666.66. Eakin executed his note to Burke for the purchase money, and Burke his bond to Eakin, thereby covenanting to convey the land in fee simple to Eakin when the note was paid, and put Eakin in possession. At this time Burke claimed the land through one John Skidmore and others, upon a swamp land grant from the State of Arkansas, and at the same time the land, according to the books of the United States Land Office, at Camden, Ark., was vacant, and subject to homestead entry under the laws of the United States. On the 22d day of December, 1879, Eakin entered it under an Act of Congress, entitled, "An Act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, at the land office at Camden, and paid the receiver $10.05 and took his receipt. Eakin has remained in possession of the land at all times since the 1st day of March, 1879. The note for the purchase money was assigned to the appellant, Robert R. Shorman, some time after it was due. No part of it has ever been paid.

On the 24th day of November, 1881, Shorman commenced this action, in the Hempstead circuit court, on the note and bond, to foreclose a vendor's lien, claimed by him on the land sold to Eakin, and on the 10th day of October, 1883, the action was finally heard. The court held that Shorman had no lien on the land; that the note was without consideration, and dismissed the complaint, and Shorman appealed.

There is no evidence that the land in question was swamp land on the 28th day of September, 1850, or was confirmed to the state. The national government being the original source of title to lands in this state, the presumption of law is that the title remained with the government until some other disposition of it is shown. The only disposition shown to have been made by the government, of the land in question, is the homestead entry. This being true, the presumption is Burke never had any title to the land. *Patterson v. Tatum, 3 Sawyer, 172.*

1. VENDOR AND VENDEE:—Estoppel as to title. Public lands.

As a general rule, a purchaser, entering into possession under his contract of purchase, cannot, in an action like this, so long as he retains such possession, deny his vendor's title. If the vendor is unable to convey the title, and he would rescind the contract ,he must restore the possession. He cannot enjoy the property and refuse to pay the price. The principle on which this rule rests is, the purchaser is estopped to deny the title of his vendor, because he acknowledged it and gained possession by his purchase, and he ought not, in conscience, as between them, to be allowed to enjoy the fruits of his contract and not pay the full consideration money. *Lewis v. Boskins, 27 Ark., 64; Galloway v. Failey, 12 Peters, 294; Jackson v. Ayers, 14 John., 223; Jackson v. McGinness, 14 Penn. St., 333; McIndoe v. Morman, 26 Wis., 589.*

2. ESTOPPEL: Public policy.

But this rule is not without exception. No one, as a rule, can estop himself from taking advantage of that which is contrary to public policy. Contracts, as a general rule, cannot vest in parties any rights in contravention of law or public policy. Mr. Parsons, in his work on contracts, says: "It is obvious, however, that the doctrine of estoppel can go no further than to preclude a party from denying that he has done that which he had power to do." *2 Parsons Contracts, 5 ed., 799; 1 Greenhood on Public Policy, 115; Spare v. Home Mut. Ins. Co., 15 Fed. Rep., 707; Steadman v. Duhamel, 1 Manning,*

Granger & Scott, 888; Dupas v. Wassell, 1 Dill., 213; Klenk v. Knobel, 37 Ark., 304; Webb v. Davis, Id., 555.

The Constitution of 1868 prohibited the encumbering of homesteads of residents, of this state, who are married men or heads of families, in any manner, while owned by them, except for taxes, laborers' or mechanics' liens and securities for the purchase money. In *Klenk v. Knobel* and *Webb v. Davis, supra,* the defendants, while the Constitution of 1868 was in force, executed mortgages and recited or covenanted therein that the property mortgaged was not their homesteads. This court held in both cases, which were actions to foreclose mortgages, that the mortgagor was not estopped from denying the truth of these recitals and covenants, and claiming the property as his homestead, because such recitals and covenants were contrary to public policy and void.

As a rule, a tenant cannot dispute the title of his landlord. Yet in *Dupas v. Wassell, supra,* it was held that a landlord could not recover against his lessee ground rent for the use of the lands leased, because the lease was void by reason of its being contrary to the Statutes of the United States and against public policy, and that the lessee was not estopped to deny his landlord's title.

The object of the act, under which Eakin entered the land in question, is to secure the settlement of the public domain. To accomplish this object the government offers its lands to the actual settler, in quantities not exceeding a quarter section, for a nominal consideration, on the condition that he resides upon or cultivates the land entered by him, for the term of five years, immediately succeeding the filing of the affidavit he is required to make at the time he applies to enter. In order to prevent the homestead settler defeating the object of the act, he is required to make affidavit, upon applying and before he is permitted to enter, that his application to enter is made for his *exclusive* use and benefit, and that his entry is made

for the purpose of actual settlement and cultivation, and not, either *directly or indirectly*, for the use or benefit of any other person; and, after the expiration of the five years, to prove by two credible witnesses that he has resided upon or cultivated the land entered by him, for the term of five years *immediately* succeeding the time of filing the affidavit, and make affidavit that no part of such land has been alienated. This mode of procedure was, manifestly, adopted for the purpose of preventing any one, except the homestead settler, receiving the benefit of the land entered, directly or indirectly. As a further inducement to accept the terms of this act and to accomplish its object, the government guarantees to the homestead settler that his land, entered under the act, shall not be taken from him for debt. For this purpose the act expressly provides that the land acquired under it shall not "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." *Revised Statutes of the United States, secs. 2290, 2291, 2296, 2297.*

3. LIEN: For debt on homestead.

It was held by this court, in *Cox v. Donnelly, 34 Ark., 762,* that an agreement for the sale and conveyance of land, entered under this act, made by the person entering, before he has perfected his right to a patent for the same, is in violation of the act, against public policy and void; and in *Sorrels v. Self, 43 Ark., 451,* that a homestead, acquired under it, is not "liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." As a logical sequence to these decisions it necessarily follows, no lien on the land entered under the homestead, to secure a debt contracted before the patent therefor is issued, can in any manner be acquired.

In *McCue v. Smith, 9 Minn., 252,* "the defendant, Ann Smith, made a settlement and claim under the act of congress of September 4, 1841, known as the pre-emption law. Prior to proving up the claim and purchasing the premises, the plaintiff loaned the defendant a sum of money to pay the purchase

money, costs and incidental expenses, and it was there verbally agreed between the defendant and plaintiff that the said sum should be a charge and lien upon the premises, when purchased, to secure the repayment of said sum, with interest, at the rate of twelve per cent. per annum, in one year. The defendant agreed to waive the benefit of redemption, and that in default of the payment of said sum with the interest, within the time aforesaid, the premises might be sold, and that the sale should be absolute. It was further agreed that the terms of the agreement, and the charge upon the premises, should be evidenced by notes and mortgage, or other memoranda in writing, as the parties might be advised when the transaction should be consummated; and that in either case, the money advanced should be and remain a lien and charge on said premises; and that the duplicate of the defendant should be deposited with plaintiff to obtain and hold the patient as additional security. After the purchase of the land defendant evidenced her agreement in writing, in the form of a promissory note, and executed a memorandum in writing in the form of a mortgage, and, by a separate instrument, waived her right of redemption, and delivered her duplicate to the plaintiff, which he surrendered to the land office and obtained the patent." The court said: "The contract having been made prior to the purchase of the land by Ann Smith, is clearly within the prohibition of the thirteenth section of the Act of Congress of September 24, 1841, under which she pre-empted the lands mentioned in the complaint. The section provides, among other things, that before any person claiming the benefit of the act shall be allowed to enter any lands upon which he or she has settled, such person shall make oath that he or she has not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whatever, by which the title he or she might acquire from the government of the United States shall inure, in whole or in

part, to the benefit of any person except himself or herself. The title, in this instance, which Ann Smith acquired, would, if the contract be valid, inure to the benefit of the plaintiff, to the extent of his charge or lien upon the premises. The contract is therefore illegal and void, and the note and mortgage, being the fruit of the contract, must fall with it."

This decision was cited, approved and followed, by the supreme court of the United States, in *Warren v. Van Brunt, 19 Wall., 646.* See also *Brewster v. Madden, 15 Kans., 249.*

No title, therefore, acquired by Eakin under the homestead act, inured to the benefit of Burke or Shorman, as that would defeat the spirit and intent of the act, and be contrary to public policy; and for the same reason, they, or either of them, did not acquire any lien on account of Eakin's purchase from Burke.

But appellant contends that Eakin must first surrender possession of the land in question before he can contest the title of Burke. This is not true. He is not estopped to deny the title of Burke, as already shown. The trust relations and obligations, on which the rule relied on by the appellant rests, cannot legally exist between the homestead settler and any other person in respect to the land entered by the homestead settler before he is entitled to his patent. He renounces all such relations and obligations by the affidavit he makes upon applying to enter his homestead, when he swears that his application is made for his *exclusive* use and benefit, and that his entry is not made, *directly or indirectly*, for the use or benefit of any other person. He is required to remain, continuously, in possession of the land entered for the term of five years, immediately succeeding the filing of this affidavit, before his right to a patent is complete. If, before the expiration of the five years, he actually changes his residence, or abandons the land for more than six months at any time, the land reverts to the government. He is not, therefore, required to

surrender the possession of his homestead, during the five years, in order to contest the title of any person and assert his own, and surrendering six months or longer before the expiration of the five years, thereby incur the risk of losing his homestead by the delays of litigation over his title.

Since Burke never had any title to the land sold to Eakin, and the title acquired by Eakin did not inure to him, the note sued on was without consideration. It seems to us it would be against public policy to require Eakin to pay Burke or Shorman for the land, when it was the intention of the homestead act that he should have it for a nominal consideration, and this was an inducement offered to him by the national government to accept the terms of the act.

Decree affirmed.

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TALIAFERRO V. BARNETT.

1. RES JUDICATA: *Application.*

No one has a vested right to claim the application of an erroneous decision of this court upon a given question as the law upon the same question in another case, arising afterwards and before the decision is overruled. It is only in subsequent proceedings in the same case that the decision of this court is the fixed law.

2. STARE DECISIS: *Application.*

The doctrine of *stare decisis* applies only where erroneous precedents have so far become a rule of property that it would effect less injury to follow than to overrule them; and is a rule of policy that addresses itself to the discretion of the court upon consideration of the erroneous decision.

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

W. P. Stephens for Appellant.

The court below refused or failed to obey the mandate, and permitted Barnett, the appellee, to file a new answer, which, in substance, alleges that this court, in its opinion heretofore rendered, violated the well-known doctrine of *stare decisis*, and that, therefore, the mandate ought not to be obeyed, when, in truth, if the mistakes made in *Sheppard v. Thomas* and *Jones v. Doss, 26 Ark., 617*, and *27 Ib., 518*, both decided by a divided court and virtually overruled in *Campbell v. Rankin, 28 Ib., 401*, had not been corrected, this court, to use the language of the court in *Callender's adm'r v. Insurance Co., 23 Pa. St., 474*, would have committed a greater error than the one which it felt bound to correct. *Wells on Res Adjudicata and Stare Decisis, chap. 14, p. 576*, title "Limitations of the Rule of *Stare Decisis*." Opinion and authorities cited by this court in this cause, *37 Ark,, 511*.

That the authorities which will be cited by appellee's attorney do not apply, see *chap. 14, supra*, and authorities there referred to.

Barnett had no vested right which the court can feel bound to respect. On the contrary, he knew or could have known, by inspection of the deed from Eliza Comer to Pauley & Glover, that some one, under the true rule and well established doctrine of equity, might have a vested right to enforce the lien retained in the deed, notwithstanding the error in *Sheppard v. Thomas* and *Jones v. Doss*, which was rather promptly and quickly rectified in *Campbell v. Rankin, supra*.

That the decision of this court in this cause is the law of the case, is more than authority, is a final adjudication from the consequences of which the court below cannot depart, (nor, indeed, this court,) nor the parties relieve themselves, see *Wells on Res Adjudicata and Stare Decisis, chap. 45, p. 569*, and cases there cited; *Foutenberry v. Frazier et al., 5 Ark., 200; The Real Estate Bank v. Rawdon et al., Ib., 558; Walker & Faulkner v. Walker, 7 Ib., 542; Porter et al. v. Doe on dem.*

Hanley et al., 10 Ib., 186, reaffirming the precedent cases; *Baxter v. Brooks, 29 Ib., 173; Rector v. Danley, 14 Ib., 304.*

It was gross error to permit the answer of Barnett to be filed, and still grosser error to overrule the demurrer thereto. *Yell, Governor, etc., use of Conant & Co., v. Outlaw et al., 14 Ark., 621.*

Parties could not question the decision. *Ashley et al. v. Cunningham, 16 Ark., 168.*

Right or wrong the decision was the law of this case. *Supra; 13 Ark., 103; 11 Id., 151; 14 Id., 304.*

D. H. Rousseau for Appellee.

As long as *Sheppard v. Thomas, 26 Ark., 617,* and *Jones v. Doss, Ib., 518,* remained unreversed and not overruled, they furnished the only rule governing contracts, so far as they fell within their principles, and all property rights acquired under them must be governed by them. Rights thus acquired can not be taken away by subsequent legislation, or subsequent adjudication of this court changing the law. The law in force *at the time* of making a contract governs its obligation. *4 Wheaton, 122; 12 Id., 257; 16 Howard, 432.*

If the contract was valid at the time it was made, by the law as *then* expounded, its validity cannot be impaired by subsequent judicial decisions. *1 Wallace, 175; 7 Id., 181; 8 Id., 576; 10 Id., 511.*

Decisions of a court of final resort, reversing or overruling decisions under which property rights have become vested, are not retroactive.

1. RES JUDICATA: Application of rule.

COCKRILL, C. J. In the case of *Sheppard v. Thomas, 26 Ark., 617,* decided in 1871, it was ruled that a vendor's lien for unpaid purchase money, though expressly reserved in the deed

of conveyance, was not assignable. That case was, in effect, declared to have been wrongly decided, in 1873, in the case of *Campbell v. Rankin, 28 Ark., 401;* but as the rule announced in *Sheppard v. Thomas* had, in the meantime, been changed by statute as to transactions occurring after its passage, the case was not in terms overruled. When the appellant here, who is the assignee of notes given for the deferred purchase price of lands—a lien for the payment of which was expressly reserved in the vendor's deed of conveyance—sought to foreclose this lien, the circuit court followed the case of *Sheppard v. Thomas,* and dismissed his cross-bill upon demurrer. He prosecuted an appeal to this court, and the decree against him was reversed. As the sale was made before the statute, and was not governed by it, the court, through Justice HARRISON, in delivering the opinion, expressly overruled *Sheppard v. Thomas,* saying that was the practical result of *Campbell v. Rankin.* See *Taliaferro as Executor v. Barnett, 37 Ark., 511.*

When the case was remanded after this decision, Barnett, the appellee, filed an answer to the cross-bill, alleging that the lands were conveyed to him after the purchase notes were assigned and before the case of *Sheppard v. Thomas* was overruled, and argued that he had, therefore, a vested right to hold the lands freed of the lien. The special judge who sat in the case overruled a demurrer to this answer, and decreed against the plaintiff in the cross-bill, and he has appealed the second time.

It is apparent that the answer offered no defense.

A decision of this court is adhered to in all subsequent stages of the same case, although it may be clearly erroneous. It becomes an adjudication between the parties to the suit from which the supreme court itself is not, upon a second appeal, at liberty to depart. But strangers to the suit acquire no such right, nor, indeed, any right to the decision in any case, further than it may be as a guide to their conduct. An ex-

ception is made, by statute, as to some criminal acts. *Mansf. Dig., sec. 6340.* A decision of the court when overruled stands as though it had never been, and the court in the reversing judgment declares what the rule of law was in fact when the erroneous decision was made.

2. STARE DECISIS: Application of rule.

When erroneous precedents have become a rule of property, the tender regard the courts entertain for interests that have grown up under and are dependent upon them, causes them to stand by the established error. The doctrine of *stare decisis* is then the prevailing rule. The theory is that less harm will result in such a case from preserving the stability of judicial decision than from ascertaining what is theoretically or actually right; for the change, if made, necessarily relates back to the time the law came into force. But this is a rule of policy merely, that addresses itself to the discretion of the court upon consideration of the erroneous decision.

Upon the first appeal, in this case, it was definitely and finally settled that it was, and always had been, the general law of this state that a vendor's lien, expressly reserved in the deed of conveyance, was assignable, and it is the unchangeable law of this case.

Let the decree be reversed, and the cause remanded with instructions to enter a decree for the plaintiff in the cross-bill, unless a valid defense be interposed.

McINTOSH & BEAM v. HILL.

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SALES: *Conditional; Title reserved until payment of price.*

When a chattel is sold with a reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser

from the vendee acquires no title, though he buys in good faith for a valuable consideration and without notice of the condition.

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

J. W. House for Appellant.

The only question in this case is the doctrine of a conditional sale, when applied to an innocent purchaser for value, who buys without notice of the conditions. This has never been settled by this court. In *Andrews v. Cox, 42 Ark., 480*, it was not involved, and in *Carroll v. Wiggins, 30 Ark., 402*, the party bought with full notice.

The later and better decisions sustain our contention. They discourage secret liens. *1 Benj. on Sales, 414 to 420, 4 Am. ed.; 93 U. S., 664; 102 U. S., 235; 37 Am. Rep., 661; 40 Id., 674; 31 Id., 79; 44 Id., 598; 40 Id., 20; 3 Id., 612.*

W. R. Coody for Appellee.

This character of conditional sales, or in other words, "contracts for sale," with the title of the property to remain in the vendor until the payment of the purchase price, or the performance of the conditions precedent to the actual sale and vesting of title, are so well settled by authority, and so fully recognized and sustained by the various decisions of this court, that we deem it unnecessary to do more than to refer to those decisions. *Andrews v. Cox, 42 Ark., 480; Ferguson v. Hetherington, 39 Ark., 440; Carroll v. Wiggins, 30 Ark., 402.* Also, *Blackwell v. Walker, U. S. Circuit Court E. D. Ark.*, reported in *11 Rep., p. 418*, with authorities cited by Judge Caldwell, which seems conclusive.

COCKRILL, C. J. This is replevin for the possession of a mule. The facts, as taken from the abstract, are as follows:

"In March, 1884, S. S. Wann contracted to sell to one Overton, the mule in controversy, for $90, due in the fall. Until the purchase money was paid the mule was to be and remain the property of Wann, and upon failure to pay in the fall Overton was to deliver the mule to Wann, and pay for its *use*. Soon after the purchase Overton mortgaged the mule, with the crop to be raised by him, to the appellants for supplies for the year 1884, and at the time told the appellants that he had bought the mule on a credit. Overton died soon after the mortgage. The mule was used to make the crop, a part of which was paid on the mortgage. The parties not being able to pay for the mule in the fall, returned it to Wann, and settled for the use of it. Wann then sold the mule to the appellee, from whom it was replevied by the appellants under their mortgage. The value of the mule was $50 or $60. The mortgage was duly acknowledged and recorded while the mule was in Overton's possession, and the sum of about $40 was still due on it when this action was commenced." The judgment of the court was against the right of the mortgagees.

3 SALES CONDITIONAL: Title reserved until payment.

The question presented, put in the best light for them, is whether the title of a vendor parting with the possession of a chattel, upon the condition that the title shall not pass until the purchase money is paid, shall prevail against a *bona fide* purchaser for value from the vendee in possession, before the condition is complied with, without notice of the original seller's claim of ownership or of the condition upon which the delivery was made.

In *Carroll v. Wiggins, 30 Ark., 402*, it was decided that a sale and delivery of personal property on condition that the title is not to pass until payment of the purchase price, does not vest the title in the vendee until the condition is performed; and the rule was enforced against a purchaser from the vendee with notice of the condition.

In *Andrews v. Cox, 42 Ark., 473,* the question as to the attitude of a purchaser without notice, from a vendee holding subject to a like condition, was discussed by the court in considering a kindred question, and though this question is not expressly ruled, the intimation is very strong that the title of the original vendor must prevail. The hardship that is sometimes discovered when the condition is to be enforced against a *bona fide* purchaser, has induced some of the courts to come to the conclusion that as against him possession is *per se* a badge of fraud, and that the doctrine, that when one of two innocent parties must suffer the loss should fall on the one who caused the dilemma, protects the *bona fide* purchaser. But possession alone gives no right to transfer title, and one who has no title (and the conditional vendee before performance of the condition has none, according to *Carroll v. Wiggins, supra,*) can confer none. Possession of personal property is only *prima facie* evidence of title, and the doctrine of *caveat emptor* prevails notwithstanding the possession. The *prima facie* title must yield to the actual title when it is asserted, and the buyer who trusts to appearances must suffer the loss if they prove delusive. If the vendor is estopped from reclaiming his property from an innocent purchaser, there is no principle, as was said in *Andrews v. Cox, supra,* upon which we could stop short of holding that one who had borrowed or hired any personal property might divest the true owner of his title, simply by assuming the power to sell. We think that reason and the overwhelming weight of authority pronounce in favor of the right of the original vendor. The leading case on the subject is that of *Coggill v. Hartford etc. R. R., 3 Gray (Mass.), 545.* See too, *Ketchum v. Brennan, 53 Miss., 596; Fairbanks v. Eureka Co., 67 Ala., 109; Blackwell et al. v. Walker Bros., 5 Fed. Rep. (East. Dist. Ark.), 419; cases cited in note to Sradtfield v. Huntsman, 37 Amer. Rep., 661–2; Schouler's Personal Property, sec. 300.*

Affirm.

COLLIER v. DAVIS.

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1. ASSIGNMENTS: *When void as to creditors; Clayton v. Johnson, 36 Ark., 406, overruled.*

An assignment of a debtor for the benefit of creditors which provides that no creditor shall participate in the assets unless he will accept his share in full satisfaction of his claim, and gives no direction for the application of the surplus after satisfying assenting creditors, (which is the same in legal effect as directing such surplus to be returned to himself,) is void upon its face. The case of *Clayton v. Johnson, 36 Ark., 406,* is, on this point, overruled.

2. SAME: *Same.*

Such deed of assignment is also void for not designating a time within which creditors are to accept the provision made for them and surrender their debts.

3. SAME: *To be administered under direction of assenting creditors.*

An assignment which provides that it be administered and closed up under the supervision of the creditors who assent to it is void. The effect of such provision is to give a bare majority of the assenting creditors complete control and power to delay the closing of the trust *ad libitum,* without any redress to creditors who are injured by the delay, for the assignee is executing the trust according to its terms.

4. SAME: *Giving discretionary power to assignee.*

The statute prescribes the duties of an assignee, and an assignment which gives him any discretionary powers, or authorizes him to dispose of the property assigned, or to settle up the estate, in a manner different from that prescribed by the statute, is void.

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

Jacoway & Jacoway for Appellant.

The deed is a copy of one held good in *Clayton v. Johnson, 36 Ark., 408,* and we rely on that case and the authorities cited there.

Hall & Carter for Appellee.

The deed of assignment is void on its face, because, first, it provides that "this assignment shall be settled and closed up under the direction of the creditors assenting to the same." A majority of the assenting creditors can have the assignee to close up the trust against the remonstrance of the minority, if this deed is good. The provisions of the statute of assignments are mandatory. See *Jaffray v. McGehee, 107 U. S., 363; Raleigh v. Griffith, 37 Ark., 150; Dodd v. Martin, 5 McCray, 53.*

Because it provides no time at which the creditors shall assent to or reject its terms. See *Henderson v. Bliss, 8 Ind., 100; Mayer v. Shields, 12 Reporter, 789, (Mississippi case decided Nov. 1881); 2 Kent, top p. 533, 6 ed.; Burrill, pp. 254, 285; Bump., 433; 7 Ohio Rep., 2 pt. 246; Brashear v. West, 7 Peters, 589; Grover v. Wakeman, 11 Wend., 197.*

We refer the court especially to the brief of Judge U. M. Rose, published on *page 53, 5 McCrary*, in the case of *Dodd v. Martin.*

1. ASSIGNMENTS: When void as to creditors.

SMITH, J. McGuire, in 1884, made an assignment for the benefit of his creditors. The deed, after reciting that the maker is indebted in a sum far beyond his ability to pay, conveys to the trustee certain goods, wares and merchandise, which are particularly described in an accompanying schedule, and all the debtor's choses in action. The trustee is empowered to sell the goods, on the best terms he can consistently with the statute, to collect the debts, and apply the proceeds ratably among the creditors. But no creditor is to participate in the distribution of the assets, unless he will accept his share in full satisfaction of his claim. And the assignment is to be settled and closed up under the directions of the creditors who assent to the same.

The assignee filed his inventory and bond in the proper court, took possession, and notified creditors of the date, terms and conditions of the assignment, as well as of assets and liabil-

ities. A majority in number and value of creditors promptly expressed their acquiescence in the arrangement; but four creditors sued out attachments. Under these writs the sheriff seized the goods. The assignee brought replevin, and on a trial before the court without a jury, the assignment was declared void and the defendant had judgment.

The only evidence introduced, besides the deed and schedule, was an agreed statement of facts. From this it appeared that McGuire was insolvent, at the time of the assignment, and in such confirmed ill health that he had despaired of his life. The assignment included all of his property which was subject to execution. The claims of assenting creditors aggregated $800.87, while those of attaching creditors were $779.19. The assignee had, by consent of all parties in interest sold the goods, and the net proceeds in his hands, after deducting all expenses, were $612.18; for which sum, it was agreed, judgment might be rendered against him and his sureties in the replevin bond, if the court should find that the defendant was entitled to a return of the goods.

As the deed is in all substantial respects, a copy of the one which is set out in *Clayton v. Johnson*, *36 Ark.*, *406*, we are under the necessity of re-examining the grounds of that decision. It is always a misfortune for a court to change front on a question which may affect property rights acquired since the rule was announced. And it is sometimes doubtful whether more mischief will be produced by adhering to an error, or by retracting it. The case has stood for more than five years, although it was never satisfactory to the profession. It is, however, indefensible in principle, and it was decided against the clear weight of authority.

In that case the single objection that was raised below, or considered here, was to the provision that no creditor should participate in the assets unless he would accept his share in full satisfaction of his claim. No directions were given for the dis-

position of any surplus after satisfying the creditors who acceded to these terms. And it was held this did not vitiate the assignment.

It seems to be admitted, in the reasoning of the court, that if the debtors had expressly reserved to themselves the surplus this would have been fraudulent. It is said: "There being no statute in this state prohibiting it, there is nothing in the general statute against fraudulent conveyances which can be construed to prevent a debtor from assigning all of his property, *without reservation or benefit to himself*, to a trustee for the payment of his debts, with a stipulation for a release."

Now, if no disposition of the surplus is made, a trust results to the maker by implication of law. And so far as the validity of the instrument is concerned, we can perceive no solid distinction between an express and an implied reservation. In one case, as much as the other, the assignment hinders and delays creditors in their remedies and endangers the ultimate collection of their debts. It puts the property beyond the reach of judgments and executions, into the hands of an assignee, chosen not by themselves, but by the debtor. It is locked up until the trusts of the deed are satisfied, and whatever remains is returned to the debtor in money—a form which is ordinarily intangible and inaccessible. Accordingly, those courts which condemn express reservations of the surplus have uniformly, so far as our researches extend, held that implied reservations are equally as bad. *Dana v. Lull, 17 Vt., 390; Malcolm v. Hodges, 8 Md., 418; Bridges v. Hindes, 16 Id., 104; Whedbee v. Stewart, 40 Id., 414; Atkinson v. Jordan, 5 Ohio, 178; Henderson v. Bliss, 8 Ind., 100.*

In New York, and perhaps in every other jurisdiction where the question has arisen, except in those mentioned in *Clayton v. Johnson*, the invalidity of assignments, stipulating for a release as a condition of receiving any benefit under the assignment, has been established. And it is a remarkable fact that in an opinion prepared by the late Chief Justice, the drift of the

decisions on this subject in several states has been totally misapprehended. Having himself a high veneration for precedents, no judge was ever more diligent in searching for them, or more careful in weighing them, or more accurate in stating the result of them.

The Alabama cases do not sustain the position assumed by the court. Take for instance, *West, Oliver & Co. v. Snodgrass, 17 Ala., 549.* The head-note, which correctly summarizes the principle decided, is as follows: "A deed of assignment, by an insolvent debtor, which provides that the preferred creditors are not to enjoy its benefits unless they accept of its provisions in full satisfaction of their debts, and that if any of them refuse to accept they shall be excluded, and the *pro rata* share to which they would have been entitled, had they accepted, shall be paid to another specified creditor, and which makes no provision as to the disposition of any surplus that may remain in the event all the preferred creditors shall refuse to accept, after paying the debt of the residuary creditor, is fraudulent and void on its face."

Compare also *Grimshaw v. Walker, 12 Ala., 101,* and *Reavis v. Garner, Ib., 664,* which are not mentioned in the opinion.

The case of *McCall v. Hinkley, 4 Gill., 128,* and *Kettlewell v. Stewart, 8 Id., 502,* were virtually, though not expressly, overruled in *Green v. Trieber, 3 Md., 11,* and *Langston v. Gaither, Ib., 40.* In the later case of *Malcolm v. Hodges, 8 Md., 418,* the syllabus is as follows:

"An implied reservation of the surplus, after paying the releasing or preferred creditors, to the grantor, avoids the deed equally with an express reservation, and the court cannot look outside of the deed to ascertain whether there will be a surplus or not." See, also, *Bridges v. Hindes, 16 Md., 101; Whedbee v. Stewart, 40 Id., 414.*

The case of *Hall v. Denison, 17 Vt., 310,* countenances stipulations for a release, as a condition of preference, but not as a condition of participation in the debtor's assets. The assignment did not attempt to exclude from all benefit under it such creditors as would not release their debts, but, on the contrary, provided for the division of all property, remaining after paying preferred creditors, *pro rata* among all the creditors.

In *Dana v. Lull, 17 Vt., 390,* the head-note is as follows:

"When a debtor makes a voluntary assignment of all his property to a trustee for the benefit of certain of his creditors, who are specified, and does not provide that the surplus shall be distributed among all his creditors, but there is either an express reservation of the surplus to himself, or no direction given as to the surplus, the effect of which would be, by implication of law, a resulting trust, as to the surplus, to himself, such assignment is fraudulent *per se* and void. And this is so, notwithstanding it appears in the end that the property assigned was not sufficient to pay all the debts due to the creditors named in the assignment." . . . .

The great names of Marshall and Story are appealed to, in *Clayton v. Johnson,* as favoring the view adopted by the court. But an examination of their opinions, in *Brashear v. West, 7 Pet., 608,* and in *Halsey v. Whitney, 4 Mason, 206,* shows that they reluctantly, and against the convictions of their better judgment, followed the local law of Pennsylvania and of Massachusetts.

The case of *Clayton v. Johnson, supra,* is on this point overruled.

2. SAME:—Time not specified for acceptance, etc.

We are further of the opinion that the deed under consideration is void, because it specifies no time within which creditors are to accept the provision made for them and surrender their debts. The assignee can never know when he is to begin

to make distribution. He cannot tell what any creditor's share will be, until he knows what creditors are coming in. And as the time for signifying their election is unlimited, distribution may be indefinitely delayed. *2 Kent's Comm., *534; Burrill on Assignments, 4 ed., p. 275; Bump. Fraud. Conv., 3 ed., 440; Pearpoint v. Graham, 4 Wash., 232; Henderson v. Bliss, 8 Ind., 100; Mayer v. Shields, 59 Miss., 107.*

3. SAME: Under control of assenting creditors.

Another fatal defect is that the deed provides the trust shall be administered and closed up under the supervision of the creditors who assent to it. The effect of this clause is to give a bare majority of assenting creditors complete control and power to keep the estate open as long as they choose. Creditors who are injured by the delay would have no redress, because the assignee is executing his trust according to its terms.

4. SAME:—Giving discretionary power to assignee.

The statute prescribes the duties of the assignee; and an assignment is fraudulent which vests in him any discretionary powers, or which directs or authorizes him to dispose of the property assigned, or to settle up the estate in a manner different from that pointed out in the statute. *Jaffray v. McGeehee, 107 U. S, 361; Raleigh v. Griffith, 37 Ark., 150; Teah v. Roth, 39 Id., 66; Schoolfield v. Johnson, 11 Fed. Rep., 297.*

Judgment affirmed.

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JETT ET AL. V. SHINN.

1. SHERIFFS: *Liability for failure to return execution.*

The irregularity of an execution is no excuse to a sheriff for failing to execute and return it, unless the irregularity be such as to render it void. If it is amendable, or a valid sale may be made under it, he is bound to execute it, disregarding the irregularities.

2. EXECUTION: *Not signed by the clerk.*

The omission of the clerk to sign a writ issued by him, or the affixing by inadvertence the name of another person instead of his own, is a mere clerical error—a matter of form and not of substance—and the defect will be treated as amended whenever it is collaterally assailed.

3. SAME: *Sheriff misled by plaintiff.*

The sheriff is not excused for not returning an execution by any consent of the plaintiff which does not show that the non-return resulted from the act or instruction of the plaintiff, or was ratified or waived by him.

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

J. E. Cravens and *A. S. McKennon* for Appellants.

A writ without signature or seal, while mandatory to a high degree in language, would still evidence no great regularity for protection to the officer, and so far fail as not to make it obligatory upon him to serve it. It would not justify an arrest, nor would a sale under it convey title.

The irregularities of a writ which a sheriff must overlook are such as in case of a sale would not affect the title. *Freeman on Ex., sec. 103; Cooley on Torts., p. 172.*

While it has been held that a writ without signature or without a seal is not void, but amendable, yet this is far worse than a writ without either, as it was signed by the plaintiff in execution, and was consequently without claim of authority. *Freeman on Ex., secs. 73, 23; 8 Ark., 363.* The clerk, in issuing writs, can use only his own name. *Freeman on Ex., sec. 23; Cooley on Torts, p. 173.* The issuance of a writ in the name of one not an officer avoids it.

The second paragraph set up a good defense. *Murfree on Sheriffs, secs. 959, 960.*

The writ upon its face gave the sheriff no guaranty of security, and for that reason did not impose upon him the duty of serving and returning it.

Jeff. Davis and *G. W. Shinn* for Appellee.

The only question that is presented for the consideration of this court is as to whether the execution in question is void or voidable. If void, the appellant was not compelled by law to serve or return it. *Herr & Co. v. Atkinson et al., 40 Ark., 377.*

But if voidable only, and subject to be amended, then appellant was bound to execute and return it within the time prescribed by law and commanded by said execution. *Bissell v. Kip, 5 Johns., 89; Cable v. Cooper, 15 Johns., 152; Jones v. Cook, 1 Cow., 309; The People v. Dunning, 1 Wend., 16; Freeman Ex., sec. 103; Noble v. Whetstone, 45 Ala.*

The execution in this case was voidable only, and when attacked collaterally, will be considered as amended. *12 Ark., 537; 5 Wend., 103; 13 Metc., 176, 478; 4 Blackf., 137; Kahn v. Kuhn, 40 Ark., 404; 9 Mass., 218; 11 Mass., 218; 25 Ark., 524; 18 Wis., 560; 23 Mich., 286; 4 Cow., 550; 2 Pick., 592; 1 Cow., 203.*

The sheriff is not the proper person to contest the validity of an execution; that concerns only the defendant. *5 Johns., (N. Y.), 99.*

"In the service of civil process, however, the sheriff is charged with duties only to the parties to the proceedings. Thus, he is liable to the plaintiff for refusal or neglect to serve process, or want of diligence in service; for neglect or refusal to return process," etc. The appellant is liable beyond all question. *Herman on Executions, sec. 414; Tood & Rafferty v. Hoagland, et al., 36 N. J., 352; Noble v. Whetstone, 45 Ala., 361; Norris et al. v. State, 22 Ark., 524; Whiting & Slark v. Beebe et al., 12*

Ark., 537 et seq.; Taylor & Co. v. Hancock & Co., 19 La., 466; Swezey v. Lott, 21 N. Y., 481; Bowman v. Cornell, 33 Barb., 69; Earl v. Smith, 26 Tex., 522; Deposit Bank v. Glenn, 1 Mets. (Ky.), 585; Cooley on Torts, 464–5–6; 9 Conn., 140; 97 Penn. St., 78; 44 Ark., 174; Herman on Ex., pp. 378, 630; 9 Porter, (Ala.), 503; Freeman Ex., secs., 207, 368; 2 La. Ann., 411.

The acts of plaintiff's attorney did not excuse the sheriff from returning the writ in due time. *22 Ark., 524.*

SMITH, J. The complaint alleged that, by the consideration of the Pope circuit court, the plaintiff, Shinn, had recovered judgment against one Battenfield for $1306.34 debt, $108 damages, and costs of suit; that on the 29th of November, 1884, he caused the clerk of said court to issue an execution upon said judgment, directed to the sheriff of Johnson county, and returnable within sixty days; that this writ came to the hands of said sheriff on the 2d of December, 1884, and was by him accepted, and levied on the 4th day of the same month on lands of the defendant; but no sale was had thereunder, nor was the execution returned within the time limited by law. Wherefore judgment was demanded against the sheriff and the sureties on his official bond, for the amount of the plaintiff's judgment against Battenfield.

The answer set up two defenses: 1. That the execution was not signed and tested by the clerk of the court in which the judgment was rendered, but bore the signature of the plaintiff in the execution. 2. That the sheriff was misled, by information derived from the plaintiff's attorney, into the belief that it was necessary to advertise the sale for sixty days, and accordingly advertised the sale to take place on the 4th day of February, 1885, but afterwards discovering that he had no power to sell after the return day of the writ, had returned the same partially executed.

To this answer a general demurrer was sustained; and the defendants declining to plead further, final judgment went against them.

Sec. 3061 of Mansfield's Digest makes the officer, to whom an execution is delivered, liable for the whole amount in such execution specified, for failure to return the writ before the return day expires. This is a very rigid and peremptory statute, as may be seen by reference to its language and to the cases of *Heer v. Atkinson, 40 Ark., 380,* and *Atkinson v. Heer, 44 Id., 174.*

Whether the sheriff was bound to execute and return the process seems to depend on the question whether it was void or only erroneous. "It is no defense that the writ was irregular, where the irregularity is not such as to render it void." "Whenever the writ is amendable, or is such that, by the failure of the proper party to move for its vacation, it may be lawfully executed, and may by a sale thereunder transfer the title of the defendant, the sheriff is bound to execute it, and to take no notice of the irregularities, and is as liable to the plaintiff for any neglect or misconduct in its execution as though it were in all respects regular." *Freeman on Executions, secs 103, 368; Daily v. State, 56 Miss., 475; Cable v. Cooper, 15 Johns., 152.*

In *Powers v. Swigart, 8 Ark., 365,* it is said, *arguendo,* that the clerk's signature is essential to the validity of the writ. But this *dictum* is at war with *Whiting & Slack v. Beebe, 12 Ark., 421,* and subsequent decisions. And the sounder doctrine is, that his omission to sign a writ issued by him, or the affixing by inadvertance the name of another person instead of his own, as in this case, is a mere clerical misprision—matter of form, and not substance—and that the defect will be treated as amended whenever it is collaterally assailed. *Mitchell v. Conley, 13 Ark., 315; Thompson v. Bremage, 14 Id., 59; Lawson v.*

Jordan, 19 Id., 306; Atkinson v. Gatcher, 23 Id., 101; Blanks v. Rector, 24 Id., 496; Bridwell v. Mooney, 25 Id., 524; Galbreath v. Mitchell, 32 Id., 278; Youngblood v. Cunningham, 38 Id., 571; Kahn v. Kuhn, 44 Id., 404; Wibright v. Wise, 4 Blackf. (Ind.), 137; Burton v. Pettibone, 5 Yerger, 443; McCormick v. Mason, 1 Serg. & R., 97; People v. Dunning, 1 Wendell, 17; Jones v. Cook, 1 Cowen, 309.

The sheriff is not excused from returning an execution by any conduct of the plaintiff, which falls short of showing that the non-return resulted from the act or instructions of the plaintiff, or was ratified or waived by him.

If the sheriff was misled by advice of the plaintiff's attorney, so that he postponed the date of sale beyond the life time of the writ, this may furnish a satisfactory reason for not selling, and for not having the money to render to the plaintiff. But it is no excuse for not returning the process upon its return day. *Norris v. State, 22 Ark., 524.*

Judgment affirmed.

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MARTIN v. HODGE.

1. CONTRACTS: *Prohibited by statute, void.*

Every contract made for or about anything which is prohibited and made unlawful by statute is void, though the statute does not declare it so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute.

2. ACTION: *None on an illegal or immoral act.*

No court will aid a man whose cause of action is founded upon an illegal or immoral act. Whenever the action appears to arise *ex turpi causa*, or from the transgression of the law, the courts refuse their assistance—not for the sake of the defendant, but because they will not aid such a plaintiff.

3. SAME: *Test as to illegality, etc.*

The test to determine whether an action arises *ex turpi causa* is the plaintiff's ability to establish his case without any aid from an illegal transaction. If his claim or right to recover depends on a transaction which is *malum in se*, or prohibited by law, and which he must prove in order to make out his case, he cannot recover.

4. REPLEVIN: *Possession evidence of title, etc.*

Proof of the plaintiff's possession of the property, and of a wrongful taking from him, without more, is sufficient to maintain replevin for the property, though it appears that he intends an unlawful disposition of it when recovered.

5. SAME: *Dismissal before trial no bar to new suit.*

The dismissal of an action of replevin and return of the property to the defendant before trial, will not bar a new action for the same property.

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

J. M. Hill for Appellant.

No title can be divested from one and vested in another by a lottery, and no testimony concerning such lottery is admissible. "*Ex turpi contractu non oritur actio.*" *Mansf. Dig., secs. 1914, 1915, 3403, 3404; 1 Taunt., 136; 17 Mass., 258; 14 Me., 404; 10 Beng., 107; 17 Vt., 105; 5 Hill. (N. Y.), 27; 22 Me., 488; 5 Penn., 452; 2 Miss., 18; 4 Humph. (Tenn.), 199.*

The parties are in the same attitude as if there had been no lottery. *22 Pick., 181.* Martin seeks to disaffirm the illegal transaction, and such actions can be maintained. *Carthew, (K. B.), 252; 10 Beng., 107; 1 M. & S., 596; 3 Wend., 296; 2 Cox, 183; 20 Johns., 290; 3 Ark., Jeffrey v. Ficklin; Rose Dig., 408.*

Plaintiff, after dismissing his suit, had a right to bring another within a year. *Sec. 5102, Mansf. Dig.* He was compelled to return the horses to save his replevin bond, and appellee acquired no right thereby.

O. W. Watkins for Appellee.

Martin, not being the owner, having no special interest in the property, and not being entitled to the possession of the horses at the time this suit was brought, cannot maintain this action. *Mansf. Dig., secs. 5571–2; Wells on Replevin, sec. 94.* The title was in issue, and plaintiff must show a good title. *Wells on Replevin, sec. 120.* It was not an error of the court to refuse to instruct the jury that it was not prejudicial to appellant to have dismissed his suit. That instruction was abstract in this case. Appellant brought his second suit and no objection was made. The statute simply means that it shall not bar any future action, and in this case that was not in question. The instructions given by the court covered all the legal points in the case upon which there was any testimony.

All the instructions asked by appellant and refused by the court are abstract. Appellant not only engaged in an open violation of the law by reason of which he put appellee in possession, but has received the full price of his property. The true doctrine (and in support of the law as declared by the court) will be found in the following cases and authorities: "Vainly does he who offends against the law seek the aid of the law." *Broom Max., 3 Lond. ed., 255.*

In *Norris v. Norris, Adm'r, 9 Dana, 317,* the court says: "When the parties to an illegal or fraudulent contract are *in pari delicto,* neither a court of equity nor a court of law will aid either of them in enforcing the execution of that which may be executory or rescinding that which may be executed. In such a case the law will not be the instrument of its own subversion, and to every invocation of its assistance replies, *in pari delicto potior est conditio defendentis.*"

Chancellor Walworth, in *Nellis v. Clark, 4 Hill, N. Y., 424,* said: "It is a general rule that no court will aid a party to an illegal contract which is executory, and to recover thereon.

And where the contract is executed a court will not aid a *particeps criminis* in setting it aside. Where both parties are equally offenders against the positive laws of the country, or the general principles of public policy, or the laws of decency or morality, *potior est conditio defendentis;* not because the defendant is more favored when both are equally criminal, but because the plaintiff is not permitted to approach the altar of justice with unclean hands."

The exceptions to this rule are some few cases where the law which creates the illegality in the transaction was intended to restrain the one party and protect the other, as in case of public officers in receiving illegal fees; by extortion contracts, by lenders of money in which usurious interest has been paid. To the same effect are the following cases: *Payne v. Bruton, 10 Ark., 53; Martin v. Royster et al., 8 Ark., 82; Kinney v. McDermot, 55 Iowa, 674; Marienthal v. Shaffer, 6 Iowa, 226; Pike v. King, 16 Iowa, 49; Smith v. Bean, 15 N. H., 577; Jackson v. Walker, 5 Hill, N. Y., 27; Holman v. Johnson, Cow., 341.*

BATTLE J. This is an action of replevin to recover the possession of two horses. There is no controvery about the facts in the case. As proven on the trial, they are, substantially as follows:

On the 25th day of December, 1884, the appellant, George W. Martin, was the owner of two horses. He determined to dispose of them by lottery, and for that purpose sold two hundred and fifty tickets at one dollar each, James Hodge, the appellee, being one of the purchasers. Afterwards, on the night of the 25th of December, 1884, the lottery took place in Eureka Springs, in this state. Three men were selected to manage and conduct the drawing. Two hundred and forty-nine white, and one black, marbles were placed in a revolving keg. A boy was blind-folded; the judges turned the keg, and the boy drew a marble from the keg. Each marble was numbered in

the order drawn. The owner or holder of the ticket bearing the number of the black marble was to be the owner of the horses. As each marble was drawn the judges would turn the keg, and then the boy would draw another marble. The judges continued to turn the keg and the boy to draw one marble at a time until the seventieth drawing when the black marble was drawn, and some one exclaimed, "lucky Jim Hodge." Hodge, then, quickly went out of the house where the drawing took place, and without exhibiting his tickets, took possession of the horses, which Martin had hitched near by, and he and one Bollinger rapidly rode them away and put them in Hodge's stable, no one expressly objecting to their doing so. It was soon discovered that Hodge was not the owner nor holder of ticket No. 70, but that one Turk Moore was. Hodge admitted he was not, and does not now claim that he ever was, or is. Soon after this discovery, and on the night of the drawing, Martin demanded of Hodge the possession of the horses and he refused to give them up. On the same night Martin commenced an action of replevin against Hodge, before a justice of the peace, for the possession of the horses, and about midnight the constable, who executed the order of delivery, took possession of them. "But the next day he went to the office of Hodge's attorney, in whose office was also the office of the justice of the peace, before whom the cause was pending, and said he did not want to have anything more to do with the affair, and dismissed the suit and told the constable, then present, that he would let Hodge and Moore fight it out, and to return the horses to Hodge," which the constable did. Afterwards, on the same day, upon reconsideration, he changed his mind, and brought this action for the same horses.

Among the instructions given, the court instructed the jury as follows:

"If plaintiff had parted with possession of the property in controversy to defendant, at or before the beginning of this

suit, and intended so to part with it, either by delivering to Hodge or authorizing the delivery thereof, you will find for defendant. As to whether plaintiff parted with his property or the possession thereof, you are to determine from all the testimony."

"If you find from the evidence that the plaintiff has lost all right of title and possession to the horses in controversy, and is only attempting to recover the possession of the same *for the purpose of furthering a violation of law*, such as lottery is, then he can not recover and your verdict must be for defendant."

And refused to instruct the jury, at the request of plaintiff, as follows:

"That the dismissal of the former suit did not prejudice plaintiff's right to a subsequent suit for the same subject matter; and that the dismissal of the former suit did not confer any right upon defendant."

"That a lottery consists in the distribution of prizes by chance; and neither the title nor right of possession to property can be acquired thereby."

A verdict was returned and a judgment was rendered in favor of defendant. Plaintiff moved for a new trial, which was denied, and he filed a bill of exceptions and appealed.

1. Contracts prohibited by statute void.

It is a well settled doctrine that "every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." *Bartlett v. Vinor, Carthew, 252; Tucker v. West, 29 Ark., 386.*

2. No action on illegal or immoral contracts.

It is equally well settled that "no court will lend its aid to a man who founds his cause of action upon an illegal or immoral act. If from the plaintiff's own showing, or otherwise,

the cause of action appears to arise *ex turpi causa*, or from the transgression of the positive laws of the country, then the courts say he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend aid to such a plaintiff." *Holman v. Johnson, 1 Cowper, 341; Nellis v. Clark, 4 Hill (N. Y.), 424; Marienthal v. Shafer, 6 Iowa, 226; Smith v. Bean, 15 N. H., 577.*

3. Test of illegality.

The test to determine whether a plaintiff is entitled to recover in an action like this or not, is his ability to establish his case without any aid from an illegal transaction. If his claim or right to recover depends on a transaction which is *malum in se* or prohibited by legislative enactment, and that transaction must necessarily be proved to make out his case, there can be no recovery. *Eberman v. Reitzel, 1 Watts and S., 181; Phalen v. Clark, 19 Conn., 421; Armstrong v. Toler, 11 Wheaton, 258.*

The case of *Catts v. Phalen, 2 How., 376*, is illustrative of this rule. In that case, the defendant, Catts, was employed by the plaintiffs, Phalen and Morris, to draw out of a lottery wheel the tickets of numbers therein to be deposited by plaintiffs, without selection and by chance, it being understood that the tickets of numbers, when drawn out in a certain order, were to determine the prizes to such lottery tickets as the plaintiffs had disposed of, or still held in their own hands, according as the tickets of numbers so drawn out corresponded with the numbers on the face of such lottery tickets respectively. Catts, after his employment, employed one Hill to purchase a ticket in this lottery for him, but apparently for Hill himself. Hill purchased the ticket in the manner he was employed, and delivered it to Catts. Catts, being in possession of the ticket purchased for him, on the day of the drawing, pretended to draw out of the wheel the tickets of numbers therein deposited by plaintiffs, while at the same time he had fraudulently concealed in the cuff of his coat false and

fictitious tickets of numbers fraudulently prepared by him, which exactly corresponded in numbers with the numbers on the face of the ticket held by him. In drawing out the tickets of numbers, he contrived to slip between his finger and thumb the false and fictitious tickets of numbers concealed in his cuff, and produced and exhibited the same to plaintiffs' agent as and for genuine tickets properly drawn from the wheel, and by reason thereof the ticket purchased for him, Catts, was registered as the ticket entitled to a prize of $15,000. He, then, hired Hill to claim the ticket and collect for him the $15,000, less fifteen per cent. to be deducted by plaintiffs, which Hill did. Phalen and Morris, discovering the fraud after the prize had been paid, brought suit to recover it. The court, assuming that the lottery was illegal, said : "The facts of the case present a scene of a deeply concocted, deliberate, gross and most wicked fraud, which the defendant neither attempted to disprove or mitigate at the trial, the consequence of which is that he has not, and cannot have any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned, the law annuls the pretended drawing of the prize he claimed; and, in point of law, he did not draw the lottery; his fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact, and he had claimed and received the money of the plaintiffs by means of any other false pretense, and he is estopped from avowing that the lottery was in fact drawn.

"Such being the legal position of Catts, the case before us is simply this: Phalen and Morris had in their possesion $12,500, either in their own right, or as trustees for others interested in the lottery. No matter which, the legal right to this sum was in them; the defendant claimed and received it by false and fraudulent pretenses, as morally criminal as by larceny, forgery or perjury, and the only question before us is, whether he can retain it by any principle or rule of law.

"The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to, or drew the prize; it was paid and received on the false assertion of that fact. The contract which the law raises between them is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place."

According to these principles of law and this test of their application, is plaintiff, in this action entitled to recover?

By the statutes of this state it is enacted: "Any person who shall vend or otherwise dispose of any lottery tickets, gift concert ticket, or like devise, shall be deemed guilty of a misdemeanor and liable to indictment, and, on conviction thereof, shall be fined in a sum not less than fifty dollars nor more than five hundred dollars." *Mansf. Dig., sec. 1915.*

4. REPLEVIN: Possession evidence of title.

Martin's possession of the horses in controversy at the time they were taken by Hodge is *prima facie* evidence of title. Any wrongful taking is not sufficient to shift upon him the burden of proving his title to the property and right to possession. If the possession of Martin and a wrongful taking from him were proven, and nothing more, he would be entitled to recover.

The evidence shows appellant proposed to dispose of his horses by lottery; and for that purpose sold two hundred and fifty tickets for sums amounting in the aggregate to $250, the full value of his horses. He, thereafter, undertook to hold the horses in trust for the ticket-holder who would hold the ticket which would be entitled to, or draw the prize, when the drawing of the lottery took place. This undertaking was illegal and void. It and the sale of the tickets did not affect plaintiff's title to or right to the possession of the horses. At the time of the drawing they were still in his possession. It was under-

stood that he would deliver them to the holder of the ticket of the number corresponding to the number of the drawing of the black marble. Hodge did not hold that ticket; no one authorized to do so decided he did. There was, therefore, no implied permission given to him to take the horses when he did; circumstances implied the reverse. There is no evidence that he had express permission. Any one else, who did not have a ticket in Martin's lottery and never had one in any other lottery, might have taken possession of the horses at the time of the drawing as Hodge did, and, succeeding in riding them away without objection, hold them under a claim and right equally as good as that on which Hodge relies. Hodge stands in no better attitude than he would have stood if he had held no ticket. His taking was wrongful. It was not necessary for Martin to introduce any evidence in respect to the lottery to establish his right to the horses. His right to recover is not dependent on that transaction.

Martin's right to recover does not depend on any disposition he may make of the horses in controversy. He can give them away. If the consideration of the gift is not deemed good in law, the gift will be only void as against creditors and purchasers. Hodge, so far as anything appears in evidence, would not have a right to complain in any kind of an action. He certainly has not in this. *Mansf. Dig., sec. 3376.*

5. Dismissal before trial no bar to another suit.

The dismissal of the first action of replevin should not prejudice plaintiff's right to the horses. He was compelled to restore them to the possession of Hodge. He could not dismiss on any other condition. The dismissal placed the parties *in statu quo.* The statute expressly provides that such dismissals may be without prejudice to a future action. The evidence shows he did not concede Hodge's right to hold the horses as a prize or otherwise, by the dismissal. *Mansf. Dig., secs. 5102, 5103.*

In giving the instructions above set forth, in so far as they are inconsistent with this opinion, and in not giving those asked for and refused as before stated, the court erred. The motion for new trial should have been granted.

The judgment of the court below is reversed, and this cause is remanded with an instruction to the court to grant appellant a new trial.

DUNCAN, TRUSTEE, v. OWENS.

REPLEVIN: *Liability of sureties in capias bond.*

The sureties in a bond executed to the sheriff for the release of a defendant arrested upon a *capias* in replevin, under *Sec. 5577, Mansf. Dig.*, are not liable for the judgment rendered against the defendant, unless an execution against the body of the defendant has been issued under *Sec. 284*, and returned "not found," under *Sec. 295*.

APPEAL from *Nevada* Circuit Court.
Hon. L. A. BYRNE, Circuit Judge.

Smoote, McRae & Hinton, for Appellant.

We respectfully refer to our abstract and brief at large herein for full statement and argument, to which we respectfully ask the attention of the court.

We submit and insist that the demurrer, as to the first ground—defect of parties—was improperly sustained. Duncan, as trustee in the trust deed, properly brought the action in replevin. The judgment was in his favor as sole plaintiff and trustee. He had the right to the custody of the property for the purposes of the trust, and also to the custody of the alternative damages for the same purpose, upon failure to get

the property; therefore he had the right to sue the sureties on the bond, if, under the circumstances, an action would lie upon it at all. *Mansf. Dig., secs. 4933–36; Hunnicut v. Kirkpatrick, 35 Ark., 172; Williams v. State, 37 Id., 464; Haynes v. Butler, 30 Id., 69; Hanf v. Ford, 37 Id., 549.*

We further submit and insist that the demurrer on the second point was erroneously overruled. The question is whether (after the judgment in the action of replevin and return of execution thereon *nulla bona,*) Duncan, the trustee, can sue the sureties on the bond. The condition of the bond is to abide the judgment of the court and put in special bail if required. *Mansf. Dig., secs. 5574–77.* This constitutes both bail above and below. *Bouv. Law Dict., vol. 1, title Bail, pp. 180, 181; Ib., title Bail Bond, p. 1882; Ib., vol. 2, title Recognizance, p. 423.*

We further insist that this is a replevin bond and not an ordinary bail bond; that it is bail for the property the same as under *Sec. 5581, Mansf. Dig.;* and that upon failure to recover after judgment in replevin the sureties are liable on the bond.

The statute prescribing this bond is not the same as that providing for bail bond ordinarily in civil cases. *Sutton v. Hays, 17 Ark., 462. See body of opinion, p. 465.*

COCKRILL, C. J. The appellant, as the trustee named in a chattel mortgage with power of sale, sued out an order of delivery, with a capias clause, in an action of replevin against Owens, under *Sec. 5574 of Mansfield's Revised Statutes.* Owens was arrested, and afterwards released upon executing a bond with sureties, conditioned as required by *Sec. 5577, Ib.* He appeared to the action of replevin and made defense, but judgment was rendered in Duncan's favor for the recovery of the mortgaged property or its value, in the usual form in such cases. Execution for the return of the property or collection

of the damages assessed, was sued out and returned unsatisfied as to both. Duncan, the plaintiff in the replevin suit, then brought this action upon the bond executed for Owens' release, alleging in his complaint the facts here set forth.

A demurrer was interposed to the complaint, setting out, first, that there was a defect of parties plaintiff; and, second, that the complaint did not state facts sufficient to constitute a cause of action. The court overruled the demurrer as to the second ground, but sustained it as to the first; and, as the plaintiff declined to amend, dismissed the action, and the plaintiff appealed.

1. REPLEVIN: Liability of surety in capias bond.

The questions arising upon both branches of the demurrer are argued by counsel, but it is conceded that the first is unimportant, and the judgment of the court is right if the second ground of demurrer is well taken. The question thus presented is, what is the extent of the liability of the sureties on a bond executed to a sheriff for the release of a defendant arrested upon a capias in replevin.

As originally adopted, the Code of Civil Procedure contained no provision for the arrest of a defendant in an action of replevin. Arrest in civil actions for debt contracted in fraud and for the protection of sureties under given circumstances was authorized, and the procedure was governed by the provisions of the chapter under the title of "Arrest and Bail—Civil." When property claimed in replevin had been disposed of or concealed so as to prevent a delivery, the court was authorized to compel the attendance of the defendant, examine him upon oath, and punish him as in case of contempt for a disobedience of its orders. *Gantt's Dig., sec. 5046.* In 1875 this provision was repealed and the law now in force as to the arrest and release of a defendant in replevin was enacted. Upon the filing of the affidavit designated by the act, the clerk is directed to add a clause to the order of delivery "commanding the sheriff . . . . that if the property mentioned in the order

cannot be had, to take the body of the defendant so that he appear at the return day to answer the premises." *Sec. 5574, Mansf., Dig.*

Then follow these two sections: 5576—"If the property described in the order be removed or concealed so that the officer cannot make delivery thereof he shall (when the order contains a capias clause) arrest the body of the defendant, and hold him in custody in the same manner as in a *capias ad respondendum* in a personal action, until he shall execute the bond prescribed in the next section, or be otherwise legally discharged." 5577—"The defendant shall be entitled to be discharged from such arrest at any time before final judgment had in the cause, upon executing to the officer who shall have made such arrest, with the addition of his name of office, a bond in a penalty of at least double the value of the property described as sworn to in the affidavit, with such security as shall be approved by such officer, conditioned that such defendant shall abide the order and judgment of the court in such action, and that he will cause special bail to be put in if the same shall be required."

If we look to no other provision of the law than that which prescribes the condition of the bond to be that the defendant shall abide the order and judgment of the court, then the bond must be adjudged an unconditional promise to perform whatever judgment the court may render in the action. *Jackson v. State, 30 Kans., 88.* But when viewed in the light of other provisions of the same act and the other acts upon the same subject, can that be said to be the obligation the sureties have assumed?

The object of the defendant's arrest is declared in *Section 5574, sup.*, to be to compel his attendance at the return day of the order, and the capias is made returnable as other orders of arrest in civil cases. It is also provided that the defendant, when arrested, shall be held as upon a *capias ad respondendum*,

and may be required after his release upon bond to the sheriff to enter into *special bail.* Special bail is nowhere else mentioned in our procedure and it is necessary to recur to the common law practice to ascertain what special bail is.

When a defendant was arrested on civil process at common law, he could be released on bail by giving bond to the sheriff for his appearance to the action. This was termed appearance bail or bail below. The writ upon which the arrest was made and which was the sheriff's authority for demanding bail, was the *capias ad respondendum* that is referred to in *Section 5576, supra.*

The appearance contemplated by the bond to the sheriff for release from custody under this writ, was not necessarily an actual appearance in person, but could be effected by putting in new bail above, that is before the court or a judge, and this was called bail to the action or special bail. When the defendant thus appeared to the action, the liability of the appearance bail was ended. The condition of the special bail bond was, in substance, that the defendant would pay the debt or surrender his body in execution, or that the bail would do it for him. If the bail surrendered the defendant before a return of *non est inventus* on the *capias ad satisfaciendum,* the condition of the bond was satisfied.

These ancient regulations, about which the practice became complicated, no longer exist, but the statutes upon arrest and bail in civil cases, confined as they are to a limited field, are derived from and are akin to the common law practice, and a knowledge of the old system sheds light upon the intention of the legislature in passing the acts that give us this relic of it. The bond to the sheriff, required by the statute for the release from custody of a defendant in replevin, corresponds to, and was evidently intended to serve the purpose of, the appearance bond or bail below at common law. The condition of the statutory bond, however, is broader than the liability

assumed by the appearance bail under the old practice. It is that the defendant shall abide the order and judgment of the court.

The effect of this condition, as interpreted by Chief Justice Parsons, (the Massachusetts statute requiring a like condition,) is that the bond stands for special bail, as well as below, when special bail is not required, as it may be under our statute when the court so orders. *Champion v. Noyes, 2 Mass., 481.* See too, *Harrington v. Dennie, 13 Ib., 92; Pierce v. Read, 2 N. H., 359; Hale v. Russ, 1 Greenl. (Me.), 336; Saunders v. Hughes, 2 Bail. (S. C.), 504; DeMeyer v. McGonegal, 32 Mich., 120; Wilcox v. Ismon, 34 Ib., 268.*

But the cases determined under statutes requiring a similar condition in the bond for release, agree that the condition of the bond is not broken until there has been a return of *non est inventus* on the *capias ad satisfaciendum.* Authorities *supra.* This court reached the same conclusion in the case of *Chandler v. Byrd, 1 Ark., 152,* determined under a statute authorizing the arrest of a defendant in detinue, and requiring a bond to effect his release conditioned that the defendant or his bail shall pay the judgment that might be rendered against him. The case is authority in point upon the questions now presented. But having once determined that the obligation sued on is a bail bond, all doubt as to the necessity of such a return is removed by the statute, for it is provided that "upon judgments in actions in which the defendant has been arrested and held to bail, and in which the order of arrest has not been vacated, an execution against the body of the defendant may issue." *Mansf. Dig., sec. 284.* And again: "A return of 'not found' upon an execution against the body of the defendant, placed in the hands of the sheriff of the county in which he was arrested, twenty days after it might have issued upon the judgment, shall be necessary to fix the liability of the bail, which

shall be to pay the amount of the judgment and costs." *Ib., sec. 295.* See *Mayor v. Johnson, 5 Ark., 691.*

These provisions are general; they are upon the same subject as the act under question, and they must all be construed so as to make one harmonious whole. "This rule of construction is especially applicable to the law of procedure; each act is passed with reference to the general law upon the same subject; the whole system is construed together, and the statute combines and operates with the entire law of which it becomes a part." *State v. Sewell, 45 Ark., 387.*

There was no allegation of the issue of execution against the person of the defendant in the replevin suit and return of not found, and so the complaint set forth no cause of action, and the judgment is affirmed.

HOLLENBERG V. LANE.

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NOTES AND BILLS: *Payment; Evidence.*

The possession of a promissory note by the maker is presumptive evidence of its payment, and if obtained without payment the owner must show it.

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

J. M. Hill for Appellant.

The agent had no authority to receive anything as payment except face value of notes in cash with accrued interest, except by consent of appellant; no such consent was given; without such consent he had no authority. *7 Cranch, Holker et al. v. Parker, 437; 13 Ark., (8 English), 644; 1 Daniel on Neg. Ins.; Carter v. Talbot, 10 Vt., 471.*

Wharton was a special and not a general agent of appellant. *Story Agency, sec. 17; 21 Wend., 278.* Authority to collect on these particular notes is only given, and hence appellee or her husband was trading with him at their peril. His (the attorney's) conduct outside of his line of duty, such as taking less than face value, would not affect the right of appellant, and appellant would not be bound by such unauthorized acts of his agent, hence appellee or her husband were dealing at their peril when they dealt with this special agent, and the principal would not be bound by any unathorized act. *2 Kent, pp. 620-621.* And appellee never ratified any act of Wharton done outside of this authority.

Now, appellant having proved that the agent never paid him any sum upon these notes, and appellee pleading payment, it devolves upon the appellee to establish payment by a preponderance of testimony; the burden is upon her, and to obtain a discharge of the debt on plea of payment, appellee must prove that the dealings with this special agent Wharton were regular. Appellee must prove that she paid this agent face value of the notes with accrued interest, before a discharge can be had. *See 2 Greenleaf Ev., 13 ed., sec. 516; 2 Kent, 11 ed., *page 621; 5 Yerger (Tenn.), 71.*

While it is admitted that the possession of a note by the maker is a circumstance, and usually the strongest circumstance, to show that the note has in some manner been discharged; but not necessarily payment in full with accrued interest. And appellant submits it was error of the court to charge the jury that possession of a note by the maker is *prima facie* evidence of payment in full to face value of note with accrued interest. *Story on Promissory Notes, 5 ed., sec. 384; Chitty on Bills, Ch. 9, 448-431, 8 ed.; Story on Bills, sec. 417; 1 Greenleaf on Ev., sec. 38; 2 Greenleaf on Ev., sec. 52; Bremridge v. Osborne, 1 Stark; 15 Ark., 519; Dan. on Neg. Instr. (320) sec.*

1233; 20 Pick, 545; Edwards on Notes and Bills, pp. 371, 688; 2 Story Eq. Jur., secs. 1367, 1372.

Did Lane pay or purchase the notes? His intention would govern, and the jury had a right to consider that; but the court refused such instructions; which was error. See *Harbeck v. Vanderbilt, 20 N. Y., 398; Swope v. Leffingwell, 72 Mo., 348; 93 U. S., 379, and Mss. opinion supreme court of Indiana, delivered Nov. 24, 1885, cited in Western Rep., Vol. 1., No. 19, p. 359, case Binford, Adm., v. Adams, Adm.*

Now, to briefly summarize appellant's position. Such payments as described, paying all notes in bulk, part due and part not due, is not a *bona fide* transaction, in due course of trade; and possession of notes so obtained is not *prima facie* evidence of their full payment with accrued interest. The transaction between appellee and her husband was no legal payment; and Lane purchased, not paid, the notes, and she purchased from him, which would be no valid payment. See also *Dan. Neg. In., sec. 1221; Story Prom. Notes, 5 ed., sec. 373; Bouvier's L. D., title "Payments."*

The Appellee *pro se.*

If possession of a note by the maker raises any presumption it would certainly be the natural one that it had been received by honest and fair means, and this should certainly prevail until the appellant rebutted the same by evidence sufficient to overturn it; if the actions of men are presumed to be wrong, if they are called upon in every transaction to prove, where they have possession of the evidence of their outstanding indebtedness, that they did not swindle the creditor to obtain it, they would avoid all commercial transactions.

In this case the appellant offers no proof whatever to rebut the natural and legal presumption, and in the absence of the same the jury were warranted in finding for appellee.

L. M. Lane, in paying off these notes, was not the agent of Mrs. Lane, nor was he the agent of Hollenbreg & Co., but acted independently of either, and expected to be reimbursed by Mrs. Lane. The question arises, was the payment by a stranger in this case a satisfaction of the debt.

By the Roman law payment could be made by any one in the discharge of the debtor. On this point the law of England is not well settled, as stated by Willis J. in *Cook v. Lister, 13 C. B. N. S., 543,* and the rule would rather seem to be that payment by a third person, a stranger to the debtor, without his knowledge, would not discharge the debtor; but in the late case of *Walter v. James, L. R., 6 Ex., 124,* Martin, B., declared the rule to be that payment by a stranger, not as making a gift for the benefit of the debtor, but by one who intended to claim reimbursement, though without authority from the debtor at the time of payment, would be a discharge of the debt. This case is an exact parallel to the one at bar; Lane paid off the notes expecting to be reimbursed. But it is not necessary to go back to the Roman and English law; in the case of *Owens v. Chandler, 16 Ark., 651,* the court uses this language: "A payment of a debt, no matter by whom effected, whether by the debtor or his agent or a stranger, can be nothing more or less than its extinguishment as a demand." This would seem to settle the point as to whether payment by Lane was a discharge of Mrs. Lane. Then the court did not err in refusing instructions No. 3 and 4 asked for by appellant, because it is presumed that appellant's agent received full value of said notes, whether they were purchased or paid off by Lane.

The appellee is not responsible to appellant for the failure of his agent to pay over the money. It was his misfortune in selecting such an agent, and until he shows that his agent did not receive payment, or that the notes were wrongfully obtained from him, or circumstances sufficient to rebut the

presumption that they have been discharged, he should fail in this action.

COCKRILL, C. J. Hollenberg delivered a piano to Mrs. Lane, the appellee, under a contract of sale upon the instalment plan, receiving a payment in cash from her, taking her promissory notes as evidence of the unpaid purchase price, and stipulating that the title should remain in him until all the notes were paid. After the notes were all due, the greater part of them remaining unpaid, Hollenberg brought this action of replevin to recover the piano. Mrs. Lane's defense was based upon an alleged compliance with her contract by payment of the notes. To sustain this defense she produced in evidence the contract of purchase and the notes which she had executed and delivered to Hollenberg.

It was in proof, on the other hand, that Hollenberg had placed the notes in the hands of an attorney at Mrs. Lane's place of residence for collection; that he instituted suit upon them, or a part of them, against her, but caused it to be dismissed, saying at the time, that Mrs. Lane's husband was going to pay them off; that afterwards Lane delivered the contract and notes to his wife, the appellee, informed her that he had paid them and took from her the release of a debt he owed her as repayment of his outlay. It was agreed that Hollenberg never received any money from his attorney on account of the notes, and that he had never specially authorized the attorney to settle the claim for less than its face and interest. This was the whole case as presented to the jury. Their verdict was for the defendant.

Under the contract Mrs. Lane's title to the piano was to become absolute on payment of the purchase price. The production of the notes and contract executed by her was sufficient *prima facie* to bar the plaintiff's action without going on to prove an actual payment of the notes. *Gibbon v. Featherston-*

haugh, 1 Starkie, 92. Possession of a promissory note by the maker is presumptive evidence of its payment. The fact that the notes in this case were received from an attorney who held them for collection does not alter or rebut the presumption. The reason that lies at the bottom of the rule that possession by the maker raises a presumption of payment, is the common practice of men owning notes not to deliver them to the obligor except on payment, and we are not informed that a different custom prevails among attorneys and other collecting agents. The presumption is not simply that the debt has been released or discharged as by accord and satisfaction, but that the money due on the notes has been paid according to their tenor. *Lane v. Farmer, 13 Ark., 63; Lawson's Presumptive Ev., Rule 75, pp. 346 et seq.; 1 Greenl. Ev., sec. 38.*

The appellant's attorney had authority to receive payment for him, and it was his duty to retain possession of the notes until payment was made; if he parted with them without payment or upon an unauthorized compromise, the burden was on the plaintiff to show it. The law never presumes the perpetration of a wrong. *Gauss v. Orr, 46 Ark., 129; Potter v. Titcomb, 7 Me., 302.*

And it is not material, as one of the appellant's rejected prayers for instructions would make it, that the husband was not expressly authorized to represent the wife at the time he received the notes from the appellant's attorney. Where a husband pays the debt of his wife, it is natural to suppose that he does so either for the purpose of making a voluntary settlement of the amount paid upon her debt, or else under the stress of an implied mandate to protect her interest, and a recognition of his act by her will amount to an acceptance or ratification. What was done in this case was ratified by the wife and the husband was reimbursed to his satisfaction.

Nor was the non-receipt of the proceeds of the notes by Hollenberg proof of non-payment. It may have tended to

prove negligence or a conversion on the part of Hollenberg's attorney, but that was a matter that did not concern Mrs. Lane, and was foreign to the issue. The presumption of payment raised by the proof the appellee offered was not met and rebutted.

Affirm.

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CHAMBERS ET AL. v. PERRY.

1. HOMESTEAD: *Covered by extension of corporate limits.*

Quere? Where a homestead is established on the confines of a town does the subsequent extension of the corporate limits over it curtail it?

2. SAME: *How protected from sale.*

A debtor who would preserve his exempted property from sale, whether homestead or chattels, must claim his exemption and file his schedule as prescribed by the statute, and see that a supersedeas issues. If the officer refuses or neglects to issue it, mandamus or an appeal lies according to the fact whether he is a ministerial or judicial officer. And a failure to prosecute the remedy is a waiver of the right.

APPEAL from *Conway* Circuit Court in Chancery.

Hon. G. S. CUNNINGHAM, Circuit Judge.

Ratcliffe & Fletcher for Appellant.

1. When a homestead is established near an incorporated town, and the limits of said town are subsequently extended so as to embrace it, the homestead is cut down or limited to one acre in area. *13 Wis., 233; 16 Id., 223; 54 Ga., 359; 56 Id., 96; 5 Kans., 592; Const. Ark., art. 9, sec. 5.*

2. Perry, if he had the right to claim the five acre homestead, lost it by not insisting on his original schedule. It was his duty to see that a supersedeas was issued. *40 Ark., 352.* If the

clerk refused to issue it, his remedy was by mandamus or appeal. *42 Ark., 410.* Having failed to do either he waived his exemption. *43 Ark., 17; 29 Ohio St., 667.*

3. When the law prescribes a method by which an exemption may be had, it must be complied with within a reasonable time. *20 Ga., 38; 22 Cal., 504; 23 Cal., 79; 10 Ala., 370; 56 Penn. St., 402.*

Sol. F. Clark & Son for Appellee.

There is nothing to show that Perry abandoned his right of homestead to the entire tract, except the application for supersedeas for the one acre. He had the right to accept what was offered him without waiving any additional right; but the homestead is not for the benefit of the husband alone, but for the wife and children, and he could not abandon it without their consent. The mere extension of the city limits so as to include his land, could not curtail his homestead right to one acre. *12 Iowa, 516; 17 Texas, 74; 30 Id., 425; 42 Id., 195; 5 Kans., 572; Thomps. on Homesteads, secs. 13, 14.*

The same facts did not exist in *13 Wis., 233.*

SMITH, J. The plaintiff alleged that he is a resident of the state, a married man and the head of a family; that he is the owner of five acres of land in a compact body, upon which he resides with his family; that at the time he established his homestead thereon, the land adjoined the town of Morrilton, but was not within its corporate limits; that the county court had afterwards extended the boundaries of the town so as to take in his land, but the land had never been platted, laid off, or subdivided into blocks, lots, streets and alleys; that one of the defendants had obtained judgment against him on a contract, but the debt was not one of the excepted debts mentioned in the constitution; that an execution upon said judgment had been

levied on the land, whereupon the plaintiff had filed with the clerk of the court, from which the writ was issued, a sworn schedule of all his property, claiming the entire tract as exempt by law, and had demanded a supersedeas; that the clerk had refused to suspend the sale except as to one acre around his dwelling; that the sheriff had proceeded to sell the remaining four acres and the judgment creditor had become the purchaser. The prayer was that the execution of a deed might be enjoined.

A demurrer to the bill having been overruled, the purchaser at the sale answered, that after the clerk refused to grant a supersedeas in the form first requested, the plaintiff had selected one acre, and having previously caused its metes and bounds to be established by survey, had put in his claim for said one acre, which was conceded; that the plaintiff had taken no further steps to make good his claim to a larger exemption, but had attended the sale and interposed no objection; that he had since refused to pay taxes on the land that was sold, had never exercised any acts of ownership, nor set up any claim, until the exhibition of his bill, which was after the period of redemption had expired. All of which, it was insisted, constituted an implied waiver and abandonment of his previous claim.

To this answer a demurrer was sustained, and the defendants resting, the injunction was perpetuated.

1. HOMESTEAD: Covered by extension of corporate limits.

The constitution recognizes two classes of homesteads: the rural homestead, not to exceed one hundred and sixty acres, for dwellers in the country; and the urban homestead, not to exceed one acre, for dwellers in cities, towns and villages. If a homestead is established on the confines of a town, does the subsequent extension over it of the corporate limits curtail its extent? To this question an affirmative answer has been given in Wisconsin and Kansas; while the contrary view prevails in Texas, Iowa and Michigan. *Bull v. Conroe, 13 Wis., 233; Parker v. King, 16 Id., 223; Sarahos v. Fenlon, 5 Kans.; Taylor*

v. Boulware, 17 Tex., 74; Bassett v. Messner, 30 Id., 604; Nolan v. Reed, 38 Id., 425; Finley v. Dietrich, 12 Iowa, 516; Barber v. Rorabeck, 36 Mich., 399.

We find it unnecessary to decide the point here, because it matters not that the plaintiff may have been entitled to hold the five acres, if, by his acts or omissions, he has waived his legal rights.

2. SAME: How protected from

The homestead act of 1852—our first piece of legislation on the subject—pointed out no particular mode by which the debtor was to declare his purpose to claim the land, upon which he lived, as free from execution. Hence it was held that he might effectually make known his claim even on the day of sale. *Tomlinson v. Swinney, 22 Ark., 400; Lindsay v. Merrill* (misprinted Norrill), *36 Id., 545.*

But the constitution of 1868 required the homestead to be selected by the owner. The act of March 28, 1871, provided how and when such selection should be made. And in *Norris v. Kidd, 28 Ark., 285,* it was ruled that the right was lost if not asserted in the statutory mode.

The present constitution contains a similar provision. And the act of 1871, as amended March 9, 1877, is still in force. *Mansf. Dig., sec. 3006.* These acts regulate the claim and ascertainment of exempted property. Land and chattels are upon the same footing in this respect. The debtor must claim his exemptions. The mere filing of a schedule is not enough. He must see to it that a supersedeas issues. If the officer neglects or refuses to do his duty, mandamus or an appeal lies, according to the fact whether he is a ministerial or a judicial officer. And a failure to prosecute the remedy is a waiver of the right. *Healy v. Connor, 40 Ark., 352; Cason v. Bone, 43 Id., 17; Butt v. Green, 29 Ohio St., 667.*

An application of these principles leads to the conclusion that, if the answer is true, as the demurrer admits, the plaintiff

is estopped to assert his claim to more than one acre; and that the bill itself states no sufficient case for an injunction.

The decree is reversed and the bill dismissed.

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PHILLIPS COUNTY v. PILLOW.

1. FEES: *Of sheriff in criminal cases; Construction of statute.*
The word "return" in *Sec. 3248, Mansf. Dig.*, does not mean "service;" and the statute does not exempt the county, when liable for the cost in a criminal case, from payment for serving every subpœna served in the case, regardless of the number.

APPEAL from *Phillips* Circuit Court.
HON. W. H. CATE, Judge, on exchange.

R. W. Nichols for Appellant.

To give any effect to the section, it must be construed as was done by the county court. If it does not mean that it means nothing, as the fee bills of that officer nowhere provide for the payment of any amount to him for making *returns on subpœnas*. What else could the legislature have possibly meant when they say "more than two returns?"

An officer was never before or after the passage of the act allowed for even *one* return on a subpœna; then what was the use or sense of limiting his pay to *two* returns, when both before and after he could get nothing for such service at all? He might make *forty* returns on subpœnas, or only *one*, and he could not, under the law, receive a cent, there being no fee allowed for that particular service.

The county cannot be made to pay constructive fees. See *Cole v. White Co., 32 Ark., 45.*

It will no doubt be urged by appellee that such a construction will work a great hardship on him, forcing him to perform services for which he can derive no pay. Such may, in some cases, be the result, but an officer who takes upon himself the discharge of the duties imposed upon him by virtue of that office, must expect to receive nothing more than the fees allowed by law.

The word "*return*" as used in the act either means something or nothing. It cannot be the simple making of the return, because it has always been held, that except in cases of "*non est*," or "*nulla bona*" there is no fee allowed for making a "return." And the only way to give effect to the statute is to hold that "*return*" is synonymous with "*service*." Otherwise, this provision is inoperative, inconsistent, and entirely nugatory. As there was no fee allowed, at all, to be paid by the county, previous to this act, the legislature had a perfect right to say how much of the plaintiff's costs they would pay. It is evident that, in this act, they intended to say so, and the construction of the act to say what they did intend is with the courts.

Stephenson & Trieber for Appellee.

Statutes are to be construed according to the natural and most obvious import of their language, without resort to *subtle and forced* constructions, etc. *20 Wend. (N. Y.) 555; 19 N. Y. 601; 1 Wheat, 326; 18 Barb., 451; Cooley Const. Lim., p. 55.*

The words "service" and "return" each have a separate and well defined meaning. By *Sec. 3247, Mansf. Dig.*, sheriffs are allowed 10 cents for a return of *non est* on each subpœna. It is reasonable to presume that the legislature intended the law to apply to such returns, and not to the *service* of subpœnas which he is bound to make or subject himself to indictment.

SMITH, J. The sheriff presented to the county court his bill for services in subpœnaing seven witnesses in the case of the state of Arkansas against Richard Dortch, charged with murder. Dortch was convicted and an execution for the costs was returned *nulla bona.* This made the county liable for all legitimate fees arising out of his prosecution. The county court allowed fees and mileage for subpœnaing two witnesses only, rejecting the remainder of the bill. The sheriff appealed to the circuit court, where judgment was rendered in his favor for the whole of his demand.

Fees of sheriff in criminal cases

The controversy involves the construction of *Sec. 3248 of Mansf. Dig.*, which provides that where the costs in criminal cases are paid by the county, "no sheriff, etc., serving subpœnas for witnesses shall be allowed to receive from the county pay for making more than *two returns* on subpœnas in any given case," etc.

Construction of statute.

The contention of the county is, that the word "return" should be construed as meaning service; otherwise the section is unintelligible, for the law provides no remuneration for making returns on writs except where the return is *non est* or *nulla bona.* The intention of the legislature is somewhat obscure. But "return" has a specific legal meaning. It is a short account, in writing, made by a ministerial officer of the manner in which he has executed a writ. *Stephen Pl., 24.* And where it occurs in a statute regulating fees, it will be presumed to have been used in its technical sense.

"The current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation." *Waller v. Harris, 20 Wendell, 562,* per Bronson, J.

"The office of interpretation is to bring sense out of the words used, and not bring a sense into them." *McCloskey v.*

Cromwell, 11 N. Y., 602. Compare *M. and L. R. Ry. v. Adams, 46 Ark., 163.*

The number of witnesses who may be summoned in a criminal cause, in behalf of both prosecution and defense, is unlimited. And it would require unequivocal language to convince us of the intention of the legislature that the sheriff, who must serve processes under pain of indictment and punishment for nonfeasance, was to have pay only for serving two subpœnas.

Affirmed.

NATIONAL LUMBER CO. v. SNELL.

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INSTRUCTIONS: *Duty of court to give, in writing.*

The provisions of the statute and constitution which require the court to reduce its charges or the instructions to writing when required by either party to do so, are mandatory, and it is error for a judge to refuse to do so. But the court is not required by the statute or constitution to reduce to writing an instruction to be given to the jury on its own motion, before argument to the jury. The court is vested with a sound discretion to instruct the jury at any time, even after they have retired to consider their verdict.

APPEAL from *Craighead* Circuit Court.
Hon. W. H. CATE, Circuit Judge.

J. C. Hawthorne, for Appellant.

1. The court erred in refusing to reduce the instruction given on its own motion to writing, after having been requested so to do, before the argument commenced. The instructions to the jury "shall be reduced to writing if either party requires it." *Mansf. Dig., sec. 5131.*

And, "Judges in jury trials shall reduce their charge or instructions to writing if either party requires it." *Const. 1874, art. 7, sec. 23; 95 Ind., 170; Thompson, Charging the Jury, 137; 45 Mo., 64.* And this error is not cured by reducing it to writing pending the argument, and reading it to the jury after the final argument. *18 Ind., 291; 17 Id., 33; 28 Id., 394.* The charge should be in writing and given literally as written. *7 Ind., 187.*

2. Reviews the evidence and contends that the verdict is contrary to it.

E. F. Brown for Appellee.

1. Counsel for appellant waived any cause for complaint by proceeding with his argument before the instruction was reduced to writing.

2. *Art. 7, Sec. 23, Const. 1874,* is simply directory, and fully complied with by the court in his reducing said instruction to writing while the argument proceeded, and reading it to the jury before it retired. *Anderson v. State, 34 Ark., 262; McDaniel v. Crosby, 19 Ark., 558; Ib., 490; 29 Ark., 268.*

Argues that the evidence sustains the verdict.

COCKRILL, C. J. The appellee sued A. B. Fisher and caused an attachment to be levied upon a portable saw mill and appurtenances as his property. The National Lumber Company asserted title to the property and intervened in the attachment proceeding for the purpose of recovering it. The appellee denied the company's title and a jury was impaneled to try the issue. The evidence tended to establish upon the one hand that Fisher had sold the property to his wife, and afterwards, as president of the company, purchased it from her for the company; and on the other hand that the company had refused to receive the property from Fisher or his wife. The

jury found specifically that the attached property belonged to Fisher. It is urged that the verdict is not sustained by the evidence.

We think that it is. As it was the title of the lumber company only that was put in issue by the assertion of it under the interplea, and as the evidence was conflicting as to the fact of a completed purchase by the company, the jury, in finding that the title was in another, settled the issue against the company. The result would have been the same if they had found that the property belonged to Mrs. Fisher or any other stranger to the proceeding. *Stephens v. Oppenheimer, 45 Ark, 492; Hershy v. Clarksville Inst., 15 Ark., 128.*

After the evidence was concluded, the interpleader presented a number of written prayers for instructions and the court gave them as asked. The bill of exceptions then presents this statement, which it is argued stamps error upon the proceedings, for which the judgment should be reversed, viz:

"The court, on its own motion, against the objection of the interpleader, gave an oral instruction. After having been at the proper time specifically requested to reduce the same to writing, it refused to do so, to which ruling of the court the interpleader at the time excepted.

"The court, after the opening argument was made by the interpleader's attorney and during the argument of the plaintiff's attorney, reduced its instruction to writing and submitted it to the interpleader's attorney before the closing argument was commenced; and at the conclusion of the argument read it in connection with the other instructions to the jury."

Whether the court actually gave to the jury an instruction not in writing, or, what is more probable from the statement in the bill of exceptions, merely settled in the hearing of the jury an instruction to be thereafter given upon its own motion, is immaterial, in the view we take of it. Its action in that regard, whatever it was, and the refusal of the court to reduce

the instruction to writing before the argument to the jury was begun, are the grievances alleged.

The statute, and the constitution as well, commands the judge to reduce his charge, or the instructions to the jury, to writing, when required by either party to do so. *Art, 7, sec. 23, Const. 1874; sec. 5131, Mansf. Rev. Statutes.* These provisions are mandatory, and it is error for a judge to refuse to comply with their terms. *Anderson v. State, 34 Ark., 257.* But there is nothing in the constitution or the statute making it incumbent upon the court to reduce to writing an instruction to be given to the jury on its own motion, before argument to the jury. The attainment of justice requires that the court should be vested with a sound discretion to instruct the jury at any time, even after they have retired to consider of their their verdict. *McDaniel v. Crosby, 19 Ark., 533, 558; Viser v. Bertrand, Ib., 487.*

Upon the request of either party the court should refrain from giving an oral instruction to the jury, and before instructing them at all, should reduce its charge to writing (*Bradway v. Waddell, 95 Ind., 170,*) but where a simple instruction, without complication, is given orally to the jury, as was done in this case, and is thereafter accurately reduced to writing by the judge without unnecessary delay, no prejudice could result to the complaining party, and the statute directs that no judgment shall be reversed for an error which does not affect the substantial rights of the party appealing. *Mansf. Dig., secs. 5083, 1303.*

This court prescribed a rule for the guidance of the circuit court before the enactment of the statute, similar to it in effect, and Ch. J. WATKINS, in commenting upon it in *Barkman v. State, 13 Ark., 703,* said: "It is not more imperative than similar statutory rules of practice in the due enforcement of which some discretion is necessarily confided to the circuit courts."

We find no error in the record and the judgment is affirmed.

ARNETT v. MCCAIN, ADM.

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1. JURISDICTION: *Appellate.*

It is the essential criterion of appellate jurisdiction that it revises and corrects errors committed in the progress of a cause, but does not create the cause.

2. APPEALS: *Parties to.*

Heirs of a decedent who were not parties to the suit of an administrator in the court below for the sale of this decedent's land for the payment of his debts, can not prosecute an appeal or writ of error from the judgment of the lower court. None but parties to the proceedings below, or the legal representatives of parties, can prosecute an appeal or writ of error. The case of *Gregg v. Gregg, 33 Ark., 89,* is on this point disapproved.

ERROR to *Drew* Circuit Court.
Hon. H. B. MORSE, Judge.

J. M. and J. G. Taylor for Plaintiffs in Error.

Contend that plaintiffs in error can prosecute the writ of error, and cite *Tidds Prac., 1189.* Any party, his privies, or any one *prejudiced* or who *might be prejudiced* by the judgment, may maintain error to reverse it. *7 J. J. Marsh., 642; 4 T. B. Mon., 152; 3 Green Law, 45; 2 Saund., 46; 6 Wheat, 260–64; 1 Georgia, 495; 6 Metc., 194; 9 Dana, 526; Gregg v. Gregg, 33 Ark., 89.*

U. M. and G. B. Rose for Defendants in Error.

No one except parties to the record can prosecute a writ of error. *1 Ark., 19; Ib. 20, 21; 7 Id., 73; Ib., 246, 387; 8 Id., 399; 9 Id., 347; 20 How. 219; 13 Wall, 187; 1 Barb., 11; 18 Ill., 133; 1 Florida, 133.*

Sec. 1289, Mansf. Dig. does not aid plaintiff.

Gregg v. Gregg, 33 Ark., 89, is not an authority. This point was overlooked.

Besides a writ of error can only be brought by one prejudiced by the judgment. *18 Ala., 34; 16 Conn., 436; 1 Fla., 133.* Here the rights of plaintiffs were expressly saved by the order of sale.

SMITH, J. Samuel F. Arnett died intestate and insolvent in the year 1872, leaving a widow and two young children, and being the owner of a lot in the town of Monticello, which was his homestead. W. S. McCain was appointed his administrator, and debts to the amount of near fifteen hundred dollars were proved. In 1873, at the instance of John A. and James M. Owens, two of these creditors, the circuit court, which was then invested with jurisdiction in matters of probate and administration, directed the administrator to sell the lot, subject to the widow's dower and homestead right. To the petition praying for this relief the administrator was the sole defendant. The sale was made and approved and the lot was conveyed to the purchaser.

Arnett's children, who, it seems, are still minors, sue out a writ of error to reverse the order of sale. The sole defendant in error is the above-named administrator.

1. Appellate jurisdiction.

It is the essential criterion of appellate jurisdiction that it revises and corrects errors committed in the progress of a cause already instituted, but does not create the cause. *Marbury v. Madison, 1 Cranch., 49; Allis, ex parte, 12 Ark., 101.*

2. APPEALS:—Parties to.

The plaintiffs in error can not prosecute this writ. They were not parties below, nor are they the legal representatives of any one who was a party. No judgment was given against them. They are consequently not aggrieved, but stand unaffected by the decree. The parties named in the record sent up are not the same as those named in the writ of error. And a

stranger is never permitted, after final judgment, to prosecute an appeal or a writ of error. *Hudspeth v. State, 1 Ark., 20; Jackson v. Wright, 6 Id., 387; Borden v. State, 8 Id., 399; Chicot County v. Tilghman, 26 Id., 461; Johnson v. Williams, 28 Id., 478; Austin v. Crawford County, 30 Id., 578; Payne v. Niles, 20 Howard, 219.*

Counsel have been misled by *Gregg v. Gregg, 33 Ark., 89,* where the right of an heir to bring error in a case like this was allowed to go unchallenged. That cause was not argued for the defendant in error, and the point was unquestionably overlooked. So far as it impliedly sanctions such a practice, the case is disapproved.

The writ of error is dismissed.

APEL v. KELSEY.

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1. EJECTMENT: *Evidence.*

In an action of ejectment the plaintiff must succeed, if at all, on the strength of his own title.

2. ADMINISTRATION: *Petition to sell land; Where to be filed.*

The petition for the sale of a decedent's lands for payment of debts must be filed in the probate court of the county in which the administration is pending.

3. SAME: *Notice of application to sell land.*

The omission to give any notice of an intended application for the sale of lands, or to have the lands appraised by three householders of the county, or to advertise the sale as required by law, are all merely errors to be corrected on appeal, and do not affect the jurisdiction of the court to order the sale or confirm it after it is made. These are all cured by a confirmation of a sale made under an order of the court.

4. SAME: *Sales must be confirmed.*

A probate sale of land for payment of debts is a judicial sale and passes no title until it is confirmed; and confirmation must be proved, it cannot be presumed.

5. EVIDENCE: *Copy of recorded deed.*

A certified copy from the registry of a recorded deed, is admissible as evidence of the contents of the original deed.

6. ACKNOWLEDGMENT: *Curing act.*

A justice of the peace of another state is not authorized to take acknowledgments of deeds for lands in Arkansas, and such an acknowledgment does not authorize the recording of the deed, but the defect of such acknowledgment was cured by the curing act of 1883 (*Mans. Dig, sec. 683,*) in all deeds recorded prior to the 1st day of January, 1883.

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

J. M. Pinnell, for Appellant.

1. This court in *Howell v. Rye, 35 Ark., 478,* said: "Whether the deed was valid on its face, and competent to show title in plaintiff, was the question to be considered by the court in ruling upon exceptions taken to it." *34 Ark., 537; 36 Id., 461–3; 43 Id., 21; 46 Id., 102; Mansf. Dig., sec. 4257.* In the light of the foregoing authorities it is manifest that the court erred in overruling defendant's exceptions to plaintiff's paper title. A plaintiff in ejectment must recover upon the strength of his title, and not upon the weakness or imperfections of defendant's title, and the defendant may avail himself of any imperfections in the plaintiff's title. *Sedg., and W., Trial of Land Titles, p. 25, secs. 57, 94, 98, 249, 477, 717, 718; 29 Ark., 277; 22 Id., 397; 14 Id., 144; 4 Id., 101; 19 Id., 202; Dawson v. Parham, Mss.; Teederman on Real Prop., 693; 3 Wash., R. P., 114; 2 Whart. Ev., sec. 1331; 24 Ark., 141; 37 Id., 647; 45 Id., 312.*

2. Plaintiff must show a complete chain of title from the government, and each link in the chain *must be good. 38 Ark., 191; 8 Bush (Ky.), 126; Abbott's Tr. Ev., p. 705, sec. 16; Mansf. Dig., secs. 2627, 2635; 31 Ark., 336.*

3. The administrator's deed was defective in this: The lands were not described in the petition for their sale. *Gantt's Dig., sec. 168; Freeman Void Jud. Sales, secs. 9, 10, 11, pp. 34, 40, and secs. 18, 19; Rorer Jud. Sales, secs. 71, 73, 77, 84, 260, 261, 262; 19 Kans., 578, 581; 53 Penn., 511.*

The notice should have been published in a paper *printed* in Arkansas county. *Gantt's Dig., sec. 176; Rorer Jud. Sales, secs. 73-4, 84, 260, 265, 266, 277.*

The land should have been sold in Arkansas county. *Gantt's Dig., secs. 171, 2679.*

They were not advertised as prescribed by law, nor advertised at all. *Gantt's Dig., secs. 171, 2678.* They were appraised by householders of Pulaski county, when they should have been appraised by householders of Arkansas county. *Gantt's Dig., secs. 177, 178; 41 Mo., 298.*

The lands were sold at *private sale* for *cash*, when they should have been sold at *public auction* on a *credit. Gantt's Dig., secs. 172, 4708; 33 Ark., 89; 35 Id., 382; 27 Id., 294; 34 Id., 63; 37 Id., 43; 38 Id., 392; Rorer Jud. Sales, secs. 12, 91.*

The sale was not reported to and confirmed by the probate court. *Gantt's Dig., sec. 173; 43 Ark., 166; 38 Id., 80; 34 Id., 352-3; 32 Id., 106-8, 112, 113; 45 Id., Reid v. Hart; Rorer Jud. Sales, secs. 1, 2, 10, 15, 122, 124, 311, 357, 360, 371; Freeman Void Jud. Sales, secs 41-2-3; Abbott's Tr. Ev., p. 693, sec. 4.*

The recitals in this deed affirmatively show that the proceedings were *in violation of law*, and the rule is: "If the record shows what has been done towards acquiring jurisdiction, nothing else will be *presumed to have been done.*" *Freeman Void Jud. Sales, secs. 8, 28; Freeman on Judg., sec. 125; Rorer on Jud. Sales, secs. 150, 151; 19 Kans., 578; 26 Wis., 370; 40 Ala., 598; 2 Ill. (1 Scam.), 325; 41 Mo., 290; Freeman on Ex., 284-5; 49 Miss., 418; 2 Wall. (U. S.), 342; 18 Ib., 350;*

2 How. (U. S.), 60; 2 Ark., 65; 4 Id., 440; 3 Id., 535; 5 Id., 411; 12 Id., 640; 10 Id., 316; 16 Id., 649.

The Wimmer deed was improperly admitted in evidence. It purported to be acknowledged *before* a *justice* of the peace in Ohio, who had no authority to take acknowledgments under our laws; and it was improperly recorded. *Mansf. Dig., sec. 651; Gantt's Dig., secs. 850, 5021, 855; 34 Ark., 62; 10 Id., 183; 14 Id., 148; 2 Id., 326; 25 Id., 372; 40 Id., 540; 37 Id., 543; 15 Id., 478; 44 Id., 520; 45 Id., 386.*

The curative acts of March 8 and 14, 1883, *did not* cure or validate the *previous illegal* recording of this deed. *44 Ark., 371.* See *15 Ark., 249, 250; 20 Id., 515; 43 Id., 160; Ib, 424–5.*

Plaintiff had notice of all these defects, because "whatever appears on the face of the title papers forms an integral part of the title itself." *2 Lead. Cas. in Eq., pp. 169, 142, 152–5–6 and 160; 1 Gr. Ev., sec 23; 2 Whart. Ev., 1039; 1 Oregon 222; 5 Ohio, 126; 21 Hun. (N. Y.), 153; 18 Barb., (N. Y.), 20; 26 Miss., 438; 1 Ga., 557; 22 Cal., 592; 4 Pet., 82; 6 Id., 611; 2 Wall., 342; 4 Jac. Fish. Dig., 4735.*

P. C. Dooley for Appellee.

Plaintiff shows a complete chain of title, and was entitled to recover. His deeds are executed and *recorded* as required by law and any defective acknowledgments are cured by *act of March 14, 1883. Acts 1883, p. 129.*

Defendant's deed was void on its face, for there was no forfeiture of lands for taxes for 1878.

The complaint alleges that the sale of the land was *approved* and *confirmed* by the probate court, and it is not *denied* in the answer. *32 Ark., 97; 35 Id., 355; 31 Id., 345.*

Reviews the law on the subject of sales by administrators to pay debts, (*Gantt's Dig., secs. 168, 170, 171, 172, 174–5, etc.,*)

and contends that there is not a word about private or public sale or confirmation or its necessity in our statute. The proceeding being *in rem*, and the court having jurisdiction, the purchaser has only to look to the order of sale, and this is not subject to collateral attack. *13 Ark., 507; 19 Id., 499; 12 Id., Moore, ex parte, 6 Eng., 519; 25 Ark., 52.* See also *Fleming v. Johnson, 26 Ark., and Montgomery v. Johnson, 31 Ark.; Adams v. Thomas, 44 Ark.* These orders are final judgments and cannot be collaterally attacked. Confirmation is only required in guardian's sales.

The order of sale must be made in the county where the personal representative qualified. *35 Ark., 383.*

As to the power of the legislature to pass the curative acts of 1883, and their effect, see *43 Ark., 420; 44 Id., 365.*

SMITH, J. Kelsey sued to recover a tract of two hundred and forty acres. The land had been patented by the general government to the State of Arkansas as swamp land, and had been by the state granted to George C. Watkins and David F. Shall. Watkins had afterwards released to his co-tenant, who died seized. And in 1875, Gordon N. Peay and W. B. Worthen, as administrators of Shall, had, pursuant to authority conferred on them by the probate court of Pulaski county, sold the land privately, for two-thirds of its appraised value, to Theodore B. Mills. It did not appear that this sale had ever been confirmed. Nevertheless the administrators undertook to convey. And the title so acquired subsequently came, through several intermediate conveyances, to the plaintiff.

Apel disclaimed title to, and possession of, eighty acres of the tract, but for the residue defended himself under a donation deed based on a forfeiture for taxes.

A jury was waived, and the court found that the plaintiff's chain of title was regular and unexceptionable, and declared

the tax deed void. Judgment was entered accordingly; but no writ of possession was to issue until the plaintiff should refund to the defendant $146.31 for taxes and improvements.

The points that will be noticed were properly saved by exceptions filed with the answer to the documentary evidence of the plaintiff's title; by objections to the introduction of them as evidence; by declarations of law that were moved for and denied; and by motion for a new trial.

1. Plaintiff must succeed on his own title.

We need not canvass the validity or regularity of the tax title, unless the plaintiff has shown such a *prima facie* title as to put the defendant upon proof that he has something in the land superior to a mere naked possession. For it is a canon of the common law that a plaintiff in ejectment must recover, if he does recover, upon the strength of his own title. It sometimes happens that neither of the parties to the action is proved to be the legal owner of the premises. In that case *potior est conditio possidentis et defendentis. Sedg. & Waits Trial of Land Titles, 2 ed., sec. 791; Gaither v. Lawson, 31 Ark., 279; Wheeler v. Ladd, 40 Id., 108; Hill v. Plunkett, 41 Id., 465.*

2. Petition to Sell: Where to be filed.

The attack upon plaintiff's title was mainly directed against the deed of the administrators. It is said the license to sell should have emanated from the probate court of Arkansas county, where the land lay. But the statute settles this. The application must be made to the probate court of that county in which the administration is pending. *Mansf. Dig., sec. 4998; Gordon v. Howell, 35 Ark., 381.*

3. Notice of application to sell, etc.

Another objection was that notice of the intended application was given through the Gazette, of Little Rock, instead of a newspaper printed in Arkansas county. But the non-publication of any notice at all would merely have been error, to be corrected on appeal, and would not have affected the jurisdiction of the court. *Rogers v. Wilson, 13 Ark., 507; Mont-*

gomery v. Johnson, 31 Id., 74; Livingston v. Cochran, 33 Id., 297; Grignor's Lessee v. Aston, 2 Howard, 319; Comstock v. Crawford, 3 Wallace, 396; Mohr v. Maniere, 101 U. S., 417.

The same thing may be said of the objections that the lands should have been viewed and appraised by three disinterested householders of Arkansas county, and that there was no attempt to advertise the sale, as the law requires. The confirmation of a sale, made under an order of court, cures all such irregularities. They do not avoid the sale, the proceeding being *in rem* and the court having jurisdiction. Upon a collateral attack, the only inquiry commonly is: Had the court jurisdiction? For, if it had, the purchaser is not bound to look behind the order of the court, or inquire into its mistakes. *Borden v. State, 11 Ark., 519; Marr, ex parte, 12 Id., 84; Barrett v. Owen, 13 Id., 177; Sturdy v. Jacoway, 19 Id., 499; Thorn v. Ingram, 25 Id., 52; Fleming v. Johnson, 26 Id., 421; Adams v. Thomas, 44 Id., 267.*

The effect of a private sale on the validity of the title we desire to reserve from the category of defects cured by confirmation, for future consideration. It may be that this is such a patent error on the face of the proceedings, as to affect the purchaser, and all claiming under him with notice.

But, so far as appeared, the sale had never been confirmed.

4. Sales must be confirmed.

Now, a judicial sale passes no title until it is confirmed; and confirmation will not be presumed, but must be shown. The court is the vendor, and what takes place before final approval is in the nature of a bid, which may be accepted or rejected. An administrator's sale to raise a fund to pay debts is a judicial sale, according to all the tests that can be applied. It is ordered by the court; the specific property to be sold is designated in the order; the administrator, who conducts the sale, is appointed by, and subject to the control of, the court, and the court must approve it before it can be treated as final.

Freeman on Void Jud. Sales, secs. 1, 41; Penn v. Tolleson, 20 Ark., 652; Sessions v. Peay, 23 Id., 39; Gwynn v. McCauley, 32 Id., 97; Wells v. Rice, 34 Id., 346; Bell v. Green, 38 Id., 78; Walker v. Jessup, 43 Id., 163; Reid v. Hart, 45 Ark., 41.

5. EVIDENCE: Copy of recorded deed.

One of the links in the plaintiff's chain of title was a conveyance from Anthony Wimmer and M. W. Wimmer and wife to Oliver P. Siddell. A copy of this, certified from the registry of deeds, was exhibited. The defendant excepted to its introduction as evidence without proof of its execution. The statute makes such a copy admissible after the deed has been recorded.

6. ACKNOWLEDGMENT:—Curing act.

But this deed, executed in 1879, had been acknowledged before a justice of the peace in the state of Ohio; and he was not an officer authorized by our law to take and certify the acknowledgment of instruments affecting the title to real estate in Arkansas. And so the deed had been improperly admitted to record. But the defect was cured by the healing act of March 8, 1883. *Mansf. Dig., sec. 683.* The language of that act is: "All deeds, etc., recorded prior to January 1, 1883, purporting to have been acknowledged before any officer, and which have not heretofore been invalidated by any judicial proceeding, shall be held valid to pass the estate which such conveyance purports to transfer, although such acknowledgment may have been on any account defective; provided, that the record of all such instruments shall be as valid as if they had been acknowledged and recorded according to law." In *Green v. Abraham, 43 Ark., 420,* we held that the record of a deed of trust, acknowledged before the trustee himself, was made effective by this statute.

The judgment is reversed and cause remanded for further proceedings, with directions to sustain the exception to the deed of Peay and Worthen, as administrators, to Mills, unless the plaintiff will undertake to show by record evidence that the sale therein recited was duly confirmed.

NEEL v. CARSON.

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EQUITY: *When taxes, etc., refunded to fraudulent purchaser.*

When money paid by a fraudulent purchaser of land at an administrator's sale is used in paying the debts of the estate, it and the taxes paid by him after his purchase, less the value of the rents, must be refunded to him.

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

M. L. Bell for Appellant.
Met. L. Jones for Appellees.

BATTLE, J. The object of this action is to set aside an administrator's sale and to recover the rents and profits derived from the land sold. The facts in the case are substantially as follows: Samuel Carson died on or about the first day of September, 1875, seized and possessed of a valuable plantation and body of lands lying in Jefferson county, and considerable personal property, and left a last will and testament. He bequeathed to his son, Andrew C. Carson, $5000, and directed it to be paid out of the first money received; then directed that his debts be paid; and after the payment of his debts and the legacy of $5000, bequeathed and devised one-half of the residue of his estate to Andrew C. Carson and the other half to his grandchildren, Grant A., Samuel A. and Henry N. Vaughan; and directed that Andrew C. Carson remain in possession of the plantation, and the live stock and other personal property thereon, and use the same until his estate should be fully administered and divided, the son paying a reasonable rent therefor; and appointed Andrew C. Carson executor. The will was proven and admitted to probate by the Jefferson probate court on the 6th of September, 1875; and letters tes-

tamentary were issued to Andrew C. Carson on the 14th of said month, he having made the necessary affidavit and bond.

On the 15th of October, 1875, Grant A., Samuel A. and Henry N. Vaughan being minors, James F. Vaughan, their father, was appointed their guardian, and qualified and entered upon his duties as such. On the 25th of October, 1875, Andrew C. Carson, by deed, conveyed to and settled upon his wife, Minnie Carson, all his property of every nature, kind and description, especially the property bequeathed and devised to him by his father, Samuel Carson. The deed was filed for record on the 8th of November, 1875. Pursuant to the will, Andrew C. Carson took possession of the Carson place, the plantation owned by Samuel Carson at the time of his death, and the personal property thereon, and attempted to cultivate the plantation.

To enable him and his wife to do so during the years 1877 and 1878, C. M. Neel, under an agreement with them, furnished them with money and supplies, and they secured him in the payment of such amount as should be due him therefor by a deed of trust, bearing date the 6th of February, 1878, thereby mortgaging to him one undivided half of said plantation and lands, certain personal property therein described, and the crops raised by them on the Carson place in the year 1878. On the 22d day of November, 1878, their indebtedness for these moneys and supplies amounted to the sum of $6914.33. The cotton crop was delivered to Neel to be sold, with the understanding that the proceeds of the sale should be appropriated to the payment of this indebtedness so far as they would extend, which was done, and there still remained a balance of $3828.15 due and unpaid.

In April, 1878, Andrew C. Carson filed his second annual settlement with the estate of Samuel Carson, deceased, and showed therein a balance of assets in his hands, unadministered, amounting to $2846.98. To this settlement J. F. Vaughan,

as guardian of the Vaughan devisees and legatees, filed exceptions, thereby and therein stating and insisting that Andrew C. Carson had failed to charge himself in his settlements with various amounts with which he should be charged, and had wrongfully and unlawfully given himself credits to which he was not entitled, which together with the sums with which he should be charged and failed to charge, amounted in the aggregate to the sum of $2674.61; and that he had not been and should be charged in addition thereto a reasonable sum for the use of the personal property belonging to the estate of his testator which had been used by him. These exceptions, it appears, were not disposed of until after the death of the executor.

On the 1st of July, 1878, Andrew C. Carson died, and on the 28th of August, 1878, C. M. Neel administered on his estate. On the 2d of July, 1878, J. B. Trulock was appointed administrator *de bonis non*, with the will annexed, of the estate of Samuel Carson, deceased. On the 21st of October following Trulock, as such administrator, filed a petition in the Jefferson probate court for an order to sell the lands of the estate of Samuel Carson, deceased, to pay the debts of the estate and a balance due on the $5000 legacy, stating therein, among other things, that Andrew C. Carson had appropriated the personal property of the estate to his own use and accounted for it at its appraised value in his settlements, and that at the filing of his last settlement there was a balance of assets in his hands to the amount of $2846.98; that this amount was not sufficient to pay the $5000 legacy; that the amount due on the claims allowed against the estate, including interest, was about $2700; and that there were no assets belonging to the estate to pay this amount and the balance due on the legacy, except the lands. On the same day J. F. Vaughn, as guardian, filed his remonstrance against the granting of Trulock's petition, and as his reason for so doing stated that the personal prop-

erty and the rents of the land, which had gone into the hands of Andrew C. Carson, executor, and the rent of the Carson place for 1878, were sufficient to pay the debts of the estate and the legacy. About the last of October or first of November, 1878, Mrs. Carson agreed with Neel to sell him her interest in the lands of the estate of Samuel Carson, deceased, for the sum of $3250, which Neel agreed to place to her credit on her account, and to pay her any balance thereafter due her on final settlement; and she further agreed to file a petition in the Jefferson probate court, asking for the same relief prayed for in Trulock's petition, which she did on the 2d day of November, 1878, stating therein that Andrew C. Carson had transferred to her the $5000 legacy, and that no part of it had ever been paid; that Andrew C. Carson had died leaving three minor children his only heirs and distributees at law, of whom she is the mother and natural guardian; and that the personal assets of the estate of Samuel Carson, deceased, were not sufficient to pay his debts and the legacy. On the 6th of December, following, she conveyed to Neel one undivided half of the lands of the estate of Samuel Carson, deceased, and covenanted with him that she was seized, in fee simple, of the one undivided half of said lands; that she had a lawful right to convey the same; and to warrant and defend the title thereto unto Neel and his heirs against the lawful claims and demands of all persons. Neel gave her credit on her account with him for the $3250, and there still remained a balance of $578.15 due him from her. On the 4th day of November, 1878, J. F. Vaughn, as guardian of Samuel A. Vaughn, Grant A. Vaughn and Henry N. Vaughn, in consideration of $3000 to be paid and a pair of mules to be delivered to him by Neel, in writing agreed with Neel to sell and did undertake to sell and convey to him (Neel) all the interest of his wards in and to the estate of Samuel Carson, deceased, and to withdraw his exceptions and remonstrance and join Trulock in his petition for an order

to sell lands. He withdrew his exceptions and remonstrance, and on the 11th of November, 1878, filed a petition in the Jefferson probate court, asking for an order directing Trulock, as administrator, to sell the lands of the estate of Samuel Carson, deceased, to pay debts and the legacy, stating it as his belief that such sale would be to the interest of all parties concerned.

On the 11th of November, the Jefferson probate court ordered Trulock, in his capacity as administrator, to sell the lands of the estate of Samuel Carson, deceased, describing them, by public auction, on a credit of six and twelve months. These lands were appraised by three appraisers at $5000. They contained 1207 acres; were reasonably worth $15,000, and were of the annual rental value of about $2000. Trulock, in his capacity of administrator, sold them, on the 19th day of December, 1878, by public auction, to C. M. Neel, on a credit of six and twelve months, for the sum of $3400, and on the same day conveyed them to him. The sale was reported to the Jefferson probate court and confirmed. On the 14th of July, 1879, Trulock, as such administrator, filed a settlement in the Jefferson probate court, and reported therein that he had collected the $3400 of Neel, and with it paid the debts of the estate of Samuel Carson, deceased, and that there was a balance of $122.37 in his hands, out of which the costs, incurred by the filing of his settlement, would have to be paid, and that this sum was claimed by Neel.

On the 28th of December, 1878, Neel gave these lands to his sister, Mrs. Anna P. Burks, and conveyed them to her, and thereafter she collected the rents of the same. About the 1st of December, 1878, Neel proposed to give Mrs. Carson a house and lot, in Pine Bluff, worth $1000. Mrs. Carson, thereafter, declined taking this house and lot, and proposed buying certain lands, known as the Cole place, of Neel, which cost him $2500, and Neel sold them to her for $1500, deducting $1000

for the house and lot he proposed giving her, and she gave him her five notes for $300 each, for purchase money, due in one, two, three, four and five years. About the 10th or 18th of February, 1879, she became dissatisfied with the Cole place, and proposed to Neel to cancel her purchase of the same, if he would give her $500 for her stock. The purchase was canceled; Neel gave her the $500 for her stock, and conveyed by deed of gift, to her, the house and lot in Pine Bluff, known as the Burks place, and gratuitously gave her credits on her account with him.

Minnie Carson, for herself, and as next friend of her children, Samuel Carson, Andrew Carson and Rose Ella Carson, minors under the age of fourteen years, and Patrick Vaughn, as next friend of Samuel Vaughn, Grant A. Vaughn and Henry N. Vaughn, minors under the age of fourteen, J. F. Vaughn, their father and guardian, having died, brought this suit against Charles M. Neel, T. F. Burks and Anna P. Burks, his wife, and J. B. Trulock, late administrator *de bonis non* with the will annexed, of the estate of Samuel Carson, deceased. They allege in their complaint that the order for the sale of the lands and the deed executed by Mrs. Carson to Neel on the 6th of December, 1878, was procured by fraud, stating the facts and circumstances constituting the fraud, and ask that the purchase of the Carson place by Neel be declared to have been made in trust for Minnie Carson and her children and void as to Samuel Vaughn, Grant A. Vaughn and Henry N. Vaughn, and that upon the payment of any balance found due to Neel upon an account being stated, the lands be decreed to be the property of plaintiffs; that partition be made between Minnie Carson and her children and the Vaughns and Neel, if he has any interest; that the deed from Neel to Mrs. Burks be declared void; that, if the court should find the deed of Mrs. Carson to Neel valid, the Cole place and the value of the personal property received by Neel from her be decreed to her; and for general relief. Neel answered.

On the final hearing, the court below held the order for the sale of the lands by Trulock, as administrator, and the sale made in pursuance thereof, the deeds of Neel to Mrs. Burks, of Mrs. Carson to Neel, of Neel to Mrs. Carson to Burks' place, and of Vaughn, in his individual capacity, or as guardian, to Neel, to be void, and decreed that they be set aside, and appointed a master to ascertain and report to the court the rents of the Carson place for each year from the time Neel took possession of it, and the necessary repairs made and taxes paid on it by Neel or his grantees, and the value of the cotton, corn, cotton seed, live stock, farming implements and other personal property received from Mrs. Carson by Neel, and the rental value of the Burks place and the taxes paid and repairs made thereon by Mrs. Carson, the rental value of the Carson place for 1875, the amount of money paid by Neel for purchase of the land at the administrator's sale and how much thereof was returned to him, and the facts connected with the deed of trust executed by Mrs. Carson and her husband to Neel, what was due from Mrs. Carson to Neel, and what became of the crops raised on the Carson place in 1878. And the defendants appealed.

The legacy of $5000 is not involved in this action. The validity of the deed of Andrew C. Carson to his wife, Minnie Carson, is not disputed. It is contended by Mrs. Carson that the deed executed by her to Neel, dated the 6th of December, 1878, was procured by fraud, and to prove that it was she testified that Neel said he could take the Carson place and everything she had; but that he would sell her the Cole place for two thousand dollars; and that she purchased it. This, if true, is no evidence that she was deceived by him, or misinformed, or that she acted in ignorance of the facts when she executed the deed. This is all the evidence that was introduced to show that this deed was procured by fraud, and it is not sufficient for that purpose.

Her subsequent transactions with Neel go to show a ratification by her of the sale made by her to Neel of the one undivided half of the Carson lands claimed by her under the deed executed to her by her husband.

It is contended by appellees that the order for the sale of the Carson lands, made by the Jefferson probate court, was procured by fraud. If this be so, the sale should be vacated and the purchaser's title annulled. *Adams v. Toomer, 44 Ark., 271.* Is it true? When Samuel Carson died he was the owner of considerable personal property, consisting of mules, horses, cattle, hogs, farming implements and other property, valued by appraisers selected by his executor for that purpose at $2507. There was no evidence introduced to show what disposition was made of it, except so much thereof as the appraisement and settlements of the executor show was appraised at various sums amounting in the aggregate to $1335. Andrew C. Carson, in a settlement filed a short time before his death, accounted for this property, which consisted of two horses, and the cotton, corn and hay on hand at the time he took charge of the estate, saying that the horses had died, and the corn and hay had been consumed by the using, and that the cotton had been sold and he had charged himself with the proceeds of the sale. The remainder of the personal property, of the appraised value of $1172, is not accounted for, and there is no evidence that it was incapable of being identified as the specific property and estate of Samuel Carson, deceased. Trulock, in his application to the probate court for an order to sell, says Carson had converted and appropriated it to his own use; but the will authorized and directed him to take possession of the plantation and personal property thereon and use the same until the estate was settled and the property divided, and required him to pay a reasonable rent therefor. The last settlement of Carson shows that there were assets to the amount of $2846.98 still remaining in his hands. The property appraised at $1172 was a part

of those assets. At the time Trulock took charge of the estate the rent of the plantation for 1878, the annual rent of which was reasonably worth $2000, was uncollected, and the crops of that year were ungathered. There was no evidence that Trulock ever collected or attempted to collect it.

J. F. Vaughan, as guardian, remonstrated against the sale, because the personal property, and the rents of land which had gone into the hands of Andrew C. Carson, as executor, and the rents of the land for 1878, were sufficient to pay the debts of the estate and the legacy. The amount remaining unpaid on the debts was about $2700, including interest. Thus matters stood when Neel purchased of Mrs. Carson the one undivided half of the Carson lands claimed by her, and of J. F. Vaughn, as guardian, the interest of his wards, and employed them to join Trulock in an application for an order to sell the lands. According to the facts proved, Neel, presumed to know the law and to intend the natural consequences of his own acts, stands in the attitude of employing Vaughn to disregard and violate a sacred trust and duty he owed his wards and children, for the purpose of buying the Carson lands at a sacrifice. Vaughn withdrew his exceptions to the settlement and his remonstrance, and he, as guardian, and Mrs. Carson, filed their respective applications, as they agreed to do. The natural consequence was, the court, seeing all the parties in interest, or their legal representatives, asking for the order of sale, made it. The result was, a large body of lands, containing 1207 acres and reasonably worth the sum of $15,000, having a valuable plantation on them, of the annual rental value of about $2000, was sold *in solido*, on a credit of six and twelve months, to C. M. Neel for the sum of $3400, to pay an indebtedness of about $2700. Our conclusion is, the order was procured by fraud; that Mrs. Burks, claiming under a deed of gift, is not an innocent purchaser; and that the sale should be set aside.

Refunding taxes, etc.

The pretended sale made by Vaughan of the interest of his wards being without the authority of law is void. The administrator's sale being set aside, the Vaughn children are entitled to one undivided half of the Carson lands. But he who seeks equity must do equity. The money paid by Neel for the land purchased at the administrator's sale having been used to pay the debts and expenses of the administration of the estate of Samuel Carson, deceased, they should pay one-half of the amount so used and six per cent. interest thereon from the time of payment thereof by Neel. *Neblet v. McFarland, 92 U. S., 101.* The administrator's sale being set aside, Mrs. Burks holds the other half interest conveyed by Mrs. Carson to Neel, and succeeds to the right of Neel to recover and receive the half of the money so used in paying debts and expenses of administration. *Tomkins v. Seely, 29 Barb., 212; Sheldon on Subrogation, sec. 34,* and authorities cited. She is also entitled to recover of the Vaughn children one-half of the taxes paid by her and Neel on the lands after the administrator's sale, and should be charged with and required to pay to the legal representatives of the Vaughn children, one-half of the rents of the Carson place and lawful interest.

The court erred in setting aside the deeds of Neel to Mrs. Burks, of Mrs. Carson to Neel, and of Neel to Mrs. Carson to the Burks place, and in directing the master to ascertain and report the value of the cotton, corn, cotton seed, live stock, farming implements, and other personal property received by Neel from Mrs. Carson, and the rent of the Burks place and the taxes paid and repairs made thereon by Mrs. Carson, and the rental value of the Carson place for 1875, and the facts connected with the deed of trust executed by Mrs. Carson and her husband to Neel, and what became of the crops made on the Carson place in 1878.

The decree of the court below, in so far as it is inconsistent with this opinion, is reversed, and in other respects is

affirmed; and this cause is remanded with instructions to the court to enter a decree herein in accordance with this opinion, and for other and further proceedings.

HOWARD v. STATE.

AND

HOWARD v. STATE.

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1. CRIMINAL LAW: *Obstructing highways.*

It is a misdemeanor, punishable by common law procedure, to obstruct a road which has become a public highway by long continued use by the public.

2. ROADS AND HIGHWAYS: *By prescription.*

A road becomes established as a public highway by prescription, where the public, with the knowledge of the owner of the soil, has claimed and continuously exercised the right of using it for a public highway for the period of seven years, unless it was so used by leave, favor or mistake; and this though the public travel may have somewhere slightly deviated from the original track by reason of any obstacle that may have been placed in it.

3. SAME: *Statutory road by adoption.*

A road which has been long used as a public road and has been recognized as such by the county court making it a part of a road district and appointing an overseer to work it, is *prima facie* a statutory highway.

4. SAME: *Order establishing, not assailable collaterally.*

The judgment of the county court establishing a public highway is not assailable collaterally for not providing compensation to the land owner for the land taken, though he was not *personally* notified of the proceedings as required by the statute.

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

Sam W. Williams for Appellants.

No statutory road was established, first, because there was no appropriation for the public use of any specified land, by defining it, valuing and paying for it. Private property cannot be taken in this high-handed manner without compensation. The instruction of the court on this point was erroneous and misleading. The securing or payment of compensation to land owners is jurisdictional. See *20 Ark., 561; 13 Id., 355.*

The seven years statute of limitations applicable to real estate does not apply to incorporeal hereditaments. The right to the public by user could only be acquired by twenty years continued, unchanged, uninterrupted use, over the same path, with the consent and knowledge of the owner. *Johnson & Bissell v. Lewis, Mss.*

Courts of equity always enjoin opening highways in advance of compensation. *High. on Inj., sec. 391.* Where a statute provides a particular mode of proceeding *in rem*, that mode must be followed strictly or the judgment is void *ab initio*, because rendered without jurisdiction. *4 Wait's Act. & Def., p. 188; Freeman on Judg., 606; 4 H. of L. Cas., 414.*

Compensation is prerequisite, a condition precedent to the right to the soil, otherwise the owner may reject it. *31 Ark., 494.* And the county court has no right to open a road, until the assessment and payment of the owner's damages.

Jno. C. & C. W. England for Appellants.

In this state there is no such thing as a highway by prescription. All roads must be established by order of the county court, after due notice, in the manner prescribed by statute.

The court erred in refusing to allow the witnesses to testify as to the manner the road was laid out, opened, etc. The statute requires notice to be given to the owners of the soil, etc., and that damages shall be estimated, etc. *Sec. 5930 et seq., Mansf. Dig.* It is only in this way the courts get juris-

diction. *Ib., sec. 5933.* The court erred in admitting the record order establishing this as a road district, for it was established by evidence that this road had never been viewed, located, staked out, or in any way designated. The order of the county was inadmissible because of uncertainty. No one could lay out this road from the description given. Nor could any one tell when he was obstructing it.

This was not a common law road. It was never dedicated by the owner to the public use, or accepted by the public, nor had the public acquired the absolute right by long usage. *Thomp. Highw., 62.*

Review the testimony and contend that appellants would not have been convicted, were it not for the erroneous instruction of the court, that seven years was the period of limitation. That twenty years is the period, see *Thompson on High., pp. 53–62; Wait's Act. & Def., 716, sec. 8; 22 Ala., 190; 19 Barb., 179; 22 Md., 526; 23 Wis., 548.*

Dan W. Jones, Attorney General, for Appellee.

There are but two questions really in the case.

1. Can the public obtain a title to the road by prescription?

2. Did the court err in permitting the state to read to the jury the record of the county court establishing the road district and in disallowing the appellants to question the regularity of the proceedings of the said county court?

The period of prescription is made by analogy seven years. *3 Washb. Rl. Pro., 449; Sibley v. Ellis, 11 Gray, 417; Washb. Eas., sec. 4, pp. 111–12; Parker v. Foote, 19 Wen., 309; Curtis v. Keesler, 14 Barb., 511; Caper v. Smith, 19 Serg. & Rawl., 26; Tracy v. Atherton, 36 Ver., 503.*

A dedication to the public is more readily presumed than a grant to an individual. *27 Ver., 265.*

The appellants do not dispute that the public can obtain a prescription right. It was not necessary that the exact spots of ground should be trodden all the time. *Elkin v. State, 2 Humph., 543.*

The county court being one of record the regularity of its proceedings is presumed. *Pierce v. Edington, 38 Ark., 151.* Certainly it would have been highly improper to have collaterally retried the questions which had been before the county court some years prior. The appellants should have taken some direct legal steps for vacating the road instead of forcibly preventing the overseer from working it. *Draper v. Mackey, 35 Ark., 497.*

An order of the county court appointing an overseer for a particular part of the road is evidence that during the appointment the road is a public road. *State v. Moore, 23 Ark., 550; State v. Hagood, Ib., 553.*

Sec. 5927, Mansf. Dig., was enacted for the benefit of those who had no title to a road and wish to open one. So here, the public having a right by prescription, it was really immaterial whether the action of the county court was regular or not; it was merely confirmatory of that title, but at the same time became record evidence of the claims of the public.

The instructions given, taken altogether, were unusually clear, and were fair to the appellants in every particular.

COCKRILL, C. J. These two cases have been argued and submitted together. They are prosecutions for obstructing a public highway. The indictment, in the second case, charges that the highway obstructed was established by the order of the county court. In the first case the indictment contains two counts, one corresponding with the indictment in the other case except as to the time of the commission of the offense, and the other charging that the road obstructed was a highway by com-

mon law, the indictment specifying that it was intended to charge but one offense.

The defendants were convicted in both cases, but the conviction in the second case was under the common law count. The obstruction consisted of the erection of wire fences across the road. The evidence was the same in both cases, and for convenience they have been argued as though there had been a separate conviction under each count of the second indictment, and it is convenient to treat the cases as counsel have done.

Obstructing the road was admitted, but it is claimed the state failed to prove that the road was a public highway. It was of course necessary that this should be done to warrant a conviction in either case.

I. Under the common law count the state undertook to prove the public character of the road by evidence of public user for a great number of years—one of the witnesses, who was thirty odd years of age, testifying that he had lived upon the roadside all his life, and that from his earliest recollection it had been used by the public as a highway. 1. Obstructing highway.

It is argued, however, in the outset that there can be no conviction in this state for obstructing a highway that is not a statutory road; but the statutes in regard to highways do not negative rights which may have been previously or subsequently acquired by the public, and they are not to be construed as doing away with the modes of establishing the existence of public roads recognized by the common law, or of abolishing the common law procedure against one for placing obstructions in them of such a character as to be a common or public nuisance. *State v. Holman, 29 Ark., 58; Bish. Stat. Cr., sec. 164; 2 Greenl. Ev., sec. 662; Day v. Allender, 22 Md., 511.*

The jury found that the road was a public highway by virtue of long continued use, and as the finding was upon dis-

cordant testimony, it cannot be disturbed, if the court gave them, in its charge, the proper guidance for reaching a conclusion.

The charge of the court on the question of user was as follows:

2. Highways by prescription.

"To establish a highway by prescription, there must be an actual public use, general, uninterrupted and continuous, under a claim of right, for a period of seven years, and this though the public travel may have slightly deviated from the originally established route by reason of any obstacle that may have been placed in said route, provided the owner of the soil acquiesced in the claim of the public rightfully to enjoy such privilege. The occasional use of the highway by the public without objection on the part of the owner will not of itself constitute a common highway."

The appellants presented a written prayer for a charge to the jury substantially the same as the above except that in place of seven it substituted twenty years as the period of public use to establish a highway. The court inserted seven in the place of twenty and gave the instruction as modified. Giving the instruction set forth and refusing the other as asked is assigned as error.

The question as to what use by the public will convert a road into a common highway is one upon which there is great diversity of opinion. Some of the adjudged cases deny that prescription has any application to highways at all; and others, while conceding that highways may derive a lawful existence from long continued use by the public under a claim of right, hold that use alone for any time, however long, of uninclosed prairie or timber land, cannot make a highway. The cases which agree that a highway may be established by user over any land whether wild or improved, differ as to the effect of the public user, and as to the length of time within which such use

with the acquiescence of the owner shall have the effect of creating a highway. A review of the decisions or even a statement of the leading reasons given for the several classes of cases would be of little practical utility. Nothing can be added to the learning on that subject at this day. Some of the mooted questions were determined by this court in the case of *Johnson et al. v. Lewis, ante p. 66,* but the determination of the question of time now under consideration was expressly waived, attention being called to the fact that incorporeal hereditaments are not within the terms of, or in other words, are not named in, the statute of limitations governing real actions.

The tendency of the American courts, however, to conform to the period fixed by the statute by analogy, is pointed out by the learned judge who delivered the opinion. Referring the curious to the text writers and the cases there cited for the arguments and discussion of the question, we are prepared (using the language of Judge Dillon in speaking for the court in *Anstoll v. Murray, 22 Iowa, 457,*) to say that "if the public, certainly where this is with the knowledge of the owner, has claimed and continuously exercised the right of using land for a public highway, for a period equal to that fixed by the statute for bringing actions of ejectment, their right to the highway as against such owner, is complete, there being no proof that the road was so used by leave, favor or mistake."

As seven years is the period that bars ejectment, we hold that the charge was right upon that point.

II. The only other objection the appellants have urged to the charge is that the jury are told, in effect, that a dedication may be presumed from use notwithstanding the public travel may have deviated at points from the old route.

The obstacles which changed the course of travel were two fences, which had been put across the road, by other parties, a few years before the indictments. Travel had been deflected

from the original road-bed just far enough to escape the obstacle, the old road being resumed after a passage around the enclosure. But there was evidence to the effect that the road was the prairie route between two towns, and that no part of the old route was ever abandoned except that embraced in the enclosure, and the obstruction now complained of was not on that part of the road. This objection to the instruction is not well grounded. *Wyman v. State, 13 Wis., 663, 668.*

III. Several objections are urged against the conviction under the indictment based upon the statute.

3. Statutory road by adoption of county court.

In order to prove the public character of the road in this case, the state showed that it had been long used as a public road in the manner already adverted to, and that the county court had recognized it as such by making it a part of the road district described in the indictment and appointing an overseer to work it, prior to and in the year defendants had obstructed it. This was at least a *prima facie* showing of a statutory highway. *McKibben v. State, 40 Ark., 480; State v. Hagood, 23 Ib., 553; State v. Hester, 21 Ib., 193; Michel v. State, 12 Tex., Ct. App., 108; Hall v. State, 13 Ib., 269; McWhorter v. State, 43 Texas, 666; State v. Ramsey, 76 Mo., 398; Plummer v. Ossipee, 59 N. H., 55.*

4. Order Establishing, not assailable collaterally.

The order showing the assignment of the road to a district and the appointment of the first overseer was embraced in the judgment of the county court declaring the road a highway. They were made by the county court upon the coming in of the report of the reviewers appointed by the court after a view had been made and a route reported by viewers who had been first appointed. Objection was made to the introduction of the orders and judgment in evidence upon the ground that they were void and of no effect, because the judgment contained no provision for compensation, or mention of assessment of damages, to the land-owners over whose land the proposed route lay. The refusal of the court to exclude the evidence was not erroneous.

The jurisdiction to open and maintain highways is vested in the county courts. In making its orders in regard thereto, "the court acts judicially, and its judgment being pronounced in a matter affecting the public convenience is binding and conclusive on all persons who had no other than a public interest in the proceeding, held in common with the rest of the community." *Murray v. Menefee, 20 Ark., 561; State v. Richmond, 6 Foster (N. H.), 232; Plummer v. Ossipee, supra; Cresswell v. Commr's Court, 24 Ala., 282; Miller v. Porter, 71 Ind., 521.* The right to compensation can be waived by the person interested and a judgment laying out a road can be avoided even in a direct proceeding only by those whose individual rights and interests have been disregarded. *Authorities supra.*

It did not appear when the orders were offered in evidence that the defendants were interested in any of the lands over which the road passed. Subsequently it was developed that they owned the land where the road was obstructed, and they offered to prove, but were not permitted, that their grantor resided on the land when the viewers acted, and that he had received no notice of the time and place of their meeting; that he had not appeared to the proceedings for opening the road and had received no compensation for his land. The court also declined to instruct the jury that the judgment laying out the road was void as to the defendants if it made no provision for compensation for their land. The question whether such a judgment is open to collateral attack by the land-owner is thus presented.

In the case of *Roberts v. Williams, 15 Ark., 43,* this court on certiorari directed the quashal of an order of the county court opening a private road, because it made no provision for compensation to the complaining land-owner. But it does not follow that the order was regarded as a nullity. When the remedy by certiorari may be invoked, it is used for the correction of error apparent upon the face of the record. In the case cited the land-owner had made his claim for dam-

ages, the court had rejected it *in toto*, and the right of appeal from the judgment had been lost without his fault. The court ruled that private property could not be taken for private or public use without compensation, and that the judgment of the county court was erroneous. But in the subsequent case of *Turner v. C. & F. Ry., 31 Ark., 494*, it was held that where the statute gives a remedy for compensation in condemnation proceedings, the land-owner's right to compensation is confined to that remedy. Now, if the county court had jurisdiction of the subject matter, and the land-owner was afforded the opportunity to assert his claim for compensation, but failed to do so after receiving the personal notice contemplated by the statute, it seems clear under this rule he would waive his right to compensation, and could not afterwards resist the right of the public to open the road. *Dunlop v. Pulley, 28 Iowa, 469; Costello v. Burke, 63 Id., 361.*

It remains to be considered then, only whether he would be justified in making resistance if personal notice had not been served upon him.

The county court acquires jurisdiction in the first instance to take the initial steps for establishing a given highway upon the presentation of a petition by ten freeholders of the county after notice given by publication in a newspaper or by posters. When the court is satisfied that the notice required by statute has been given, three viewers may be appointed whose duty it is to view the route, assess the damages, and report to the court. *Mansf. Dig., secs. 5927, et seq.* It is made the duty of one of the parties petitioning for the road to give the land-owners or their agents, if residing in the county, personal notice of the time and place of the viewers' meeting. It was this notice the appellants sought to prove had not been given, and the question is, does the want of it avoid the judgment of the county court.

The proceeding to open a highway possesses all the characteristics which distinguish a proceeding *in rem*. *Costello v. Burke, 63 Iowa, 361; Wilson v. Hathaway, 42 Ib., 173; Murray v. Menefee, 20 Ark., 566.*

The court acquires jurisdiction of the property which is the subject of adjudication before the viewers are required to act. They are only an executory arm of the court employed in the exercise of the jurisdiction already acquired, and an omission of duty, or error committed on their part, can be regarded in no stronger light than an erroneous exercise of jurisdiction by the court itself. No irregularity in the exercise of jurisdiction will avoid the judgment of the court. *Adams v. Thomas, 44 Ark., 267; Grignon v. Astor, 2 How., 319.*

The jurisdiction of the court is not dependent upon the subsequent notice to be given by the petitioner to the land-owner, any more than the jurisdiction of the probate court is dependent upon the various steps as to notice and appraisement required by the statute in order to obtain an order for the sale of a decedent's lands in the course of administration. But we have frequently held that the omission of one or all of these prerequisites does not affect the validity of the order of sale. The land-owner cannot be said to be deprived of his right to be heard by the want of notice of the viewers' meeting. The assessment of damages by the viewers is not of itself binding upon him. It requires the judgment of the county court to give it any force or validity. It is made the duty of the court to see that the award of damages is just to the public and the individual, (*Mansf. Dig., sec. 5937,*) and the land-owner, who is a party by virtue of the publication, is thus afforded his day in court regardless of the report of the viewers.

In this view of the matter the judgment was erroneous and not void and afforded the defendants no justification for ob-

structing the road. *Draper v. Mackey, 35 Ark., 497; Wells on Jurisdiction, sec. 421.*

The judgment in each case will be affirmed.

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FANNING v. STATE.

1. COST: *Construction of statute.*

Statutes regulating costs are construed strictly, and all doubts as to their meaning are resolved against the officer claiming them; and fees for constructive service are in no case allowed.

2. FEES: *Prosecuting attorneys.*

However numerous may be the parties convicted under a joint indictment, the prosecuting attorney is entitled to but a single fee for one conviction against all and not a separate fee against each.

APPEAL from *Boone* Circuit Court.
HON. I. M. PITTMAN, Judge.

O. W. Watkins for Appellant.

The prosecuting attorney is entitled to one fee only for a conviction in each case, no matter how many defendants there may be. *Sec. 3233, Mansf. Dig.; Bouvier L. D., title "Conviction;" 1 Bishler, Law, sec. 223; 1 Blatchf., 459; 10 Sm. and M., 192; 5 Ark., 536; ex parte Jerry Murphy, St. Louis Ct. Appeals, 1886, Mss.; 25 Ark., 235; Dwarris St., p. 644.*

Dan W. Jones, Attorney General, for Appellee.

Sec. 3233, Mansf. Dig., allows a fee for *each* conviction, and there was a conviction of *each* defendant in the case.

SMITH, J. Sixteen persons, having been jointly indicted for a misdemeanor and having pleaded guilty, were condemned to pay a fine of $10 each and the costs of the prosecution. As a part of the costs, the clerk taxed up against each defendant a fee of $10 in favor of the prosecuting attorney. The defendants moved for a re-taxation of costs, alleging that the attorney prosecuting for the state was only entitled to one fee in the entire case; but the circuit court denied their motion.

1. Construction of the statute.

Section 3233 of *Mansf. Dig.*, allows a fee for each conviction. And the question is, whether there have been sixteen convictions, or only one.

If there is a doubt as to the meaning of the statute, that doubt must be resolved against the officer. For statutes regulating costs are construed strictly. Fees for constructive services are in no cases allowed. Those who serve the public must rest content with the compensation provided by the plain letter of the law. *Shed v. Railroad Co., 67 Mo., 687; Crittenden county v. Crump, 25 Ark., 235; Cole v. White county, 32 Id., 445.*

2. Prosecuting Attorney's fees.

But we apprehend there is no ambiguity in the statute. A conviction is defined to be "that legal proceeding of record which ascertains the guilt of the party, and upon which the sentence or judgment is founded." *Bouvier's Law Dict., title "Conviction."* Bishop says it is "finding a person guilty by verdict of a jury." *1 Cr. Law, sec. 223.* Here has been but one indictment, one plea, one legal proceeding of record, one judgment, and consequently but one conviction, although several persons were included in the accusation and are affected by the proceeding and judgment. There has been but one case between the state and the defendants. The prosecuting attorney has drawn but one indictment and has represented the state at but one trial. He has rendered substantially the same service which he would have rendered if the indictment had been against one defendant. And any reasoning which allows

him sixteen fees for performing one service, or set of services, would entitle the clerk to sixteen fees for entering the judgment.

Now, such a construction might become oppressive. Defendants who are jointly indicted and who do not sever, are liable for all the costs of the prosecution; although payment by one inures to the benefit of all. *Mansf. Dig., sec. 2339.* One of these defendants might have been able and willing to pay his fine, and the prosecuting attorney's fee of $10, and the other costs. Could he be held and hired out as a convict if he refused to pay the costs that were taxed on account of his co-defendants?

Costs in a criminal case are not intended as a part of the punishment. That object is accomplished by the infliction of fines, or imprisonment, or both. Costs are awarded in order that the state may prosecute the guilty at their own expense. *State v. Jackson, 46 Ark., 137.*

This question came before the Honorable Seymour D. Thompson, one of the judges of the St. Louis Court of Appeals, in the matter of Jerry Murphy and Jerry Spillance, on an application for the writ of *habeas corpus.* The petitioners had been jointly proceeded against for a misdemeanor, tried, convicted, and adjudged to pay a fine of $25 and costs. They paid the fine and what they were advised were all the costs, including a single fee of $5 for the prosecuting attorney. The justice of the peace had taxed a fee of $5 in respect of each defendant; and for the non-payment of the remaining $5 he issued his warrant of commitment, under which the petitioners were held. The statute of Missouri is identical with ours; and the petitioners were discharged. We have been furnished with a certified copy of the luminous and exhaustive opinion filed by the learned judge, of which we have made a liberal use in preparing this opinion.

The judgment is reversed and a re-taxation of costs is ordered in conformity to this opinion.

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McCloy & Trotter v. Arnett.

1. Homestead: *Right of infants in; Ejectment.*

Under the constitution of 1868 the exemption of the homestead from sale for debt descended to the widow and infant children of a deceased debtor; and after the termination of the widow's right, by death or re-marriage, the infant children have such an estate and right of possession as will support an action of ejectment against any one in possession, who does not hold under a better title than their father.

2. Same: *Liability of purchaser of.*

A purchaser of a decedent's homestead, at a probate sale, must take notice of the minor's right; and if he use the homestead for his profit or convenience, must account to the minor for the rents.

3. Same: *Power of probate court to sell reversion in.*

Under the constitution of 1868, the reversionary interest in a decedent's homestead, after the termination of the homestead rights of his widow and infant children, could not be sold for payment of his debts, and an order of the probate court for the sale of the homestead, subject to the homestead right of the widow and children, was without jurisdiction and void.

4. Infants: *Not prejudiced by admission.*

An infant can not be prejudiced by admissions of his guardian or attorney.

5. Ejectment: *Compensation for improvements.*

In ejectment as well as in equity, a defendant may set off against the claim for rents the value of his improvements made in good faith, believing himself to be the owner of the premises, to the extent that they have enhanced the rents.

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

McCain & Crawford and *Z. T. Wood* for Appellants.

The homestead of a deceased debtor, under the constitution of 1868, was not entirely exempt from the payment of his debts. The exemption was to last during widowhood and "during the minority of the children." Subject to these temporary rights the land occupies the same position as other

lands. The sale of lands subject to a life estate is as old as the common law.

When a widow has a homestead in her own right, neither the widow nor children have any homestead rights in the lands of the late husband and father. *45 Ark., 340.*

The dower right of the widow is superior to the homestead right of the children. *37 Ark., 302.* It is prior in point of time, as it vests at the time the husband becomes seized.

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

The case arose under the constitution of 1868, and by its provisions the rights of the parties hereto must be determined.

That constitution confers upon "a married man or head of a family" no new or hitherto undefined estate in land. It simply creates an exemption from forced sale, under execution or otherwise, of any land owned by him, after he has once impressed it with the character of a homestead during his life. All the *indicia* of ownership still exist. He may live on it or not, as he pleases. *Brown v. Watson, 41 Ark., 309; Euper v. Alkire & Co., 37 Ark., 283; Tomlinson v. Swinney, 22 Ark., 400.* He may alienate it. *Stanley v. Snyder, 43 Ark., 429.* He may use it in any manner he sees fit. *Klenk v. Knobel, 37 Ark., 298.* But under that constitution the creditor always had recognized rights in the homestead of his debtor. It was subject to the lien of any judgment that the creditor might recover against him, and so soon as it passed out of his hands the lien might be enforced. *Jackson v. Allen, 30 Ark., 110; Moore v. Granger, Id., 574.* And at his death his exemption ends altogether. If the personalty of the debtor is insufficient, the homestead may be subjected, and the purchaser at administrator's sale gets all the title which the deceased debtor had.

But the constitution of 1868 placed the homestead under an additional charge, viz: As a homestead for the widow and

children under certain conditions. It could not be said that any estate was thus created in the land. If so, it was, at most, a conditional life estate in the wife, or a determinable estate for years in the children. It is not a continuation of their father's estate, but a particular interest vested in them by the constitution. Their interest is independent of the ownership of the land, and cannot be affected by a conveyance of it. If plaintiffs depend upon their rights under the homestead exemptions for the maintenance of this action it must be dismissed. They are not parties in interest, for their rights are expressly saved by the order of sale. The husband holds the freehold, which cannot be alienated at forced sale. The widow has only the right to occupy for life upon condition. The interest of the children either follows that of their mother, or is of a like character, being only the usufruct of the premises for a determinable number of years. After the death of the debtor the freehold descends to the heirs, subject to the widow's dower, and the payment of the debts of the deceased. The homestead right of the widow and children cannot be defeated by a conveyance of it. An administrator's sale passes title to the reversion, and upon the divestiture of the homestead rights the title becomes perfect in the purchaser. *Thompson on Homesteads and Exemptions, sec. 635; Judge of Probate v. Simonds, 46 N. H., 368.*

J. M. & J. G. Taylor for Appellee.

The homestead is exempt from *sale* not only during the father's life but during the minority of the children. *Const. Ark., 1868, art. 12, secs. 3, 5.*

There is no question here as to whether the widow's dower right is superior to the homestead right of the children, but if there were the *homestead* right would prevail. *32 Mich., 380, 402; 5 Allen, 146; 11 Ib., 194; 21 Texas, 605; 68 Mo., 13.*

The probate court had no jurisdiction to subject the homestead of a deceased person to the payment of his debts, during the minority of the children, and a sale of the reversion was void. *Act Dec. 8, 1852; Const. 1868, art. 12; Const. 1874, art. 9, sec. 6; 29 Ark., 280; Ib., 633; 37 Id., 316; Acts 1873, p. 240; Thomp. on Homest. & Ex., sec. 635; Freeman Void Jud. Sales, sec. 35.*

That the homestead reversion cannot be sold, see *53 Ala., 452; 23 Cal., 415–18; 12 Cal., 114; 65 N. C., 447; 60 Ill., 281; 66 Id., 224.*

The minors could maintain ejectment; *Thomps. on H. & Ex., sec. 622, and authorities supra,* and are entitled to recover rents. *37 Ark., 316; Mansf. Dig., sec. 2637.* And they cannot be mulcted for improvements thereon. *Thomps. on H. & Ex., sec. 552; 29 Ark., 280; 37 Id., 316.*

The widow cannot so sell the homestead as to pass such title to a stranger that he would be entitled to any part of the property on partition, nor so as to give him any interest in the rents. *39 Ark., 161; 10 Fed. Rep., 601.*

The widow's interest terminated upon her marriage. *Const. 1868, art. 12, secs. 4, 5.* The assignment of the dower in the homestead does not affect the children's rights.

The appellants can only claim an offset against the rents for the *increased* rents and profits, which are directly traceable to the permanent improvements placed upon the lot. *51 Ala., 400; Jones on Mortg,, secs. 1126, 1130.*

They cannot improve the minors out of their estate.

The appellants must have taken notice of appellee's rights. They could not have believed they were the owners, under color of title even, and thus entitled to the benefit of the betterments act. Their title being void, they cannot recover for

improvements against an infant. *85 N. C., 184; 84 Id., 479; 15 Texas, 563; 117 Mass., 360.*

M. W. Benjamin amicus curiæ.

The probate court had no jurisdiction to order the sale of a homestead, or the reversionary interest in the same, during the minority of the children, and a sale made thereof is void. *Const. 1868, art. 12, sec. 5; 27 Ark., 235; 38 Texas, 487; 45 Cal., 433; 35 Id., 310; 75 N. C., 430; 25 Wis., 525; 29 Ark., 633; 37 Id., 316; Kirksey v. Cole, Mss.*

SMITH, J. The minor children of Samuel F. Arnett, deceased, brought ejectment for a town lot, which had been their father's homestead. The title of defendants was acquired from Arnett's widow. She had applied to the probate court for an assignment of dower in certain real estate, owned by her husband during coverture, and alienated by him without her consent in legal form; and also for a reservation of homestead in the town lot. Her prayer for homestead was rejected; in lieu of which dower was admeasured to her in the homestead premises, the line passing through the center of the hall of the dwelling house. In 1873, Arnett having died in the year preceding, the circuit court, then exercising probate jurisdiction, had, at the instance of creditors, directed the administrator to sell this lot, subject to the widow's dower and homestead. At this sale the widow became the purchaser of the reversionary interest, and the sale was approved and a conveyance made to her. She afterwards remarried, and she and her husband either mortgaged the lot to McCloy & Trotter or sold it to them absolutely, with the privilege of repurchasing within a given time. Under this deed the defendants obtained possession. And they further pleaded the betterments act.

To the pleas of title a demurrer was sustained, while the pleas, asserting a lien on the lot for taxes paid and repairs made, were adjudged to be good. The issue of fact so raised was tried before the court without a jury, upon the following agreement as to facts:

"We hereby agree that the following statement of facts may be read in evidence in this cause on behalf of the plaintiff:

"That Samuel F. Arnett was a married man, the head of a family, a resident and citizen of the state of Arkansas, and owned and occupied the premises in controversy, together with the dwelling and appurtenances thereon, as a homestead; and that said premises did not exceed one acre of land, and are worth not exceeding $2000; that the same was in the town of Monticello; that he so owned and occupied the same up to, and at the time of, his death in 1872; that he died leaving a widow and two minor children, viz: Lena and Jesse, the plaintiffs herein; that the plaintiffs, Lena and Jesse, are still under the age of 21 years; that his widow, Mary N. Arnett, remained unmarried until 1874, when she intermarried with one George Foreman, and took another homestead in her own right, (in 1878) carrying the children with her; and she is still living.

"That defendants, McCloy & Trotter, have had possession of said premises since the 24th day of January, 1883, receiving the rents and profits thereof, and are still in possession of same.

"That the rents for the year 1883 were reasonably worth $8.33 per month, and for 1884 and 1885, $12.50 per month; that they have not paid those rents to these plaintiffs.

"And in behalf of defendants, the following: Defendants, peaceably and in good faith, believing themselves to be the true owners, after they took possession made valuable and lasting improvements on the premises, of the value of $350, of which amount $125 was made on the dower part, and $225 on the remainder.

"The rents for that claimed as dower are two-fifths of the rents of the whole. To redeem and pay taxes on the premises, the defendants expended $65.50 in currency.

"Signed:

"W. S. McCain,
"*For Defendants.*

"Wood & Hyatt,
"J. M. & J. G. Taylor,
"*For Plaintiffs.*"

The court found that the plaintiffs were entitled to the possession of all the premises sued for; but that the defendants were entitled to recover from the plaintiffs $70.50, being the excess of taxes and improvements over rents. Judgment was therefore given for the plaintiffs; but it was directed that no writs of possession issue until the aforesaid sum of money was paid by them.

1. Homestead: Rights of infants in. Ejectment.

The rights of the parties are governed by the provisions of the constitution of 1868 on the subject of homesteads. And whether that constitution be regarded as creating a new estate, unknown to the common law, or merely as protecting the minors' right of occupancy until they attain their majority; whether the reversion after the homestead is, or is not, subject to sale for the debts of the decedent; the pleas of title present no bar to the action. The exemption descends to the widow and infant children; and after the widow's right has ceased by death or re-marriage, the children, if still under age, have such an estate and right of possession as will enable them to support ejectment against any one in possession, who does not claim by title superior to that of their father. The purchaser, at a probate sale of the tract of land, to which the homestead of a deceased parent appertained, must take notice of the minors' right, and if he use the homestead for his profit, or convenience, must account to the minor for the rents. *Booth v. Goodwin, 29 Ark., 633; Altheimer v. Davis, 37 Id., 316.*

2. Liability of purchaser of.

3. Probate court can not sell reversion.

And here we might appropriately close the discussion of this branch of the case, having said enough for the proper disposition of this appeal, and leave the parties to settle by litigation after the plaintiffs shall have come of age, what estate the defendants have obtained in the premises, or whether they have obtained any. But as the question is squarely presented, and has been argued, and as the decision of it now, while the parties are before us, will save further litigation, we proceed to consider whether, under the constitution then in force, the reversionary interest of the estate of a deceased person could be ordered to be sold to pay his debts.

The language of the constitutional provision is: "The homestead of a family, after the death of the owner thereof, shall be exempt from the payment of his debts, in all cases, during the minority of his children, and also so long as his widow shall remain unmarried, unless she shall be the owner of a homestead in her own right." *Constitution of 1868, art. 12, sec. 5.*

From this and other sections of the same article, it is plain that the framers of that constitution did not intend to place the homestead entirely beyond the reach of creditors. The right is a temporary one, and upon its cessation, the homestead falls back into the residuum of the estate, and becomes subject to administration. *Cohn v. Hoffman, 45 Ark., 383–4, and cases cited.*

The provisions for the debtor's exemption is in these words: "Every homestead, owned and occupied by any resident of this state, shall be exempted from sale on execution, or any other final process from any court," except for certain privileged debts. *Ib., art. 12, sec. 3.* Notwithstanding a judgment was a lien on the homestead, and the debtor's right was practically limited to the enjoyment of the property as a homestead, he being unable to sell or leave it without forfeiting his privilege, yet so long as he resided on the land the creditors could not seize and

sell the reversion. *Grubbs v. Ellyson, 23 Ark., 287; Hughes v. Watt, 26 Id., 228; Greenwood & Son v. Maddox & Toms, 27 Id., 648; Lindsey v. Norrill, 36 Id., 545; Tucker v. Keniston, 47 N. H., 267; Wiggins v. Chance, 54 Ill., 175.*

Black v. Curran, 14 Wallace, 463, professing to follow the local law of Illinois, decided that the fee in the homestead tract could be sold under execution, subject to the debtor's right of occupancy, and that the purchaser took the absolute title, when the homestead right ceased. But in *Hartwell v. McDonald, 69 Ill., 293*, it is said that the supreme court of the United States had wholly misconceived the Illinois statute and the decisions construing it. And it may be regarded as settled law that an execution sale of a homestead, when the debtor claims his exemption, if he is required to claim it, is void, and has no effect on the title beyond casting a cloud over it. *Freeman on Executions, sec. 239.*

Now there can be no distinction between a forced sale of the debtor's homestead in his lifetime and of his widow's and children's homestead after his death. The constitutional inhibition is as peremptory in one case as the other. The term is used throughout in its defined legal sense—the place of a house or home—that part of a man's landed property which lies about and contiguous to his dwelling house, with the improvements and appurtenances. *Tumlinson v. Swinny, 22 Ark., 400.*

And so the homestead act of 1852 was construed in *Booth v. Goodwin, supra.* The effect of it was declared to be to suspend the rights of creditors until the youngest child came of age.

But the language of the constitution is still more unequivocal than the act of 1852. This court has repeatedly announced that an administrator has no interest in the lands of his intestate and no control over them except to subject them to the satisfaction of general creditors. It is a corollary from our admin-

istration statutes. Now the constitutional provision means precisely what it says—that the homestead of the deceased debtor shall be exempt from liability for his debts during the minority of his children.

Such is also the legislative interpretation of the constitution, as may be seen by reference to the act of April 25, 1873, which makes it a misdemeanor, punishable by fine and imprisonment, for an administrator to attempt to sell the homestead, after it has been reserved for the benefit of the widow and children.

Under that constitution then, neither the probate court, while it was in existence, nor its successor, the circuit court, had any jurisdiction to order the sale of the homestead of a decedent, for the payment of ordinary debts contracted since its adoption, until after the termination of the homestead right. Nor would the purchaser at such sale take any title as against the minor children. The homestead was not assets in the hands of the administrator. The authority of the court was limited to the determination of such incidental questions as might arise upon the segregation of the homestead tract; for example, whether the land was impressed with the homestead character by the parent, whether it exceeded the prescribed quantity or value, whether the children were now of age, etc. And an erroneous determination of such matters must have been corrected by appeal or writ of error. But an order of sale of a parcel of land, as in this case, which is shown by the petition, and the order itself, to have been the residence of a deceased head of a family, is an absolute nullity. *Yarboro v. Brewster, 38 Texas, 397; Hamblin v. Warnecke, 31 Id., 91; Ruttenberg v. Pipes, 53 Ala., 452; Tompkins' Estate, 12 Cal., 114; James' Estate, 23 Id., 415; Poe v. Hardin, 65 N. C., 447; Wolf v. Ogden, 66 Ill., 224; Estate of Busse, 35 Cal., 310; Schadb v. Heppe, 45 Id., 433; Hinsdale v. Williams, 75 N. C., 430.*

We know of no authority to the contrary, except *Judge of Probate v. Simonds, 46 N. H., 363.* There the administrator sold

the estate, describing it as subject to the widow's right of homestead, and the widow became the purchaser. It was said that the sale passed title, subject to the widow's homestead, and it did not change the legal effect of the sale that she happened to be the purchaser. *Evans v. Evans, 13 Bush., 587,* can hardly be considered an authority on the other side of the question; because, according to the note to *Sec. 549* of *Thompson on Homesteads and Exemptions,* the statute of Kentucky, so far from prohibiting a sale under such circumstances, explicitly provided that "the land may be sold, subject to the rights of the widow and children, if a sale is necessary to pay the debts of the husband."

It is true that a reversion or remainder in land may be sold under execution. But this is by virtue of a statute, not in opposition to it. To make the cases parallel the statute should forbid the sale of estates in expectancy.

Nor does it affect the result that McCloy & Trotter have a conveyance of all the widow's interest in the premises, including her estate in dower, which had previously been set out to her. The homestead right of the children in the premises, until they arrive at full age, is superior to the right of the tenant in dower conveyed to a third person. *Loeb v. McMahon, 89 Ill., 487; S. C. 8 Cent. L. Jour., 492; Hannon v. Sommer, 3 McCrary, 126; S. C. 10 Fed. Rep., 601.*

The homestead estate is created equally for the use of wife and children, and none of them can do an act that will impair or prejudice the rights of the others. *Johnston v. Turner, 29 Ark., 290.* Dower could not be carved out of the homestead premises so as to defeat the right of the minor children to occupy and enjoy. *Trotter v. Trotter, 31 Ark., 145; Kirksey v. Cole, 47 Id.*

The law does not favor the alienation of homesteads. The minor children, and after them the creditors, have rights which

are endangered by every such transfer. *Whittle v. Samuels, 54 Ga., 548.*

This relieves us of the necessity of inquiring whether, prior to the act of February 15, 1877, *Mansfield's Digest, secs. 188–92,* a sale of lands could be ordered on the petition of creditors. Before the passage of that act, the administrator alone was authorized to present such a petition. Mr. Freeman, in his *Monograph on Void Judicial Sales, sec. 10,* says it is a jurisdictional defect to order the sale on the petition of a person who is not competent to present it.

4. Infant not prejudiced by admissions of guardian or his attorney.

It was a dangerous concession, in the agreed statement of facts, that the defendants had made improvements in good faith, believing themselves to be the true owners of the lot. The deed under which they took possession is absolute in form. The contemporaneous contract for redemption was not produced; neither was any evidence offered that their vendors were indebted to them at the time, and continued to be indebted to them after the sale. Hence we must conclude that the transaction was a defeasible purchase, and not a mortgage. But neither the guardian nor the guardian's attorney can make any admissions to the prejudice of the ward. *Evans v. Davis, 39 Ark., 235; Moore v. Woodall, 40 Id., 42; Pinchback v. Graves, 42 Id., 222.*

And the recital in the deed of the administrator to Mrs. Arnett, that the sale and conveyance were subject to the widow's dower and homestead right, was probably sufficient to put the defendants upon inquiry whether Arnett had left any infant children surviving him, and what their rights in the premises were.

5. Compensation for improvements.

But be this as it may, minors can not be improved out of their homestead. The constitution gave them the unqualified right, out of high considerations of public policy; and the legislature could not annex conditions to its enjoyment. Other-

wise any disseisor, entering under semblance of title, might effectually deprive them of their estate by placing upon the land improvements of greater value than their rents could amount to during the term of their occupancy. Compare *Andrews v. Melton, 51 Ala., 400.*

The defendants are entitled to set off their improvements against rents only to the extent that by the expenditure of their labor and money they have enhanced the rental value of the land. In other words, they are not to be charged with the increased rents which are directly traceable to their own reparations and meliorations, but only such rents as the property would have yielded without the improvements. The additional profits, or income from the improvements, are not taken from the owner's land, but spring from an independent source, to-wit: the labor of the defendants. *Sedg. & Wait on Trial of Land Titles, sec. 678; Jackson v. Loomis, 4 Cowen, 168; Nixon v. Porter, 38 Miss., 401; Latum v. McClellan, 56 Id., 352; Dungan v. VonPuhl, 8 Iowa, 263; Wolcott v. Townsend, 49 Id., 456; Taylor's heirs v. Whitting's heirs, 9 Dana, 399.*

The amount paid in taxes and in redeeming from tax sales, is also a proper deduction to be made from the gross rents of the property. It has been held that a plaintiff, after a recovery in ejectment, can not be compelled to refund to the defendant the amount of taxes paid by him while he was in possession. These decisions are rested upon the doctrine that such payments were voluntary, and that no action can be maintained for money paid for the use of another, except upon proof of a previous request, express or implied, or a subsequent assent or sanction. *Homestead Co. v. Valley R. R., 17 Wallace, 153; Napton v. Leaton, 71 Mo., 358.* But taxes are a charge upon the land, and must have been paid by the plaintiffs had they been in possession. Consequently they should be taken into account in estimating the actual damages which the plaintiffs have sustained by the wrongful withholding of possession by

the defendants. *Sedgwick & Wait on Trial of Land Titles, sec. 688, and authorities cited.*

It may seem like an innovation to admit such equitable defenses in mitigation of damages, independently of statute. In *Porter v. Doe, 10 Ark., 186,* there is a dictum of Mr. Justice WALKER, that the right to set off valuable and lasting improvements made by the defendant in ejectment, in good faith and before notice of the adverse claim of the plaintiff, existed at common law. On the other hand, in *Horsley v. Hilburn, 44 Ark., 478,* it is intimated that it is only permissible in equity, where the plaintiff seeks the aid of the court to establish an equitable title, being imposed as a condition of interference. In *Rector v. Gaines, 19 Ark., 70,* the question arose under a special statute; and the other cases that we call to mind, in which the principle is recognized by this court, have been cases in chancery: *Watkins v. Wassell, 15 Ark., 73; Cunningham v. Ashley, 16 Id., 181; Marlow v. Adams, 24 Id., 109; Jones v. Johnson, 28 Id., 211; Summers v. Howard, 33 Id., 490; Brewer v. Hall, 36 Id., 353.*

The policy of the common law was averse to making any allowance to a person adjudged to have held the possession of land, without right or title, for his labors and expenditures in improving the property, during the period of his wrongful occupancy. Nevertheless, as early as *Coulter's case, Coke's Rep.,* it is said, by way of argument and illustration, that the disseisor, upon a recovery against him, may recoup the damages to the value of all that he has expended in amending the houses. And in *Green v. Biddle, 8 Wheaton, 1,* it is laid down, as a rule of the common law, that the disseisor, if he be a *bona fide* occupant, may recoup the value of the meliorations made by him against the claim of damages. And in America generally it has been held that the action for mesne profits, whether prosecuted separately, after a recovery in ejectment, or in conjunction with ejectment, is essentially an action *ex æquo et bono,*

in which every equitable defense may be set up, this feature of the action being borrowed from the chancery practice on bills to account. *Sedg. & Wait on Trial of Land Titles, secs. 648, 690; 3 Sutherland on Damages, 349; Murrey v. Gouverneur, 2 Johns. Cas., 441, per* Kent, J.

Especially is this so in states which have adopted the reformed procedure. Our code of practice provides that "the defendant may set forth in his answer as many grounds of defense, counter-claim and set-off, whether legal or equitable, as he shall have." *Mansf. Dig., sec. 5033.*

Upon the reversal of a common law case, we usually send it back for retrial, although *Section 1313 of Mansfield's Digest* authorizes us to affirm in part and reverse as to the rest, or to affirm as to one defendant and reverse as to another, or to modify the judgment. And this power has been frequently exercised. *Trieber v. Stover, 30 Ark., 727; Brown v. State, 34 Id., 232; L. R. & Ft. S. Ry v. Miles, 40 Id., 298; Shirey v. Cumberhouse, 41 Id., 100.*

Here is no issue to be tried. The value of the annual rents and the amount of the taxes and repairs are ascertained by the agreed statement of facts, which is for this purpose in the nature of a special verdict.

No good end could be subserved by a second trial. We, therefore, affirm the judgment awarding the possession of the premises in controversy to the plaintiffs, and reverse so much of the judgment as denies to them a writ of *habere facias possessionem* until they shall have paid $70.50 to the defendants, and we remand the cause with directions to enter a judgment in favor of the plaintiffs against the defendants for the mesne profits, since the 24th day of January, 1883, down to the date of the judgment, if the defendants shall then be in possession, or down to the time of yielding possession, if they shall have before surrendered possession, at the rate of $8.33 per month, less $65.50, the amount of taxes paid by them, and less also any sum that may have been paid for taxes since the trial.

MEYER V. ROUSSEAU, NEXT FRIEND.

47 460
74 87

PROBATE COURT: *Power to exchange lands of infants.*

The probate court has no power to order the lands of a minor to be exchanged for other lands.

APPEAL from *Lincoln* Circuit Court in Chancery. Hon. JOHN A. WILLIAMS, Judge.

J. M. & J. G. Taylor for Appellant.

The probate court had jurisdiction to make the order of exchange, and being approved and confirmed it is not subject to collateral attack. If erroneous, it could only be corrected on appeal, or by direct attack for fraud. *Schouler on Exrs., etc., sec. 361, n. 2; Rorer on Jud. Sales, sec. 317; Ib., p. 138; 3 Wall., 406; 5 Sawyer, 237.* A private sale of lands of a deceased person is error, *33 Ark., 89,* yet upon such a petition the court would gain jurisdiction of the subject matter. *2 Wall., 216.* See also *Rorer Jud. Sales, p. 59; 8 Fed. Rep., 216; Schouler Dom. Rel., p. 512, n. 1; 1 Brock, 356.*

The court had authority to make the order under *Sec. 3509, Mansf. Dig.* It was simply *a sale* and the investment of the proceeds in other real estate.

The minors having received the land and money of Meyer, and not offering to restore the consideration or reconvey the land, they are estopped to question the transaction. *Rorer on Jud. Sales, sec. 467; 23 Maine, 517.*

Infants are no exception to the rule; when they ask equity they must do equity. *33 Ark., 490.*

J. M. Cunningham for Appellees.

It was the duty of appellant to see to the application of the consideration paid the guardian, for he knew that the guardian was acting in violation of his trust. *Story Eq., 1131 a.*

The action of the probate court was *coram non judice*, and the order of exchange void. *Const., Art. 7, sec. 34; Mansf. Dig,, secs. 3502, 3509.* The court had no jurisdiction beyond the terms of the statute. *Waples Pro. in rem, 563.* See *Grider v. Driver, 46 Ark., 109–118.*

BATTLE, J. Mary E. Jones and Charles E. Jones were minors and the owners of certain lands in Lincoln county, and Jonathan Jones was their guardian. In 1875, Jonathan Jones, as such guardian, applied by petition to the Lincoln probate court for an order authorizing and directing him to exchange his wards' lands for certain lands in Jefferson county, described in his petition; and the probate court directed him to make the exchange. The exchange was made. Jones, as guardian, conveyed his wards' lands to Gabe Meyer, and Meyer conveyed to the guardian the lands in Jefferson county. Jones reported his proceedings to the probate court, and they were approved by the court; and Meyer took possession of the lands conveyed to him. Jones having died, Mary E. and Charles E. Jones, by their next friend, brought this action against Meyer to recover the lands conveyed to him by their late guardian. The defendant having answered, claiming under the exchange, the action, on motion of plaintiffs, was changed into an equitable proceeding. Plaintiffs, thereupon, filed an amended complaint, in which they set forth, among other things, the facts above stated, and asked that the order of the Lincoln probate court, authorizing the exchange, and all orders and judgments confirming or attempting to confirm the exchange, be set aside and declared void, and for other specific relief set forth in the prayer of the complaint, and for general relief. The defendant answered this complaint. On

the final hearing, the court below set aside the exchange and declared the same void, and granted other relief not necessary to state here, and defendant appealed.

The only question of importance, in this case, is: Did the Lincoln probate court have authority to make the order empowering Jones, as guardian, to make the exchange of lands?

In *Myrick v. Jacks, 33 Ark., 428,* Mr. Justice EAKIN, in delivering the opinion of the court, said: "Courts of probate have, by the statute, been intrusted with some limited powers over the estates of minors, in the hands of administrators and guardians, and within the scope of those statutory powers they are certainly entitled to all presumptions accorded to superior courts of record. But they had no such jurisdiction by common law, and beyond the limits given they have none now. When they proceed to do a thing which, by proper proceedings and upon a proper case made, they are authorized to do, it will be presumed they have acted correctly; or, if the proceedings have been irregular or the conditions of jurisdiction not strictly fulfilled, it is error to be corrected on appeal or *certiorari.* But if they undertake to make an order not authorized under any circumstances, although they may have jurisdiction over the same property for other purposes, it is void." *Young v. Lorain, 11 Ill., 636; Grignon's Lessee v. Astor, 2 How., 338; Comstock v. Crawford, 2 Wall., 402; Fitzgibbon v. Lake, 29 Ill., 176; Gager v. Henry, 5 Sawyer, 243, 244.*

In *Guynn v. McCauley, 32 Ark., 97,* this court held that "the probate court has no jurisdiction to authorize a father to sell the land of his minor child, until he is appointed guardian," and qualified as such. And in *Summers v. Howard, 33 Ark., 490,* it was held that the probate court cannot authorize a curator to sell a minor's estate, and that a sale so made is void. The reason of the decision, in both these cases, is, the statute did not authorize such sales.

It is contended by appellant that the Lincoln probate court had a right to order the exchange of lands in this case, under *Section 3509 of Mansfield's Digest*, which says:

"When it shall appear that it would be for the benefit of a ward that his real estate, or any part thereof, be sold or leased and the *proceeds* put on interest, or invested in productive stocks or in other real estate, his guardian or curator may sell or lease the same accordingly, upon obtaining an order for such sale or lease from the court of probate of the county in which such real estate, or the greater part thereof, shall be situate."

Section 3511 says that the sale or lease mentioned in *Section 3509*, shall be subject to the provisions of *Chapter 73 of Mansfield's Digest*, in relation to the sale of real estate of minors. The only provisions of this chapter, in relation to the sale of real estate of minors, are those which provide how lands of minors, ordered to be sold to raise the funds necessary to complete the education of such minors, shall be sold. One of these provisions is: "Such sale shall be advertised and conducted in the same manner as now provided by law for advertising and conducting sales of real estate of deceased persons, made by executors and administrators, for the payment of debts." From this it is clear that the sale meant by *Section 3509* is a sale for money by public auction, as in that way the sale of lands of deceased persons, made by executors and administrators for the payment of debts, is required to be made.

The word sale has a fixed legal signification. In delivering the opinion of this court in *Cooper v. The State, 37 Ark., 418*, Chief Justice ENGLISH said: "A sale is an exchange of goods or property for money paid or to be paid. Barter and exchange are of about the same meaning. *Barter*—the exchange of one commodity or article of property for another. *Exchange of goods*—a commutation, transmutation, or transfer of goods for other goods, as distinguished from *sale*, which is a transfer of goods for money."

Under no state of facts is the probate court authorized by the statute, so far as we have been able to discover, to order the lands of a minor to be exchanged for other lands. The order of the Lincoln probate court directing an exchange of appellees' lands for other lands is void.

In order to save any misapprehension, we state here that we do not undertake to decide in this case that a private sale of a minor's lands, made by his guardian pursuant to an order of a probate court, and confirmed by the proper court, should be treated as void in a collateral proceeding because it was private. That question does not arise here.

It is contended by appellant that a part of the consideration received by appellees for the lands in controversy was $2000, and the land conveyed by him to their late guardian, and that they have failed to offer to return the money or reconvey the land, and that, by reason of such failure they are estopped from disputing the validity of the exchange. There is no evidence that appellees ever received the $2000, or any part thereof, or any benefit therefrom, or ever were in possession of the land, or received any part of the rents and profits thereof. This being true, the appellees were not bound to return the money, or reconvey the land. *Grider v. Driver, 46 Ark., 109.*

Decree affirmed.

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ATKINSON & CO. v. PITTMAN.

EXEMPTIONS: *Judgments; Set-off.*

Pittman recovered judgment against Atkinson & Co. for $379. In the same court Thompson recovered judgment against Pittman for $548, and Atkinson & Co. purchased this judgment and filed a motion to set it off against the judgment of Pittman against them. Thereupon Pittman filed his schedule claiming the

judgment recovered against Atkinson & Co. among his exemptions, and showing that he was a married man, a resident of the state and head of a family, and his whole personal property—including the judgment—did not exceed $500. Held: that he was entitled to the exemption and the judgments could not be set off.

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

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

Whether the appellants are entitled to set off their judgment against appellee against his judgment against them, depends upon the construction of *Sections 5173–74, Mansf. Dig.;* and *sec. 2, art. 9, Const. 1874.* This was allowed in *3 Minn., 419,* and *21 Barb., 424–37.*

It is argued that this would be in effect to deprive appellee of his constitutional exemptions. But this is not so. The constitution only protects the debtor's property from "seizure on attachment, or sale on execution or other process." The motion to set off is not included in either the terms or spirit of the constitution. The parties here are mutually indebted to each other, and the only debt due is really the balance found after deducting the smaller from the larger. Just and legal obligations operate of themselves to extinguish each other *pro tanto.*

N. T. White for Appellee.

1. The judgment in this case was purchased by Atkinson & Co. *after* the judgment of Pittman against them, and can not be set off. *Waterman on Set-off, secs. 46, 75 and note b; Mansf. Dig., secs. 5038, 5173.*

The judgments are not mutual or due from the same parties.

2. Appellee is entitled to claim his judgment as exempt. *Sec. 3422, Mansf. Dig.; 31 Ark., 652; 42 Ark., 410.*

The proceeding attempted to be followed in this cause, would be taking the property of appellee exempt by law, and on "final process" subjecting it to appellant's debt. This can not be done.

BATTLE J. The appellee, John E. Pittman, recovered a judgment in the Jefferson circuit court against appellants, R. G. Atkinson & Co., for $379.63. Frank Tomlinson recovered a judgment in the same court against Pittman for the sum of $548.40. After Pittman recovered judgment against them, R. G. Atkinson & Co. purchased the judgment recovered by Tomlinson, and filed a motion in the Jefferson circuit court to set off one judgment against the other. Pittman responded to the motion, saying that appellants had purchased the judgment against him subsequent to the rendition of his judgment against them, and for the sole purpose of using it as a set-off against his judgment; and gave notice and filed a schedule, in which he stated that he was and is a resident of the state, a married man and head of a family, and that the total value of his personal property, including the judgment recovered against appellants, did not exceed the sum of $500; and claimed the judgment recovered by him as a part of the exemption allowed him by the constitution of this state. On the hearing the court sustained the schedule, and held that Pittman was entitled to hold his judgment as a part of his constitutional exemption, and refused the motion. R. G. Atkinson & Co. then filed a motion for a new trial, which was denied; and they saved exceptions and appealed.

The motion to set off judgments filed in this case is based upon a statute of this state, which reads as follows:

"*Sec. 5173.* Judgments for the recovery of money may be set off against each other, having due regard to the legal and

equitable rights of all persons interested in both judgments. The set-off may be ordered, upon motion, after reasonable notice to the adverse party, where both judgments are in the same court, or in an action by equitable proceedings in the court in which the judgment sought to be annulled by the set-off was rendered."

It is contended by appellee that to allow the set-off asked for by appellants would be, in effect, to deprive him of his constitutional exemptions. On the other hand it is contended by appellants that they and appellee are, on account of these judgments, mutually indebted to each other, and that the only debt due is the balance due after deducting the smaller from the larger judgment; and that they operate of themselves to extinguish each other *pro tanto.*

The principle contended for by appellants is the rule of the civil law. "The civil law admitted a set-off in the name of compensation, which has been defined to be 'the reciprocal acquittal of debts between two persons who are indebted the one to the other,' or 'the extinction of debts of which two persons are reciprocally debtors to one another by the credits of which they are reciprocally creditors to one another.'" According to the civil law, "as soon as the person who was the creditor of another, becomes his debtor in a sum of money, or other demand, which may be the subject of compensation with that of which he was creditor, and *vice versa*, as soon as a person who was a debtor of another becomes his creditor in a sum which may be the subject of compensation with that of which he is debtor, compensation takes place, and the respective debts are immediately extinguished by operation of law, to the extent of their concurrence." *Waterman on Set-off, secs. 12, 13.* But the common law does "not recognize the principle of compensation and extinguishment of debts, by the mere operation of law, as established and maintained by the

civil law;" and does "not allow the defendant in an action at law to plead that the plaintiff is indebted to him in as much or more, than he is indebted to plaintiff; but leaves him to his remedy by another action at law to recover his debt against the plaintiff," unless the nature of the employment, transactions, or dealings, necessarily constitute an account consisting of receipts and payments, debts and credits, and then the balance only is considered the debt, and nothing more can be recovered." *Small v. Strong, 2 Ark., 206.* The right of set-off in this state derives its being from the statute of 1818. But the statutes of this state do not recognize the rule of compensation and extinguishment of debts of the civil law. Under our statute the defendant can set up by way of set-off a debt due him from the plaintiff as a defense, or, if he elects to do so, bring another and separate action to recover his debt.

It follows then that these judgments held by appellants and appellee did not extinguish each other by operation of law, to the extent of their concurrence, but remain in full force and effect, unaffected by each other. The judgment recovered by Pittman is still his personal property, and, under the decisions of this court, may be selected and held by him as a part of his constitutional exemption. Frank Tomlinson could not have reached and condemned it to the satisfaction of the judgment recovered by him, before his assignment thereof, by process of garnishment, if Pittman had claimed the protection of the constitution. The same facts exist now, which gave Pittman the right to hold it under the constitution exempt from seizure on attachment or other "process from any court on debt by contract," as existed when Tomlinson held the judgment recovered by him. Pittman has done nothing to forfeit it as an exemption. His right to hold it as a part of his exemption under the constitution remains as it did before appellants purchased the Tomlinson judgment.

But appellants contend that while the judgment recovered by Pittman against them cannot be reached by attachment, execution or garnishment, it can be reached by set-off under the statute—that the constitution does not prevent it being reached and condemned to the satisfaction of their judgment by that mode of procedure. We have seen that these two judgments did, and do, not operate to extinguish each other to the extent of their concurrence. It follows then, that the proceeding sought to be invoked in this case is only a substitute for an execution or garnishment to reach and condemn Pittman's judgment to the satisfaction of that held by appellants, and is clearly a "process of court" in the sense those words are used in section 2 of article 9 of the constitution of this state.

In *Curlee v. Thomas, 74 N. C., 51,* Thomas recovered a judgment against Curlee for $193. Curlee subsequently obtained a judgment against Thomas for $60 upon a cause of action existing at the time of Thomas' judgment, but which was not pleaded. A motion was made by Curlee in the superior court, in which both judgments were docketed, to allow his judgment against Thomas to be credited on Thomas' judgment against him. It appeared that Thomas did not own the amount of personal property exempt by the statute, exclusive of the judgment against Curlee. Curlee's motion was therefore denied, on the ground that the proceeding sought to be invoked was "final process," within the meaning of the constitutional provision exempting a certain amount of personal property from final process. The court said: "If the plaintiff had issued an execution against the defendant upon his judgment it is clear that she would have been entitled to her personal property exemption against it. Her judgment against the plaintiff was personal property, and, if it was required to make up the amount to which she was entitled under the constitution, it would have been the duty of the officer having

the execution to allot it to her. The plaintiff can be in no better situation, and the defendant in no worse, by this short-hand way of getting the benefits of an execution without its burdens. To give effect to such motions as this would be, in many cases, to deny this benign provision of the constitution." *Thompson on Homesteads and Exemptions, secs. 892, 894; Wilson v. McElroy, 32 Pa. St., 82; Collett v. Jones, 7 B. Mon., 586.*

We find no error in the judgment of the court below and it is affirmed.

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GRAVES v. PINCHBACK, ADM., ETC., ET AL.

1. SLAVERY: *When abolished in Arkansas.*

The emancipation proclamation of President Lincoln had no legal efficacy in liberating slaves except so far as it was actually put in operation by the federal army in the field setting free captured slaves. The adoption of the constitution of 1864 is the true date of the liberation of slaves in this state.

2. TRUST: *Arising from conversion of infants' property.*

One who intermarries with the widow-administratrix of her deceased husband's estate stands *in loco parentis* to the infant heirs of the estate, and if he intermeddle with the assets, by converting them into other property in his own name, he will be held as a trustee for the heirs as to the property acquired by the conversion.

3. PARTIES: *Action for property of a decedent.*

Although the debts of an estate have not been paid and there has been no final settlement of it, and notwithstanding the administrator is the proper party to sue for a conversion of the intestate's effects, his heirs cannot be forever kept out of their rights in the property by the neglect of the administrator, or of creditors, to enforce payment of their demands, but may sue for them.

APPEAL from *Lincoln* Circuit Court in Chancery.
Hon. W. M. HARRISON, Special Circuit Judge.

J. M. Cunningham for Appellants.

In this case the purchase was made in part by the grantee with the means of complainants, *without their consent*, and it is not necessary that the payment advanced should be an aliquot of the whole, or that there should be any intention of the parties to make the transaction a purchase in trust. By his wrongful intermeddling with complainant's property and assuming to act as a trustee, when the office did not belong to him, he has made himself a trustee *de son tort*, and may be called to account by the *cestuis que trust* for the assets received under the color of the trust. *Perry on Trusts, 265; Brown Stat. Frauds, 85–6; Perry on Trusts, 127, 128–9; 10 Hare, 209; 52 Me., 402; 14 Ill., 505; 57 Penn. Stat., 202; 57 Id., 247.*

One who purchases trust property, with notice of the trust, will stand in the shoes of the trustee and will be charged with the same trusts in respect of the trust property as the trustee from whom he purchased; and likewise a volunteer, one who takes without the payment of a valuable consideration, either with or without notice of the trust, will be chargeable in the same way. *Perry on Trusts, 217; Hill on Trustees, 171; Wilson v. Mason, 1 Cranch, 45; Mechanics' Bk. v. Seton, 1 Pet., 229; McCall v. Harrison, 1 Brock, 330; Wormly v. Wormly, 8 Wheat., 421; Oliver v. Piatt, 3 How., 333; Caldwell v. Carrington, 9 Pet., 86; Ferrers v. Cherry, 2 Vern., 384; Jennings v. Moon, Ib., 609; Sanders v. Dehew, Ib., 271; Macreth v. Symmons, 15 Ves., 349; Daniels v. Davison, 16 Ves., 249; Le Neve v. Le Neve, 3 Atk., 646; Murray v. Ballou, 1 Johns. Ch., 566.*

Hydrick stood *in loco parentis* to the infant heirs, and one who intrudes himself upon, or intermeddles with an infant's estate, makes himself responsible. *Hempst., 225; 1 Atk., 544; Ib., 488; 3 Id., 130; 1 Vern., 296; 2 Id., 333; 2 Bro. C. C., 631; 6 Va., 88; 2 Keene, 722; 1 M. & Cr., 41; Story's Eq., 511; Co. Litt., 79; 6 Hare, 505; Perry on Trusts, 245; 1 Gill, 367; Hill on Trustees, 171.*

A resulting trust arose, and appellants could follow the trust fund into any new investment made, even into the hands of third parties. *2 M. & K., 655; 3 How., 333; 3 M. & S., 562.* They had a lien on the property purchased. *Perry on Trusts, 128; 2 Serg. & R., 529; 1 Rict. Chy., 126; Adams' Eq., 166 and note*; *Amb., 409; 17 Ves., 48.*

No fictitious value was placed on appellant's property. They furnished one-fourth of the purchase money of the land on a currency basis, and are entitled to have that amount refunded. *11 Vesey, 92; 13 Id., 407; Perry on Trusts, 470; Bespt. Eq., 42; Dorris v. Grace, 24 Ark., 326.*

The slaves were not emancipated by President Lincoln's proclamation. *24 Ark., 326; 26 Id., 24.* They were not, or at least there is no evidence that they were, within the lines over which the military power of the United States extended. *24 Ark., 330.*

U. M. & G. B. Rose and *D. H. Rousseau* for Appellees.

1. This is not a resulting trust. *Bisp. Eq., 1 ed., 79; Bigelow on Fraud, p. 109.* A party must pay an aliquot and defined portion of the purchase money, with the understanding that he is to have a definite interest. *14 Gray, 119; Bigelow on Fraud, p. 110; 30 Me., 121; 53 Me., 403.*

Hydrick stood in no trust relation to the property of Graves' estate. It was a *naked conversion*, in nowise involving a breach of trust. *Perry on Trusts, sec. 128; Id., sec. 135; 3 Edw. Chy., 583; 4 Humph., 233; 4 Ired. Eq., 94, reported 3 Battle's Dig., 572; 3 Sneed, 462; 40 Miss., 788.*

2. Plaintiffs being in possession of the land conveyed to their mother in payment of the property that went into the purchase, do not offer to return it. They do not offer to do equity, but seek to retain the advantage and escape the bur-

den. This they cannot do. *31 Ark., 154; 15 Id., 286; 17 Id., 606; 20 Id., 424; 25 Id., 204; 33 Id., 333; Bigelow Fraud, p. 410.*

3. Suit improperly brought. It could only be brought by the administrator. *42 Ark., 25; 8 Ark., 48; 21 Id., 62.*

4. Plaintiffs demand unconscionable. Mrs. Graves was entitled to her dower, though it was not allotted to her. *40 Ark., 393.*

5. Plaintiffs' slaves were put in at confederate money prices, and they can in no event recover more than their value in currency. *8 Wall., 1; 91 U. S., 3; 115 U. S., 566.*

6. The slaves were freed by the emancipation proclamation.

SMITH, J. Peyton Graves died intestate in the year 1861, in Desha county, the owner of five or six slaves and some other personal property, but of no lands. He left a widow and three infant children. The widow took administration upon his estate, and claims to the amount of $2000 were proved against it. Being administratrix she could not set out her own thirds in the personalty of which her husband died possessed. She therefore applied to the probate court for that purpose, and commissioners were appointed to make the allotment. What action, if any, was taken by these commissioners, does not appear. No report was filed by them, so far as the probate records show; and they, as well as the widow, are now all dead.

The widow, in 1862, was married to Hydrick. And in August, 1863, Hydrick purchased the Touchstone place, a body of lands mostly unimproved, containing 1278 acres. The consideration expressed in the deed he received was $13,700. The transaction is proved to have been made on the basis of confederate money, then much depreciated. In paying for the lands, Hydrick used two of the slaves, three oxen and one

wagon, which belonged to the Graves estate. Touchstone took the slaves at an estimated value of $1500 each, and the rest of the property is proved to have been worth, in confederate notes, from $300 to $500. Hydrick took the title to the lands in his own name, but subsequently conveyed one hundred and sixty acres of the tract to a trustee, who reconveyed to Mrs. Hydrick. The motive for this seems to have been that her means were used in the purchase of the property. The parcel settled on Mrs. Hydrick was the choicest and best improved part of the tract.

The accounts of the administratrix were never settled, and Graves' debts remain to this day mostly unpaid. No further administration was had, it being doubtless considered that the assets, consisting principally of slaves, had perished as a result of the war. At the death of Mrs. Graves, her children, being three by the first marriage and one by the last, inherited the land which was conveyed to her, and they are now in possession of it.

The heirs of Peyton Graves now filed their bill against Hydrick, and L. A. and X. J. Pindall, who had purchased some of the Touchstone lands under execution against Hydrick, to establish a resulting trust in the lands on account of their having been partially paid for with the property belonging to their father's estate. Their prayer is that Hydrick may be declared a trustee for them, and that he be charged with the value of the property so converted by him to his own use, and that the same may be declared a lien on the lands, paramount to the title of the Pindalls.

Hydrick died before answer filed, and the cause was revived against his administrator and heir. The suit was resisted on various grounds. And at the hearing the circuit court dismissed the bill.

1. SLAVERY: When abolished in Arkansas.

In support of the decree it is argued that, at the date of this transaction, no property existed in slaves, by virtue of the emancipation proclamation of President Lincoln. But this was a war measure, and could not *proprio vigore* alter the status of a slave, nor deprive the owner of his property. It had no legal efficacy except so far as it was actually put in operation by the armies in the field setting free captured slaves. The adoption of the constitution of 1864 is the true date of the liberation of the slaves in this state.

2. TRUST:—Arising from conversion of infant's property.

It is further urged that Hydrick sustained no fiduciary relation to the plaintiffs, or to the property of Graves' estate; that the property was not, as to him, trust property; and his sale of it was therefore a naked conversion, not a breach of trust. But the answer to this is that the property belonged to the plaintiffs, subject to their mother's rights and the payment of their father's debts; that Hydrick stood to them *in loco parentis;* and that he became a trustee by intermeddling with the property of these infants. *Story on Eq. Jur., sec. 511; Lenox v. Notrebe, Hempst., 225; Van Epps v. Van Deusen, 4 Paige Chy., 64.*

3. PARTIES:—In action for property of decedent.

Although the evidence shows that the ancestor's debts have not been all paid and the affairs of the estate finally settled, and notwithstanding the administrator is the proper party to sue for a conversion of the intestate's effects, heirs can not be forever kept out of their rights by the neglect of the administrator, or of creditors to enforce payment of their demands. *Mays v. Rogers, 37 Ark., 155; Stewart v. Smiley, 46 Id., 373.*

Upon the merits the decree does substantial justice. The slaves, oxen and wagon, which Hydrick put into the land trade did not probably exceed in value the share which the law provided for his wife out of the estate of her deceased husband. In that case a court of equity would set off her claim against the value of the property with which she was to be charged,

notwithstanding her dower may never have been formally assigned. *Menifee v. Menifee, 8 Ark., 9; Trimble v. James, 40 Id., 393.*

Hydrick, then, has converted two slaves, in which his wife had only a life interest, the reversion belonging to the plaintiffs, into land. The slaves were a species of property that was about to perish. Hydrick has so arranged the title to a part of the land that, at his wife's death, it will descend to her children. And the shares of the plaintiffs are an ample equivalent for their interest in the slaves. The plaintiffs could not have been injured in any event. For, if the slaves had continued to be property, they would not have been bound by the disposition Hydrick made of them. But retaining the land, which represents their slaves, and not offering to surrender that, they seek to charge other lands, acquired in exchange, with a lien for the sum at which the negroes were estimated in confederate currency. It is evident that they are far more anxious to have equity done unto them than they are to do equity themselves.

Affirmed.

SCALES V. STATE.

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1. SABBATH BREAKING: *Indictment for.*

An indictment for Sabbath breaking which charges that the defendant "on the third day of May, 1885, said day being Sunday, unlawfully was found *laboring* and performing other services, the same not then and there being of household duty, of daily necessity, comfort or charity," charges the offense in the language of the statute and is sufficient to apprise the defendant of the nature of the charge against him, and to enable him to prepare his defense and to plead the judgment in bar of a second prosecution against him for the same offense.

2. SAME: *Repeal of Section 1886, Mansf. Dig., constitutional.*

The act of March 2, 1885, repealing Section 1886, of Mansf. Dig., is not in violation of any provision of the constitution; and since the repeal no person is

excused for laboring or performing other prohibited service on the Christian Sabbath by observing some other day as the Sabbath agreeably to the faith and practice of his church or society. All persons, without regard to religious faith or practice, are now prohibited from labor or other service on Sunday, which is not of household duty, of daily necessity, comfort or charity.

3. THE SABBATH LAW: *A civil regulation.*

The Sabbath statute is essentially a civil regulation providing for a fixed day of rest in the business, the ordinary avocations and amusements of the community. It imposes upon no one any religious ceremony, or attendance upon any form of worship, and leaves every one to the religious observance of any day he may deem suitable or appropriate.

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

J. D. Walker for Appellant.

1. The indictment did not sufficiently declare the facts constituting the offense, or meet the requirements of the law. *2 Hale, 169; 6 East., 239; Cowp., 672; art. 2, sec. 10, const; 1 Ark. 171.* It did not set out the *facts*, so that the defendant—if convicted—could plead in bar of another prosecution. 11 *Ohio, 282; 1 DuVal, 90, 160.*

2. *Sec. 1886, Mansf. Dig., is not repealed* by the act of March, 1885, and the persons embraced in the exception are still entitled to its benefits. Appellant by the evidence has brought himself: *First*, within that exception; *secondly*, within the provisions of *art. 2, sec. 24, const. Ark.;* and *thirdly*, within *14th amendment const. U. S.*

The law in regard to Sabbath breaking was "*extended*" to a class not embraced by the statute as it existed prior to the act of 1885, and it could *not* be so extended unless "so much thereof as is revived, amended, *extended* or conferred, is *re-enacted* and *published at length.*" There is no pretense of a re-enactment of Sec. 1883, nor is it published at length, but

Sec. 1886 is simply *repealed by title.* This could not be done. *Art. 5, sec. 23, const.; 31 Ark., 239.*

3. The law, without the exceptions contained in Sec. 1886, is unconstitutional and void; it denies appellant *the equal protection of the law,* guaranteed him by the constitution, and gives others a *preference* over him, necessitating him to refrain from labor *two* days in each week. *Art. 2, sec. 24, const. Ark.; 14 amend. const. U. S.; slaughter house cases, 16 Wall., 109.*

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

The appellant was convicted of laboring on the Sabbath. The indictment was in the language of *Section 1883 of Mansf. Dig.,* and was sufficient, although it did not charge the particular kind of labor performed. The following cases are analogous in principle: *State v. Anderson, 30 Ark., 131; State v. Hutson, 40 Ib., 361; State v. Moser, 33 Ib., 140; 41 Ark., 226; 39 Ib., 216.* The appellant knew that the charge he had to meet was laboring on the Sabbath, and that was sufficient to put him on his guard. No question was made as to the sufficiency of the indictment by demurrer, but it was raised by motion in arrest, after verdict and after the evidence had shown the kind of labor done. If there was really a defect it was cured before the question was raised. *See rule of Sergeant Williams in Stephen on Pleading, 1 star p. 149. Sec. 1886, Mansf. Dig.,* was repealed in express terms. *Acts 1885, 37. Sec. 23, art. 5, cons.* does not contain the word "repeal," and evidently does not require that a section repealed and completely excised should be reprinted. Its object was to have any amendments and additions placed in the act just as the legislature desired the whole to appear.

The Sunday law in no way militates against either *sec. 24, art. 2, const. Ark., or the 14th amendment to the const. of U. S. First,* it does not compel any person to worship anything, or

attempt to interfere with the free exercise of conscience, nor does it give a preference to any sect or denomination; it prohibits, without any exception, any and all classes from laboring on the Sabbath, and is as general in its application as the law relative to murder or any other crime. It is a police and not an ecclesiastical regulation. *Swann v. Swann, by Caldwell J., 21 Fed. Rep., 299. Second,* it does not seek to deprive any one of life, liberty or property, but makes its infraction a penal offense which is enforced by "due process of law." The appellant is not compelled to labor on Saturday, nor does his conscience and religion require him to labor on Sunday, therefore, the law is obnoxious to neither of the constitutions. *Shover v. State, 10 Ark., 259; Brittin v. Ib., 229.*

COCKRILL C. J. This is an appeal from a conviction for "Sabbath breaking." The sufficiency of the indictment was questioned by a motion in arrest of judgment. The particular act that constitutes the alleged offense is not set out. The indictment charges merely that the defendant "on the 3d day of May, 1885, the said day being Sunday, unlawfully was *found laboring* and performing other services, the same not then and there being of customary household duty, of daily necessity, comfort or charity."

The language of the statute which creates the offense is employed in the indictment, and nothing more is required in a statutory misdemeanor when the general language of the statute is sufficient to apprise the defendant of the nature of the accusation against him. *Glass v. State, 45 Ark., 173; State v. Snyder, 41 Ib., 226; State v. Hutson, 40 Ib., 361; State v. Witt, 39 Ib., 216.*

We cannot say that the indictment is insufficient under this rule, but think that the defendant would be enabled to prepare his defense and plead the judgment in bar of a second prosecution for the same offense. *Emmerson v. State, 43 Ark., 372.*

II. The statute under which this conviction was had comes to us from the Revised Statutes of 1838. It contained this provision, which was carried forward into the revision of 1884 as *Section 1886*, viz.: "Persons who are members of any religious society who observe as Sabbath any other day of the week than the Christian Sabbath or Sunday shall not be subject to the penalty of this act, so that they observe one day in seven agreeably to the faith and practice of their church or society." But in 1885, before the commission of the offense charged in the indictment, the legislature passed an act the only part of which that is material to this prosecution is as follows: "That Section 1886 of Revised Statutes of Arkansas be and the same is hereby repealed." *Acts of 1885, p. 37.*

The proof showed that the appellant was found painting a church on a Sunday. He offered to prove that he was a member of a religious society known as the Seventh Day Baptists, one of the tenets of which is the observance of Saturday as the Sabbath instead of Sunday, and that he had regularly refrained from all secular work and labor on Saturday agreeably to his religious faith and that of his church.

It is argued that the court erred in rejecting this testimony because, as it is said, first, the effort to repeal *Section 1886* was ineffectual; and second, that if it was not, the law, without the exception made by that section, gives a preference to other religious denominations over that of the appellant, within the meaning of *Section 24* of *Article 2* of the *State Constitution*, which providest hat "No preference shall ever be given by law to any religious establishment, denomination or mode of worship above any other;" and moreover denies to him the equal protection of the law, within the meaning of the federal constitution.

The argument against the repeal of *Section 1886* is based upon the idea that if the law is read without that provision the penalty of the statute is "extended" to the appellant without a re-enactment of the law, and that such a method of legislation

is prohibited by the following provision of the constitution, viz: "No law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length." *Section 25, Art. 5, Const.*

It will be observed that the provision does not in terms prohibit the repeal of a law by reference to its title, and the prohibition can be extended by implication only. The power of the legislature is not to be cut off by inference save where the inference is too strong to be resisted. *Vance v. Austell, 45 Ark., 400.* We look to the constitution not to see whether power is granted but to ascertain if it is withheld, and when there is a doubt as to the existence of a power, it must be resolved in favor of the legislative action.

It is well settled that this provision does not make it necessary, when a new statute is passed, that all prior laws modified, affected or repealed by implication by it should be re-enacted. If we should so hold a large part of the laws of this state would have to be re-enacted and republished at every session of the legislature, and some of them many times over. No human foresight or diligence could determine the extent of the alteration and modification that would be effected by the acts of a single session, and if it could it would not then prevent the necessity of the re-enactment and republication biennially of almost the entire body of the statute law. To make the provision mean that would be an absurd construction, and it is the reasonable construction the provision should receive with a view to giving it the effect intended by its framers. The mischief designed to be remedied by a constitutional provision nearly the same in effect as this one was pointed out by this court in the case of *Perkins v. DuVal, 31 Ark., 236,* and may be found more elaborately stated in *Cooley's Constitutional Limitations, *p. 151,* and cases there cited. What is com-

plained of as an evil here is not laid down as such in any case to which we have been referred.

If the legislature had undertaken to amend *Section 1886* the provision under consideration would have required the section as amended to be set forth *in extenso*, and the old section, upon the passage of the new one, would have been repealed, if not expressly, then by implication. *State v. Ingersoll, 17 Wis., 631.* In that event there would have been no necessity for re-enacting the other parts of the chapter in which the section is found. When there is an express repeal of the section, without a substitute for or an amendment to it, what greater necessity is there for re-enacting the other sections that are affected only incidentally by the repeal?

The section has been repealed and the chapter is intact without it. *Commercial Bank v. Markham, 3 La. Ann., 698; Chambers v. State, 25 Texas, 307; State v. Ingersoll, supra; Sedgwick Const. of St. and Const. Law., 2 ed., p. 532.*

III. The constitutionality of this law as originally enacted has been repeatedly affirmed by this court in both civil and criminal cases. *Shover v. State, 10 Ark., 259; State v. Anderson, 30 Ark., 131; Tucker v. West, 29 Ib., 386; Merritt v. Robinson, 35 Ib., 483.*

No reference was ever made to the exception contained in *Section 1886*, for the purpose of maintaining its validity, and we are cited to no case or authority where the view is entertained that the failure to make the exception in favor of those who faithfully observe a different day as their Sabbath will render the law invalid. The supreme court of California expressed that view in 1858 over the dissent of Judge Stephen J. Field (*ex parte Newman, 9 Cal., 502*), but the dissenting opinion was afterwards adopted by the court as the correct exposition of the law (*ex parte Andrews, 18 Cal., 678*), and the validity of the statute has ever since been maintained in that state. *Ex parte Bird, 19 Cal., 130; ex parte Koser, 60 Ib., 177.*

The validity of similar statutes has been affirmed elsewhere against repeated assaults, and in Louisiana it has even been held that a municipal ordinance which forbade the sale of goods on Sunday, but excepted from its operation those who kept their places of business closed on Saturday, was in the teeth of the constitution, in that it gave to the Saturday, observer a privilege denied to others. *City of Shreveport v. Levy, 26 La. Ann., 671.* But the legislative enactments of most of the states preserve to those whose religious faith impels them to keep holy a different day from Sunday, the right to keep Sunday as a secular day, if not to the full extent given under our statute before the act of 1885, at least to do so in such a manner as not to disturb those who observe that day, and the acts in either form, whether making a full and free exception of the observer of other days, or none at all, are held to be a valid exercise of legislative power.

The reasons that are commonly given for sustaining these acts are briefly stated by Judge Devens, in a recent Massachusetts case, in these words:

"It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for that purpose, and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems suitable or appropriate. That one who conscientiously observes the seventh day of the week may also be

compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of the community." *Commonwealth v. Has, 122 Mass., 40.* See too *Cooley's Const. Lim.,* **476–7; Desty's Cr. Law, sec. 117 a and cases cited; Frolickstein v. Mayor of Mobile, 40 Ala., 725; Gabel v. City of Houston, 29 Tex., 335; Swann v. Swann, 21 Fed. Rep., 299; Parker v. State,* (*Sup. Ct. Tenn., 1886.*) *1 S. W. Rep., 202; Specht v. Com., 8 Penn. St., 312, and cases cited supra.*

It is said that every day in the week is observed by some one of the religious sects of the world as a day of rest, and if the power is denied to fix by law Sunday as such a day, the same reason would prevent the selection of any day; but the power of the legislature to select a day as a holiday is everywhere conceded. This state, from the beginning, has appropriated Sunday as such. On that day the business of our courts and public offices has always been suspended, (*Mansf. Dig., sec. 1483*); the issuance and service of legal process prohibited; presentment and notice of dishonor of commercial paper not allowed (*Ib., sec. 465*); and the performance of an act in execution of a contract which matures upon Sunday postponed to the next day. *L. R. & Ft. S. Ry. v. Dean, 43 Ark., 529.* This observance of Sunday as a day of refrainment from secular business has always been required of the people generally, without reference to creed, and they continue to so observe it without complaint that, as a municipal institution, it violates any of their constitutional or religious rights. The principle which upholds these regulations underlies the right of the state to prescribe a penalty for the violation of the Sunday law. The law which imposes the penalty operates upon all alike, and interferes with no man's religious belief, for in limiting the prohibition to secular pursuits it leaves religious profession and worship free. *Ex parte Newman, supra.*

The appellant's argument, then, is reduced to this; that because he conscientiously believes that he is permitted by the law of God to labor on Sunday, he may violate with impunity a statute declaring it illegal to do so. But a man's religious belief can not be accepted as a justification for his committing an overt act made criminal by the law of the land. *Reynolds v. U. S., 98 U. S., 145.*

If the law operates harshly, as laws sometimes do, the remedy is in the hands of the legislature. It is not the province of the judiciary to pass upon the wisdom and policy of legislation—that is for the members of the legislative department, and the only appeal from their determination is to their constituency.

Affirm.

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SELLMEYER v. WELCH.

MARRIED WOMAN: *Her earnings, etc.*

The earnings of a married woman arising from her services done and performed on her sole account become her separate property, and she may appropriate them if she chooses to the payment of her husband's debts, and where she does so appropriate them she is bound by it and can not reclaim them.

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

J. E. Riddick for Appellant.

The instruction given by the court is clearly erroneous. A married woman has the right to spend her personal wages as she pleases, and if she chooses to spend them in the payment of board for her husband and son, it is her own concern, as

she has a perfect right to do so. The proposition is too plain to require citation of authorities. The court seems to have failed to note the distinction between the executed and executory contracts of married women. Courts sometimes refuse to enforce executory contracts of married women, but where such contracts have already been performed, and they attempt to ignore them, the question is different. If this be true, the court erred both in the instruction given by him and in refusing those asked by appellant. *Const. of 1874, art. 9, sec. 7; Collins, trustee, v. Wassell, 34 Ark., 17; Scott et al. v. Ward, trustee, 35 Ark., 480; Roberts and wife v. Wilcoxson & Rose, 36 Ark., 355; Walker v. Jessup, admr., 43 Ark., 163; Bispham's Equity, sec. 101; Bishop on Married Women.*

1. MARRIED WOMAN:—Her earnings, etc.

COCKRILL C. J. Mrs. Welch, a married woman, sued Sellmeyer on an account for $135 for her services as cook for himself and laborers on a railroad. Sellmeyer pleaded payment.

Upon the trial, Mrs. Welch testified that she had contracted with Sellmeyer, who was a railroad contractor, to cook for him and his hands, not to exceed fifteen in number, for the sum of $25 per month, and the board of herself and family; the said family consisting of a husband and son; that she cooked for about forty hands for a period of three months; that her services were reasonably worth $50 per month, and that no part of the same had been paid.

Sellmeyer, on his part, testified that he employed the plaintiff, who was a married woman, to cook for work-hands that he boarded; that among the men boarded by him were the husband and son of the plaintiff; that after the performance of said service by the plaintiff, he had a settlement with her and ascertained that there was due her the sum of $135, the amount claimed in the complaint; he found also that her hus-

band and son were indebted to him in the sum of $70, for board, and that thereupon the plaintiff agreed to pay the board of her husband and son, and did pay for the same out of the amount due her, leaving still a balance of $65, which was paid her in cash. He denied that he was to board her husband and son free in addition to wages paid.

In rebuttal, Mrs. Welsh denied that she had accepted the board of her husband and son in part payment of her wages.

The defendant asked the following instructions:

1. "If plaintiff accepted board of her husband and son in payment of her debt from defendant to her, then she is bound by said settlement, and it will be considered a payment.

2. "If the jury find that the contract between Mrs. Welch and defendant, Sellmeyer, was to pay her a certain amount per month, and that the defendant settled this amount with plaintiff, partly by cash and partly by furnishing board for her husband and son, which board of her husband and son was furnished at her request, and was accepted by her in satisfaction of part of her debt, then that was binding upon her and she cannot now claim a second payment."

These instructions were refused, and exceptions saved by Sellmeyer.

The court then, upon its own motion, instructed the jury as follows:

"If the jury find from the evidence that the indebtedness from Sellmeyer to plaintiff was for wages for the personal labor of plaintiff, and that she is a married woman, then this indebtedness will be held to be her separate property and she cannot charge or encumber it, or bind it for the payment of the board of her husband and son."

There was a verdict and judgment against the defendant for $55; and after exceptions properly saved he has appealed.

The earnings of a married woman arising from labor and services done and performed on her sole account become her separate property. *Mansf. Dig., Sec. 4625.* It has been held that she may sell her separate real estate to pay her husband's debts, (*Scott v. Ward, 35 Ark., 480; Roberts v. Wilcoxson, 36 Ib., 355*), and there is no rule of law or public policy that prevents her from devoting the earnings of her labor to the same purpose if she desires to do so; and, where there is no other objection to the contract, an executed agreement by a married woman to pay a debt due by her husband and son for board is binding upon her. The court erred therefore in giving the instruction in effect that the appellee could not legally part with her earnings in payment of her husband's and son's debts, and also in refusing to give the instructions prayed by the appellant.

Let the judgment be reversed and the case remanded for a new trial.

WOOD v. STATE.

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1. EMBEZZLEMENT: *By public officer; Indictment.*

The act of July 9, 1868, (*Gantt's Dig., sec. 1375,*) for the punishment of embezzlement by public officers, was by implication repealed by the act of 20th February, 1883, (*Mansfield's Dig., sec. 1643,*) and an indictment under the last act must charge that the accused had taken the oath of office.

2. INDICTMENT: *For statutory offense; Essentials.*

An indictment upon a statute must state all the circumstances which constitute the statutory offense; no case being brought within a statute unless it is completely within its words. The precise words of the statute need not be followed. Words of equivalent import, or more extensive signification, which necessarily include the words of the statute, may be substituted.

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

O. W. Watkins for Appellant.

The act of 1883 (*Acts 1883, p. 56,*) by implication repealed *Gantt's Dig., sec. 1371.* It contained *new* provisions, and covered the entire subject matter.

The indictment does not comply with the statute, and is fatally defective, leaving out the *material* words "who has taken the oath of office," etc.

Where it is a crime only under certain circumstances, the indictment must aver and set out the circumstances, else it will be insufficient. *1 Best. Cr. Pro., 1 ed., secs. 282, 362, 366; Myers' Fed. Dec., vol. 12, sec. 1433; 53 N. Y., 513; 67 Id., 19; 30 Ark., 497; 36 Id., 64.*

Criminal statutes are strictly construed, and no case is to be brought by construction within a statute, unless it is completely within its words. *38 Ark., 521; 1 Best. Cr. Pro., 2 ed., secs. 612, 615, note 2;* also *53 Ala., 481; 25 Am. Rep., 643; 3 Humph., 483; 39 Am. Rep., 189; 5 Denio, 76.*

Dan W. Jones, Attorney General, for Appellee.

The indictment charged that he was "duly elected and acting." There is no good ground for the appellant's assumption that the taking of the oath is an aggravation of the offense; the statute, *Sec. 1643, Mansf. Dig.,* does not state a punishment for an officer who takes no oath and then a greater punishment for one who has taken an oath. It is charged that he "was acting," and *Sec. 4781, Mansf. Dig.,* requires each officer to take an oath before entering upon the duties of his office. In *Tully v. People, 67 N. Y., 19,* cited by appellant, it is held to be unnecessary to follow the precise words of the statute, if words of a more comprehensive meaning, covering those of the statute, be used.

But is it not a good common law indictment? It is said in *2 Bish. Crim. Law, sec. 320,* that no reason is perceived why the original statute on embezzlement should not be common law in this country. One employed by a township as an accountant and treasurer was held for embezzlement. *2 Arch., 1346; R. v. Squire, R. & Ry., 849; 2 Bish. Cr. L., sec. 349.*

It was only necessary to show a failure to settle. *Mansf. Dig., sec. 1643.*

1. EMBEZZLEMENT:—Indictment.

SMITH J. The indictment charged that the defendant, on the 10th day of September, 1883, being then and there the duly elected and acting county treasurer, in and for the said county of Carroll, and having then and there in his hands, as such county treasurer, a large amount of money, to-wit: $181,22, and of that value, the property of common school district No. 39, in said county, said money being then and there public funds, and being composed of national bank bills and United States treasury notes, of the money of the United States of America, commonly called greenbacks, but a more particular description whereof is to the grand jurors unknown, and while he, the said Henry Wood, was acting as such county treasurer as aforesaid, having such money in his hands by virtue of his said office, he, the said Henry Wood, did then and there feloniously, wilfully, and with felonious intent to cheat and defraud said school district and the citizens thereof, feloniously convert the same to his own use and benefit, and thereby swindle and defraud the said school district of their lawful funds, etc.

A demurrer and a motion in arrest of judgment were overruled; and the defendant was sentenced to a term of five years in the penitentiary.

The act of July 9, 1868, entitled "An act to define and punish embezzlement of any officer of the state employed in the collection of the public revenue;" provided, "That every

officer of the state, city, county or township, who is, or has been, employed in the collection of the public revenue, or who has any public funds in his hands, and who has converted to his own use, or otherwise misapplied, any part of the money or funds collected by him, or which may have come to his possession by virtue of his employment, and every such officer who shall fail, or omit, to pay the amount found due from him upon settlement directed in this act by the judges of the county court, shall, on conviction, be fined not less than $500, and be imprisoned in the penitentiary not less than one year nor more than five." *Gantt's Dig., sec. 1371.*

On the 20th of February, 1883, another act was passed for the better protection of the public revenues, which reads as follows: "That every officer of the state, county, city, incorporated town, or township, who has taken an oath of office, as required by law, employed in the collection of the public revenue, or who may have any public funds in his hands, who shall convert the same to his own use, or use it in any way for his private purposes, or shall loan, or permit any other person to use, or otherwise misapply, any part of the money or funds so collected by him, or which may have come into his possession by virtue of his employment, and every such officer who shall fail or omit to pay the amount found due by him upon settlement, shall be deemed guilty of a felony, and on conviction thereof, shall be imprisoned in the penitentiary not less than five (5) nor more than twenty-one (21) years." *Mansf. Dig., sec. 1643.*

The later act contains no repealing clause and makes no reference to the earlier one. But, as it covers the whole subject and embraces new provisions, we must hold that it was intended as a substitute for the first and that it operates as an implied repeal. *Pulaski Co. v. Downer, 10 Ark., 588; Mears v. Stewart, 31 Ark., 17; U. S. v. Tynen, 11 Wallace, 88.*

And of this opinion were the gentlemen having charge of the revision of 1884; for the first statute is omitted in their compilation.

The indictment must therefore be regarded as framed upon the last enactment. And such was the view of the circuit court, as we perceive by its directions to the jury upon the measure of punishment to be meted out to the defendant, in case they found him guilty.

2. INDICTMENT: Essentials.

Now, there is a patent defect in the indictment, in that it does not aver that this county treasurer ever took the oath of office. No doubt it was a piece of folly to insert in the act the qualifying clause, "who has taken an oath of office;" but having been inserted, the words become essential in the description of the offense and can not safely be omitted from the indictment. *1 Bishop Cr. Pro., 3 ed., sec. 618, and cases cited.* For an indictment upon a statute must state all the circumstances which constitute the statutory offense, no case being brought by construction within a statute unless it is completely within its words. *State v. Graham, 38 Ark., 519; People v. Allen, 5 Denio., 76; Wood v. People, 53 N. Y., 511; Budd v. State, 3 Humph., 483.*

This principle is illustrated by the case of *Sikes v. State, 30 Ark., 496.* That was an indictment against a clergyman for solemnizing the rites of matrimony between infants without the consent of the parents or guardians. But it did not allege that there was a parent or guardian in this state. And it was adjudged bad, because the statute said, "if they have either parent or guardian living in this state."

It is not indeed necessary that the words of the statute should be precisely followed. Words of equivalent import, or more extensive signification, which necessarily include the words of the statute, may be substituted. *Tully v. People, 67 N. Y., 15.*

Thus it would, perhaps, have been sufficient to aver that the defendant had duly qualified as treasurer. But the allegation is only that he had been elected, and was acting in that capacity. This was not equivalent to saying that he had taken the oath of office.

The judgment is reversed and the cause remanded with directions to arrest the judgment.

WINTERS ET AL. V. FAIN.

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VENDOR'S LIEN: *For purchase price payable in services.*

Preddy executed to Fain the following note for a town lot, which Fain sold and conveyed to him by deed: "$250. August 5, 1879. Sixteen months after date I promise to pay to John Fain, for lot purchased of him this day, two hundred and fifty dollars, in fees as attorney for said Fain, provided his business amounts to so much; otherwise balance to be paid in currency. Chas. W. Preddy." *Held:* That Fain had in equity a lien on the lot for the amount of the note, and after maturity could enforce it against the lot in the hands of a purchaser from Preddy with notice of the note, for so much in currency as had not been paid in fees or otherwise.

APPEAL from *Lincoln* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.

D. H. Rousseau for Appellants.

Preddy's answer was a set-off and counter-claim, and should have been denied by Fain. Not being so denied, Preddy was entitled to a decree for the amount claimed in his answer. *27 Ark., 490; 43 Ark., 427; Mansf. Dig., secs. 504–8.*

It was not necessary for Preddy to move for a decree. It was the duty of the court to render judgment on the counter-claim.

The note was not a lien on the land. None was expressed on the face of the note, or reserved in the deed, and this case falls within the rule in *Harris v. Hanie, 37 Ark., 348; 3 Mylne & K., 655.*

J. M. Cunningham and *U. M. & G. B. Rose* for Appellee.

It is objected that there was no reply to the counter-claim of Preddy. No reply was necessary, because Preddy had no counter-claim, but only an answer. Where the parties go to trial, and take evidence as though the issues were entirely made up, they cannot raise the objection to the imperfections of the pleadings for the first time in this court. *Hanks v. Harris, 29 Ark., 323; Stidham v. Matthews, Id., 658; St., L., I. M. & S. Ry. v. Harper, 44 Ark., 524; Sorrels v. Self, 43 Ark., 451; Healey v. Connor, 40 Ark., 352.*

Winters' plea of innocent purchaser is bad, because it does not deny notice down to the time of the payment of the purchase money. *Byers v. Fowler, 12 Ark., 286; Whiting v. Beebe, Id., 552; Duncan v. Johnson, 13 Id., 190; Gerson v. Pool, 31 Id., 87; Allen v. McGaughey, Id., 259; Pearce v. Foreman, 29 Id., 568; Miller v. Fraley, 21 Id., 35; Massie v. Enyart, 32 Id., 257; Tuley v. Ready, 27 Id., 102.* There is nothing in the point that the provision in the note allowing it to be paid in attorney's fees prevents the existence of the vendor's lien. That provision did not affect the nature of the obligation, but only gave an alternative method for its discharge. *Harvey v. Kelley, 41 Miss., 490.*

VENDOR'S LIEN: — For purchase money payable in services.

SMITH J. Fain alleged in his bill that he had sold and conveyed to Preddy a lot in Star City, for $500; whereof one-half was paid down, and for the remainder the following note was made: "250. August 5, 1879. Sixteen months after date I promise to pay to the order of John M. Fain, for lots

purchased from him this day, two hundred and fifty dollars, in fees as attorney for said J. M. Fain, provided his business amounts to so much; otherwise balance to be paid in currency. Chas. W. Preddy."

That $183 still remained due and unpaid on the note; and that Preddy had re-sold the land to Winters, who, however, had bought with full knowledge of the plaintiff's equities. The prayer was for judgment against Preddy and for a foreclosure of the vendor's lien.

Preddy answered, alleging, first, that Fain owed him $37.50 for rent, having occupied the premises three months after he had sold them; second, that Fain owed him $360.87 for attorney's fees; third, that Fain put into his hands for collection some claims on which his fees would have been $130.58, and had withdrawn them without cause; and fourth, that he knows not whether Winters bought with notice or not.

Winters, in his answer denied notice, but admitted in effect that he knew, at the date of his purchase, that the note copied above was outstanding, and that the consideration for its execution was the sale of the lot.

There was a reference to a master to take and state an account between Fain and Preddy. The master reported a balance of $156.86 due the plaintiff. This amount was reduced, on exceptions, by the sum of $25, and judgment was given for the residue, and the sale of the lot ordered.

The defendants have appealed, and now urge, as ground of reversal, that the plaintiff had no lien. He had made a deed, which contained no reservation of a lien. It is true that the vendor's equitable lien exists only as a security for the payment of purchase money, and not for the performance of an act, the non-performance of which gives rise to a claim for

unliquidated damages. Thus, in *Harris v. Hanie, 37 Ark., 348*, where one conveyed his farm for a specified quantity of cotton thereafter to be delivered by the vendee, it was decided that no lien arose from the transaction. Yet, it appears, from *Young v. Harris, 36 Ark., 162*, that if land is sold for a specific price in money, which it is agreed may be paid in personal services, or in the note of a third person, the lien may be enforced if the services are not rendered or the note is not delivered. And in *Harvey v. Kelley, 41 Miss., 490*, H. sold to K. certain lands, taking the note of the vendee for the purchase price. At the foot of the note was written an agreement that it might be discharged in lumber at a stipulated price. K. failed to pay the money, or deliver the lumber. And it was held that the lien was not waived by the agreement to receive lumber in payment.

It is further objected that the decree is wrong because Preddy's answer contained a set-off and counter-claim, which stood practically confessed, as no reply was filed. On the authority of *Gibbs v. Dickson, 33 Ark., 107*, we decline to allow Preddy any advantage from this slip in pleading. In that case it is said, the correct practice is to move the court for judgment upon the undenied plea; and that if the defendant fails to move, and goes to trial as if the issue was made up, he loses his advantage. Here Preddy permitted the cause to be referred to a master and afterwards to proceed to a hearing without objection.

Preddy was not prevented by the conduct of Fain from paying the note by professional services. Fain did not withdraw his business until after the maturity of the note. The note then became payable in currency alone, allowing Preddy compensation for services already rendered.

Decree affirmed.

L. R., M. R. & T. Ry. v. Haynes.

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1. Damages: *Estimate of; Opinion of witness.*

A witness is never permitted to estimate the amount of damages which a party has sustained by the doing or not doing of a particular act. That is the province of the jury and not of a witness. He may state the facts showing the extent of the injury, and any other pertinent matter; but the measuring of damages is not a fact, but matter of opinion or speculation.

2. Railroads: *Contributory negligence.*

A trespasser on a railroad track cannot recover for running him down in the absence of reckless or willful conduct of the company or its agents.

3. Same: *Same.*

Though an engineer sees one lying upon the track at a distance before him, yet if he honestly mistakes him for some inanimate object until it is too late to avoid running over him, the company is not liable for the mistake and injury.

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

J. M. Moore for Appellant.

We hardly feel that it is necessary to file a brief in this case or do more than refer the court to the case of *St. L., I. M. & S. Ry. v Freeman, 36 Ark., 41.* The cases are in many respects parallel. In both cases the engineer, when he first saw the party injured, thought it to be some other object and took such precautions as were proper under the circumstances, and did everything in his power to avert the accident after discovering that it was a human being on the track. In the case cited, this court held that the company was not liable, but in the case at bar the circuit court held that the engineer could not be heard to say that he mistook the plaintiff's foot for a log or chunk of wood. See third and fourth instructions given for the plaintiff; and seventh and twelfth instructions asked by defendant and refused.

In the eighth instruction given for the plaintiff the circuit court adopts the Illinois doctrine of comparative negligence, which was condemned by this court in Freeman's case.

The court refused to instruct that it was contributory negligence for the defendant, if he was subject, as he testified, to fits of vertigo, to expose himself as he did on the track near train time; (see the fourth and eleventh instructions asked by defendant and refused), or that it was contributory negligence for a man to go to sleep on a railroad track; (second instruction asked by defendant and refused).

In short, the case was tried on an erroneous theory throughout. It is inconceivable how the circuit court could have so egregiously erred in view of the rulings of this court in the following cases: *L. R. &. Ft. S. Ry. v. Pankhurst, 36 Ark., 374; St. L. & S. F. R. R., v. Marker, 41 Ark., 542; L. R. & Ft. S. Ry. v. Miles, 40 Ark., 298; Ledbetter's case in Mss.*

W. F. Slemons and *C. D. Wood* for Appellee.

It was not error for the court to allow the plaintiff to estimate his damages under the question as propounded to him, and was only restating in substance what was claimed in his complaint (*37 Ark., 519*, sustains the doctrine); and was not prejudicial to defendant.

The second instruction asked for by plaintiff submitted the facts fairly to the jury, is good law, and was properly given. *38 Ark., 369; 42 Ark., 328, and cases cited; A. & E. Ry. cases. vol. 8, p. 314; Ib., 347; Ib., 480; A. &. E. Ry. cases, vol. 3, p. 365; Ib., vol. 6, p. 222.*

The third instruction is law and was properly given. *Central Law Journal, No. 22, May 30, 1884, p. 349.* It would be carelessness to run a train over a log or chunk.

Fourth instruction properly given; was supported by the evidence. *Central Law Journal, No. 22, May 30, 1884, p. 349.* Safety to passengers demanded this if nothing else.

Eighth instruction properly given. *43 Wis., 509; 36 Wis., 92; 22 Wis., 675; 29 Wis., 144; 40 Wis., 35.* We fail to see wherein this court has condemned the doctrine here laid down. *36 Ark., 41.* But if it has, was defendant prejudiced by the instruction?

The third instruction asked for defendant was properly overruled, because there was no evidence to support it, and it is purely abstract. *15 Ark., 492.* If there was not a particle of evidence that plaintiff had gone to sleep on the track, why is it error to refuse an instruction on that point?

The fourth instruction asked for defendant was properly overruled. Plaintiff had the same right that other footmen had, especially when on business. The refusal to give this instruction could not and did not prejudice defendant's case, because it is evident from the evidence that the jury regarded the fact of the train not being stopped before reaching plaintiff, after the engineer saw him, as negligence and the proximate cause of the injury.

The twelfth instruction for defendant was properly overruled. The principle it asked the court to establish is not good law. "When one discovers the danger in which another lies and negligently fails to avert it, no negligence, however gross, of the latter, can excuse the former from answering the full consequences and the payment of all damages done." *Werner v. Citizens R. Co., S. C. Mo; Central Law Journal, No. 22, May 30, 1884, page 439.*

Conceding, however, that this instruction was good law, this court will not reverse because it was evidently not prejudicial to defendant.

The opinion of this court in *Citizens Street Railway v. Steen, 42 Ark., 322 to 329 inclusive, and cases there cited*, are applicable to this case, and is a lucid exposition of the law of negligence and of damages of cases of this character.

The damages were for the jury to determine from the evidence. *Klutts v. St. Louis, etc., Ry. Co., A. & E. Railroad Cases, vol. 11, p. 644; 42 Ark., p. 126.*

SMITH J. This action was brought by Haynes, who was using the railroad track as a foot-path, to recover damages for being run over by a passing train. The answer averred that the defendant's servants in charge of the train exercised all proper care—that the injury occurred by reason of the plaintiff's own negligence in lying on or near the track while he was drunk, or asleep; and that every effort was made to stop the train after the plaintiff's situation was discovered. The plaintiff obtained a verdict for $4500. And the motion for a new trial alleged the admission of incompetent testimony, misdirection of the jury and that the verdict was contrary to the evidence.

After detailing the nature and extent of his injuries and the circumstances under which he was struck, the plaintiff was asked this question:

1. ESTIMATE OF DAMAGE:—Opinion of witness not admissible.

"Taking into consideration the amount you have expended in attempting to cure yourself of your injuries, the present and prospective condition of your leg, the bodily pain and mental anguish, the time you have lost from your labor, your inability to labor and follow and attend to your business affairs in the future, how much were you damaged by the injury?" Plaintiff answered $4500. To the question and answer defendant objected, and his objection being overruled defendant at the time excepted.

The impropriety of such a line of examination was pointed out by this court, nearly forty years ago, in *Pierson v. Wallace, 7 Ark., 282.* This is one of the few subjects upon which there is absolutely no conflict in the authorities. A witness is never permitted to estimate the amount of damages which a party has sustained by the doing, or not doing, of a particular act. That is the province of the jury and a witness cannot be allowed to usurp it. He may state facts showing the extent of the damages and any other pertinent matters. But the measuring of the amount of damages in dollars and cents is not a fact. It is a matter of opinion or speculation. See *Lawson's Expert and Opinion Evidence, 448,* where a vast number of cases are collected; *Kirkpatrick v. Snyder, 33 Ind., 169; O. & M. Ry. Co. v. Nickless, 71 Id., 271.* The leading case on this subject is *Norman v. Wells, 17 Wend., 136.* There the court say: "The ordinary and in general the only legal course is to lay such facts before the jury as have a bearing on the question of damages, and leave them to fix the amount. They are the only proper judges. They are impartial and capable of entering into these ordinary matters. Witnesses are, in such cases, unavoidably governed by their feelings and their prejudices, gathered from many sources. . . . No case was cited by counsel where evidence of opinion as to the amount of damages sustained has ever been sanctioned as legal. The amount of indemnity, where it is not capable of being reached by computation, is always a question for the jury.

"If there be any rule without exception it is this, and I have been unable to find any instance where the opinion of witnesses has been received."

The evidence, which was in no material part conflicting, discloses the following state of case: The plaintiff was a man of intemperate habits and was beyond doubt drunk on this particular occasion, according to the testimony of all the witnesses, himself included. He had started out to walk down

the railroad track from Tillar station to a shingle mill, distant one and a half miles. When he had gone a half mile, he was, according to his own account, overtaken by a blind spell and knew no more until he was run over. His foot was crushed and amputation became necessary. There was evidence tending to show that he was subject to attacks of vertigo or dizziness. The track was straight at the place where the accident happened. The engineer discovered a small object on the rail when he was at the distance of 300 yards. This he took to be a billet of wood. When his engine had approached within 200 yards of the object, he saw it was a man's leg, and immediately signaled for brakes and reversed the engine. But the train was composed of twelve or fourteen freight and passenger cars, the track was wet and slippery, and it was found impossible to stop it in time to prevent the injury. The engineer says he could have done no more if he had been about to run into a broken bridge. The plaintiff was lying in a path at the end of the cross ties, with his leg between the ties and his foot resting on the rail.

2. Contributory negligence.

Now, it is very plain that the proximate cause of the injury was the negligence of the plaintiff in voluntarily walking upon the track and his inability to get out of the way of the train, in consequence of intoxication or a paroxysm of his disease. And the whole doctrine of contributory negligence is bottomed on the maxim, *In jure non remota causa, sed proxima, spectatur.* The railway company is not responsible, unless its trainmen had a clear opportunity, after discovery of the plaintiff's peril, to avoid striking him. Or, to state the proposition in a different form, a trespasser on a railroad track cannot recover for running him down, in the absence of willful or reckless conduct on the part of the company or its agents. *St. L., I. M. & S. Ry. Co. v. Freeman, 36 Ark., 41; L. R. & Ft. S. Ry. v. Pankhurst, Ib., 371; St. L., I. M. & S. Ry. v. Ledbetter, 45 Id, 246; Same v. Wilkerson, 46 Id., 513; Wright v. R. Co. 6 East. Rep., 611; S. C., 142 Mass.*

The jury were told that the plaintiff was guilty of contributory negligence if he was drunk at the time, and that in that case he could not recover unless the train could have been stopped in time to save him, after discovery that it was a human being on the railroad track. But the court rejected this prayer:

"8. If the plaintiff was subject to attacks of vertigo or dizziness, as he claims, it was contributory negligence for him to be traveling along the track near train time even if he was not drunk."

We can see no difference between the two infirmities, which will affect the liability of the company.

The following directions were also given by the court: 3. SAME.

"3. The jury are instructed that if they believe from the evidence that the engineer in day time ran the engine and cars over plaintiff, seeing him lying over defendant's track in a straight stretch in said road, he cannot be heard to say that he believed it to be a log or chunk."

"4. The jury are instructed that if they believe from the evidence that defendant's engineer, operating the locomotive and engine and cars at the time the injury herein occurred, saw an object on the track which he took to be a log or a chunk, due care would require him to stop the train if possible and remove the obstacle whatever it might be, and if said engineer did not do this they will find for the plaintiff."

And the court refused the following request to charge:

"12. If the plaintiff was in a drunken condition or otherwise guilty of contributory negligence he cannot complain of the engineer so long as the engineer thought the obstacle on the track was a chunk, if he really thought so. In such case the engineer's duty to plaintiff did not begin until the engineer became aware it was a man."

In *St. L., I. M. & S. Ry. Co. v. Freeman, supra,* the trainmen mistook a child, one hundred yards off, for a hog. Yet it was not intimated that the mistake rendered the company liable for the death of the child. A failure to distinguish so small an object as a man's leg at 300 yards is still more excusable.

The court also gave the following:

"8. The jury are instructed that slight negligence is not a slight want of ordinary care, but a want of extraordinary care, and the law does not require such care of the person injured by the negligence of another as a condition precedent to his recovery."

We do not know whether this was an attempt to state the Illinois doctrine of comparative negligence, or to revive the exploded distinction between degrees of negligence. But it is obscure and far better calculated to puzzle than to enlighten a jury.

Reversed and a new trial ordered.

KIRKSEY ET AL. v. COLE.

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1. PRACTICE: *Bill of exceptions.*

It is improper to incorporate the pleadings in a case in the bill of exceptions. The object of a bill of exceptions is to bring upon the record for the supreme court that which does not already appear therein, and which it is necessary to bring to the notice of the appellate court.

2. STATUTE OF LIMITATIONS: *Homestead.*

Under the homestead act of 1852, the homestead of a decedent vests (where there is no widow) in his minor children alone, as an entirety. As each child arrives at age his interest in the homestead as such expires, and he has no right to the possession and can bring no action for it until the youngest child arrives at age; and so, until then, the statute of limitations of seven years does not begin to run against him or his vendee in favor of any adverse occupant of the land.

APPEAL from *Craighead* Circuit Court.
Hon. M. T. SANDERS, Judge, on exchange.

E. F. Brown for Appellant.

1. The claim and possession by appellee under color of title, do not constitute such an adverse holding as to enable him to recover in this suit under the plea of seven-years statute of limitations. *20 Ark., 516; Angel on Limitations, pp. 390–91–92 and 409-10.* And hence the court erred in refusing to give the jury the second instruction asked by appellants.

2. The right to the possession of the homestead of the ancestor in this case vested upon his death in his five minor children during their minority, and the holding of one was the holding of all; nor could any one of the minors abandon or be prejudiced in his rights; and the leaving of the rents and profits to the younger by the adult heirs was not an abandonment of the fee or the right of entry upon the coming of age of the youngest; and under the constitution of 1874 at least, would be a complete bar to the right of entry of the adults and their assigns during the minority of any one of the children. *Gould's Dig., ch. 68, sec. 29; Const. 1868, art. 12, sec. 5; Const. 1874, art. 9, sec. 6; 29 Ark., 280, 407, 633; Angel on Limitations, p. 371, note 1, also s. p. 372.*

3. The right of entry not being complete in appellants during the minority of any one of the children of the deceased, and the appellants being the assignees of the adult heirs and claiming solely under them, appellants were not prejudiced by the entry and holding of appellee until December 1, 1879; and less than four years after the majority of Lewis Howell brought this action; and hence appellants were not barred by the statute of limitations at the date of the suing out of the order of summons in this case, and we therefore submit that the

court erred in giving the first, second, third and fourth instructions for appellee. *23 Ark., 339; 35 Ark., 84; Ib., 626; 39 Ark., 472; 42 Ark., 29; Ib., 357; 10 Ark., 228; 32 Ark., 152; Angel on Limitations, s. p. 369–74; Moark's Underhill on Torts, 715.*

Y. A. Cole pro se.

The appellants are barred by limitation. Appellee having been in actual, adverse possession for more than seven years. *34 Ark., 598; 38 Id., 181; 44 Ark., 289; 41 Id., 53; 44 Id., 490.*

BATTLE J. Augustus Howell died on or about the first day of April, 1859, seized in fee and possessed of certain lands in Craighead county, which lie in a body and contain 160 acres. At the time of his death he resided upon and occupied these lands as his homestead. He was a married man and the head of a family, and left him surviving five children, George, Sallie, Caroline, Gaines and Lewis Howell. The youngest, Lewis, was about four weeks old when his father died. George and Sallie, on coming of age, conveyed their interest in these lands to John Simmons, and he conveyed to appellant, W. D. Kirksey. Caroline sold and conveyed her interest to William Edgar, who thereafter died leaving J. T. Edgar his only heir surviving him. Gaines sold and conveyed his interest to John Simmons, who afterwards, on the 5th day of August, 1879, sold and conveyed to appellee, Y. A. Cole; and on the 29th day of March, 1885, Lewis sold and conveyed to Cole.

On the 9th day of June, 1873, the sheriff and collector of Craighead county sold these lands to Cole for the taxes of 1872, and on the 10th day of June, 1875, the clerk of Craighead county pretended to convey them by deed to Cole, the same not having been redeemed. This sale and deed are admitted by all concerned to be void.

In 1875, Cole took possession of these lands; and on the 27th day of August, 1883, Kirksey and J. T. Edgar sued Cole in ejectment for possession. Cole answered the complaint, denying the title of plaintiffs and their right to possession, claiming exclusive possession and pleading the seven years' statute of limitation.

The only evidence about the entry of the defendant and his possession of the land, was the testimony of Joseph Simmons and the defendant. Simmons testified that "John Simmons became the guardian of Gaines and Lewis Howell, and collected rents of defendant Cole and his tenants for two or three years after he went on the land."

Cole says he "got his tax deed in 1875, entered and stopped parties from cutting timber, and in December of that year went on the land with a tenant; repaired the fences; and that he had tenants on the land in 1876, 1877 and 1878, and that he had paid the annual taxes every year since 1875. He also testified that 'last year' (1884) he had built a house on the land."

Plaintiffs asked for and the court refused to give to the jury the following instruction: "And the jury are further instructed that, although they may find from the evidence that the defendant held continuous, unbroken, notorious, peaceable and adverse possession of the lands in controversy for seven years next before the bringing of this suit, yet, if they find that the plaintiffs were the owners of three-fifths of said lands, that said lands were the homestead of Augustus Howell at the time of his death, and that one or more of the children of said Howell were minors at the date of the entry of the defendant upon the said lands, and, that they, or either of them, did not arrive at the age of twenty-one years until within said seven years, then they will find for the plaintiffs the three-fifths of said lands, although they may find that such child, or children, did not,

during said seven years, reside upon said lands, or receive any rents or profits therefrom, either by themselves or their guardian."

And the defendant asked for, and plaintiffs objected to and the court gave, the following among other instructions, to the jury:

"The court is asked to declare the law to be, that a right of action accrued to the plaintiffs or their grantees upon the adverse entry of the defendant, and that the fact that a right of homestead in the premises in controversy existed in other and younger heirs of Augustus Howell, did not prevent the statutes from running against plaintiffs or their grantors.

"The jury are instructed that the saving to minors in reference to bringing actions after coming of age is personal to the minor; and if, upon becoming of age, a minor sells his land to another, the right of action accrues to the purchaser at once, and such purchaser cannot avail himself of the three years' saving in favor of minors."

A verdict was returned in favor of defendant, and upon it a judgment was rendered in his favor against plaintiffs. Plaintiffs filed a motion for a new trial, which was overruled, and they saved exceptions and appealed.

1. PRACTICE: Bill of exceptions.

Before considering the questions involved in this action, we notice that appellants incorporated in their bill of exceptions the pleadings in this action, the complaint and answer. This was improper. They were already a part of the record of the case. The office of a bill of exceptions is to bring into the record that which does not otherwise appear therein, and which it is necessary to bring to the notice of the court to which appeal is taken.

Augustus Howell having died in 1859, the disposition of his homestead is governed by the homestead act of 1852. By the second section of that act the homestead of a deceased person,

who was, when living, entitled to the benefits of the act, is exempt from sale and execution, during the time it shall be occupied by his widow, or child, or children.

The object of this act, as defined by this court in *Tumlinson v. Swinney*, *22 Ark.*, *404*, was "to secure to the householder, or head of a family, a *home*, a *dwelling place*, free from the claims of creditors, and protected from the invasion of officers of the law—an asylum where the family may live in independence and security, and which they may improve and make comfortable without the fear of being deprived of it, and turned houseless and homeless upon the world, by improvidence, or by the misfortunes and vicissitudes incident to life."

This wise and beneficent provision of the act of 1852 was extended to the widow and children of the owner of the homestead after his death. The act intended that the widow and children should enjoy the homestead as the husband or father could, and to provide for them the same protection. It recognized their dependence on the homestead of the husband and father for a home, and the necessity of providing for them protection and the comforts of a home against the creditors of the deceased. From this it is manifest that the minor children are the only children meant by; or referred to, in the act of 1852, and that they are only entitled to occupy the homestead during their minority. When they arrive at the age of majority they can acquire and hold a homestead in their own right, free from sale and execution, and are thrown upon their own resources with the duty of providing for themselves. *Booth v. Goodwin*, *29 Ark.*, *633*; *Hoffman v. Neuhaus*, *30 Texas*, *633*.

2. HOMESTEAD

The design of the act of 1852 was to continue the homestead *entire*, as the home of the widow or minor children, and that no right of the children should become operative to sever or divert such homestead from full occupancy and enjoyment as a home during the minority of any one of the children. To

divide it would, in effect, partially destroy it and violate its sacred character. It has been likened to a joint tenancy, with right of survivorship. As each child arrives of age his interest in the homestead as such expires. "No partition can be made of it, nor can any of the children lessen or impair the rights of the others." *Johnston v. Turner, 29 Ark., 292; Trotter v. Trotter, 31 Ark., 145; Keyes v. Hill, 30 Vt., 759; Hoffman v. Neuhaus, 30 Texas, 633.*

The act provides that the homestead shall be exempt from sale and execution during the time it shall be occupied by the widow or children. Under this provision of the act is it necessary that the minor children of a deceased parent, who was entitled to a homestead exemption upon land, should actually reside upon and continuously occupy the same, in order to protect their homestead right to it? This question came up for consideration in *Booth v. Goodwin, supra,* and this court held, that "an infant is incapable, either by act or declaration, of abandoning or waiving his homestead right;" that "actual occupancy of the infant of the homestead place is not necessary, is not required of an infant;" that "it is the duty of his guardian to take possession of the homestead place, and to rent or lease it for the benefit of his ward, as a means for his support and education, and this must have been the possession and occupancy contemplated by the legislature, beeause it is the only one consistent with the condition of the minor child or children;" and that "the effect of the homestead act was to suspend the rights of the creditors until the child or children become of age, and are presumed to be capable of taking care of and supporting themselves."

Statute of limitations.

There is no controversy as to the lands sued for being the homestead of Augustus Howell, at the time of his death, or his right to hold the same free and exempt from sale or execution. This being true, the lands descended, at his death, as a homestead to his minor children to hold during

minority. As each one arrived of age, he or she ceased to have any right to occupy or use the same in any way, to the possession thereof, until all reached the age of their majority. Plaintiffs' right of action, therefore, did not accrue until the youngest child, Lewis, was twenty-one years old, which was some time in 1880, and the seven years' statute of limitation did not commence running until then. *Cox v. Britt, 22 Ark., 567; Jones v. Freeds, 42 Ark., 357.*

The defendant being in possession of the land in controversy, and denying the plaintiffs' right to possession, and asserting adverse title in himself, plaintiff was entitled to institute this action against him. In order for defendant to sustain his plea of the seven years' statute of limitation in bar of their right to recover, it is necessary for it to appear that he held actual, open, continuous, hostile and exclusive possession of the land sued for, for the full period of seven years after this right of action accrued. *Sharp v. Johnson, 22 Ark., 79; Byers v. Danley, 27 Ark., 77; Ringo v. Woodruff, 43 Ark., 469; Trapnall v. Burton, 24 Ark., 371.*

The court erred in refusing to give the instruction asked for, and in giving those given, above set forth, and in overruling plaintiffs' motion for new trial.

The judgment of the court below is, therefore, reversed, and this cause is remanded with an instruction to the court to grant appellants a new trial.

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CAROLAN V. CAROLAN.

1. CERTIORARI: *None for mere errors of J. P.*

When a justice of the peace has jurisdiction of a cause and of the person of the defendant, his judgment cannot be assailed collaterally, nor quashed by *certiorari*, for any mere irregularity or error in his proceedings. The writ of *certiorari* cannot be used for the correction of errors as upon appeal.

2. SAME: *Judgment before J. P. without proof.*

The rendering of judgment by a justice of the peace without proof, or the striking out of his answer for want of verification, and refusing to let him defend for want of a verified answer, are but errors correctable by appeal, and do not subject his judgment to quashal by *certiorari.*

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

T. C. Humphry for Appellant.

Appellant was denied a defense or hearing, which in law was a revocation of the court's process. The answer was sufficient and in apt time. *Mansf. Dig., sec. 4050; 30 Ark., 560; 37 Ark., 580.* Appellee did not show himself entitled to judgment, *Mansf. Dig., secs. 4046, 4068,* and should have been non-suited. *Ib., sec. 4065.* The justice's record should show facts giving it jurisdiction or the law regards the whole as *coram non judice* and void. *Rose Dig., p. 470, sec. 2; Ark. Justice, secs. 8, 10; Drake Att., sec. 85, 5 ed;* see also *Freeman on Judg., sec. 118* and *93 U. S., 278.*

The justice having no jurisdiction the circuit court acquired none on appeal, and the remedy is by *certiorari. 44 Ark., 100; 6 Id., 371; 39 Id., 347; 30 Id., 17; 29 Id., 173.*

Clendenning & Read for Appellee.

The appearance of appellee cured all defects in the summons, if any. The writ of *certiorari* cannot be used by the circuit courts for the conviction of errors of inferior courts, as upon appeal; but where the inferior judgment shows upon its face that the court had no jurisdiction of the subject matter, or the person of the defendant, it may be quashed upon *certiorari. Baskins v. Wylds, 39 Ark., 347; Haynes v. Semmes, 39 Ark., 399; Street v. Stuart, 38 Ark., 159; State v. Henkle, 37 Ark., 532.*

"On *certiorari* the record is conclusive as far as it goes." *Countz v. Markling, 30 Ark., 17.*

The recitals of the judgment in this case must be taken as conclusive.

The writ of *certiorari* should not be issued in any case when there is, or has been, a right of appeal, unless the opportunity of appealing has been lost without the fault of the petitioner. *Payne v. McCabe, 37 Ark., 318.*

COCKRILL, C. J. The appellee sued the appellant upon an open account, duly verified, before a justice of the peace. The appellant appeared on the return day of the summons and filed an answer, but the justice conceiving that the answer was of a nature that required verification, caused it to be stricken from the files upon motion of the plaintiff's attorney, and refused to hear evidence from the defendant to sustain the allegations of the answer that had been stricken out; and as the defendant did not offer to amend or answer further, judgment was rendered against him. After the time for appeal from this judgment had expired, the defendant petitioned the circuit court to quash the judgment upon *certiorari.* The transcript from the justice's docket, which accompanied the petition, set forth the facts as stated above. The petition offered no excuse for not prosecuting the appeal and it was dismissed upon demurrer. The petition seeks to reverse the judgment of dismissal.

1. CERTIORARI: None for mere errors of J. P.

The justice of the peace had jurisdiction of the cause of action and of the person of the defendant, and any irregular or erroneous act on his part is no more than erroneous exercise of jurisdiction, and does not make the judgment rendered liable to be successfully assailed collaterally or quashed upon *certiorari.* Nor can the writ of *certiorari* be used for the correction of errors as upon appeal. *Pearce, ex parte, 44 Ark., 509.*

The record does not show affirmatively that no proof was taken upon the rendition of judgment, and in the absence of such showing the presumption is that the justice performed his duty in that respect. *St. L., I. M. & S. Ry. v. Barnes, 35 Ark., 95.* Moreover, the statute authorizes the rendition of judgment upon a verified account without other proof of its correctness (*Hershy v. Yantes, 46 Ark., 498*); but if we should regard the indebtedness upon the account as denied and the burden of proof upon the plaintiff, it was nevertheless only error in procedure, according to the decision in *Railroad v. Barnes, supra*, for the justice to render judgment in such a case without proof, and does not subject the judgment to quashal upon *certiorari.*

But the writ of *certiorari* should not be issued in any case where there has been a right of appeal unless the opportunity of appealing has been lost without the fault of the party entitled to it. *Payne v. McCabe, 37 Ark., 318.*

2. SAME: Judgment before J. P., without proof.

It is argued, however, by the appellant, that he was deprived of his right to appear and be heard, and that the judgment is therefore a sentence without judicial determination of his rights, and entitled to no respect. But his conclusion is based upon a false assumption of fact, and the case of *Windsor v. McVeigh, 93 U. S., 274,* which is relied upon to sustain the position, is therefore inapplicable. In that case the trial court refused to permit the defendant to appear and defend upon any terms because he was engaged in rebellion against the United States government, and the supreme court held the judgment against him void in a collateral attack upon it. But in the case at bar the record does not bear out the appellant's contention that there was an absolute refusal to permit him to appear and defend. It is recited in the justice's judgment that "the court being of the opinion that the defendant could not tender an issue until his answer was verified, refused to hear evidence in support thereof; and being well and sufficiently advised in the premises," proceeded to render judgment.

The defendant made no effort to comply with the condition that the court placed upon his right to make defense—that is to verify his answer, but preferred to allow judgment to be rendered against him rather than comply with the ruling of the court. The justice was in error in striking out the defendant's answer and in refusing to hear his defense without a written or verified answer; but a justice of the peace has the right to determine every question that arises in a cause pending in his court that a superior court has under like circumstances, and when he errs in his conclusions upon the law, the judgments of his court are no more open to attack than those of the circuit court.

The appellant's only remedy to correct the errors complained of was by appeal to the circuit court, where the right of defense without a verified or written answer would have been accorded him.

Affirm.

HUDGINS v. MORROW ET AL.

1. MORTGAGE: *Redemption.*

The act of March 17, 1879, (*Mansf. Dig., sec. 4759,*) for the redemption of property from mortgage sales, has no application to mortgages executed before the passage of the act.

2. SAME: *Power of sale not revoked by death of mortgagor.*

A power of sale coupled with an interest cannot be revoked by a mortgagor, and his death cannot defeat or suspend the right to execute the power.

3. SALES: *When set aside for inadequacy of price.*

Inadequacy of price alone will not authorize the setting aside of a sale, but is significant only when connected with other facts tending to show bad faith, mistake, or undue advantage taken of the weakness or ignorance of persons whose property rights are affected by the sale, or with some other ground of equitable relief.

APPEAL from *Jefferson* Circuit Court in Chancery.
Hon. JOHN A. WILLIAMS, Circuit Judge.

N. T. White for Appellant.

The findings of the court are not sustained by any evidence.

The legal title was in the trustee. *Perry Trusts., sec. 315; 15 Ark., 55; 11 Id., 94; 18 Id., 85; 42 Id., 504.* Deeds of trust are not affected by the death of grantor. *Jones on Mortgages, sec. 1792.* There is not a *scintilla* of proof that there was any unfairness, injustice, or inequity in the sale, so the decree was based solely on inadequacy of price, and this is not of itself sufficient to vacate a sale. *122 Mass., 122; 11 Mo., 211; 19 W. Va., 1; 53 Tex., 37; 24 Minn., 417.*

No appraisement was necessary under *Act March 17, 1879. 40 Ark., 423; 1 Howard, 311.* Nor did appellees have the right to redeem under *Mansf. Dig., sec. 3072,* for this applies only to sales under decrees of courts; and besides, it reserves no right to minors after twelve months. *Secs. 3067 to 3071 Mansf. Dig.* See also *Jones Mortg., sec. 1915* and *31 Mich., 426.*

W. P. Stephens and *John McGregor* for Appellees.

Where there is abuse of confidence or ingredients of a suspicious nature or peculiar relations between the parties, gross inadequacy of price furnishes the most vehement presumption of fraud. *Kerr on Fraud and Mistake, p. 187; 1 Story Eq. Jur., sec. 246; 38 Ark., 584; Perry on Trusts, sec. 602, (O.); Jones on Mortg., secs. 1906–9–11–15.* And where the parties are minors, not able to protect their rights, the sale will be more readily set aside. *Jones Mortg., sec. 1911.* Less than fraud will do *38 Ark., 590–1.*

But appellees had the right to redeem. They had no day in court. There should have been a suit to foreclose. *38 Ark., 589; 42 Id., 222.*

This was nothing but a mortgage. *4 Neb., 308; 19 Am. Rep., 658; 1 Peters, 441; 43 Ark., 519.*

As to their right to redeem see *Mansf. Dig., secs. 3067, 3072.*

I. MORTGAGE: Redemption.

COCKRILL, C. J. Suit was begun, by the appellees, in the Jefferson circuit court in chancery, in October, 1884, to redeem lands that had been sold under a deed of trust with power of sale and purchased by the appellant in March, 1880, and to cancel the deed executed by the trustee to him as purchaser. The trust deed was executed by W. T. Morrow in the spring of 1878, to secure a debt of $445, due to one Meyer, evidenced by a note maturing in the winter of the same year. The note was not paid at maturity and the trustee advertised the lands for sale in accordance with the terms of the deed, but before the day of sale arrived Morrow, the grantor, died, and the sale was postponed at the instance of the administrator of his estate. Subsequently the lands were again advertised by the trustee and the sale made at which the appellant became the purchaser, his bid being $550, which was paid and applied to the satisfaction of Meyer's debt and the costs of executing the trust. The lands were worth about $1600 at the time of sale.

The appellees are the heirs at law of Morrow, and some of them were still minors at the institution of this suit.

The court granted the prayer of the complaint, found that the rents received by the appellant had reimbursed him for all expenditures made, canceled his deed and decreed that the appellees be let into possession of the lands.

The record presents nothing upon which the decree can be sustained.

At the date of the execution of the deed of trust there was no provision in our law for redemption from a sale made by a trustee under such a deed. The act of March 17, 1879, (*Mansf. Dig., sec. 4759,*) confers the right of redemption in such cases, but in the case of *Robards v. Brown, 40 Ark, 423,* it was ruled that this act could not be held to apply to instruments executed before its passage, and that case is decisive of this upon the question of redemption.

2. Power not revoked by death of mortgagor.

No fact is shown that furnishes a reason for canceling the deed executed by the trustee to the appellant. The power of sale contained in the mortgage executed by Morrow—for the deed was in effect only a mortgage—being coupled with an interest in the lands, could not be revoked by him, and his death did not defeat or suspend the right to execute the power. *Connors v. Holland, 113 Mass., 50; 2 Jones Mortg., sec. 1792.*

3. SALES:—When set aside for inadequacy of price.

The closest scrutiny of the facts does not disclose any circumstance of fraud, unfairness or irregularity about the sale, or any abuse by the trustee of the confidence reposed in him. The inadequacy of the price paid for the lands is left alone to support the decree. But that fact has significance only when taken in connection with others tending to show bad faith, mistake, an undue advantage taken of the ignorance or weakness of the persons whose property rights will be affected by the sale, or some other of the grounds of equitable relief. *Fry v. Street, 44 Ark., 502; King v. Brooken, 122 Mass., 122; Klein v. Glass, 53 Texas, 37; Kline v. Vogel, 11 Mo. App., 211; Graffam v. Burgess, 117 U. S., 180.* None of these is made to appear.

Reverse the decree and dismiss the complaint.

KEMPNER v. COHN.

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1. CONTRACTS: *Conducted by mail; When completed.*

When parties conduct a negotiation through the mail a contract is completed the moment a letter accepting the offer is mailed, provided it be done with due diligence after receipt of the letter containing the proposal and before any intimation is received that the offer is withdrawn.

2. SAME: *Same.*

Whether an offer remains open is a question of fact. When an answer by return mail is requested, or may be expected by the usage of trade or the nature of the business, the making of the offer is accompanied by an implied stipulation that the answer shall be immediate. But unless the time is limited the proposition is open until it is accepted or rejected, provided an answer is given in a reasonable time.

3. SAME: *Withdrawal of offer.*

An offer made by letter which is to be answered in the same way, cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before he has accepted. An uncommunicated revocation is no revocation at all.

4. DAMAGES: *For breach of contract to convey.*

In an action by a purchaser of land for breach of the contract to convey, the measure of damages is the difference between the contract price and the value of the land when the breach occurred, with interest on such difference.

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

J. H. Harrod for Appellant.

1. It was error to allow plaintiff the expenses of investigating the title, before he had definitely accepted the offer, i. e., abstract of title and attorney's fee. *Woods Mayne on Damages, sec. 233, *p. 170.* It was also error to allow him for interest lost on his uninvested money. The true rule as to the amount of damages recoverable in case of failure to convey, is the difference between the *contract price* and the *actual value* of the property at the date of contract of sale. *8 Am. Law Reg., N.*

S., p. 570; Pringle v. Spaulding, 53 Barb. Probable profits and speculative damages are not allowed. *1 Pac. Rep., 435.*

2. Appellant submits: First, that the evidence in this case does not show a *contract* between the parties; second, that if there was a definite and certain acceptance of Kempner's offer by Cohn, that that acceptance was not made within a *reasonable time* and did not bind Kempner.

The first proposition depends upon the construction given to Cohn's letter of the 7th of February.

If that letter was an acceptance of appellant's offer then there was a contract. It is settled by all authorities that to make an acceptance of an offer bind the party making it, the offer must be accepted unconditionally and without modification or qualification.

When the answer departs from the proposition either in words or effect, or varies the offer, there is no contract. *Parsons on Contracts, 6 ed., vol. 1, *p. 477.*

"The respondent can accept wholly, or reject wholly, but one of these things he must do." *Ibid.*

An answer has sometimes been held insufficient to make a contract when the difference in terms between the parties did not seem to be very important. In fact the court seldom inquires into the magnitude or effect of the diversity; if it exists, that fact is enough. *Parsons on Contracts, 6 ed., vol. 1,* pp. 477–8.*

As to what is a *reasonable* time, see *12 Conn., 423; 26 Ohio St., 334; 10 Wall., 129.*

3. If Kempner rescinded his offer and mailed that revocation before Cohn mailed his acceptance of the offer, there was no contract of sale. *Minor Inst. Com. and St. Law, book 3, p. 127; 1 Pick. (Mass.), 283; 6 Wend. (N. Y.), 103.*

4. There *never* was a *mutual assent* to this contract of sale at the same time. There was no meeting of minds as required by all the authorities.

Caruth & Erb for Appellee.

1. The expenses of investigating the title were proper elements of damage. *2 Leith on Dam., p. 217; 2 Add. on Cont., p. 63.*

2. It is contended there was no proof of acceptance. To say nothing of Cohn's verbal acceptance to A. Kempner, the bearer of defendant's proposition, which he directed Kempner to communicate to defendant, and which *defendant admits was communicated*, it is submitted that Cohn's letter of February 7th is a decided, unconditional acceptance.

3. The appellee *did* accept appellant's offer in a reasonable time. The jury found from the evidence that he did, and they were warranted in so finding. As to what is a reasonable time, depends on the circumstances of each case.

4. The court properly refused the sixth instruction asked by defendant. It is not law. *1 Parsons Cont., 6 ed., sub. p. 484; 2 Kent Com., p. 629; 1 B. & Ald., 681; Benj. on Sales, secs. 68 to 75.*

The reasoning in *McCullough v. Eagle Ins. Co.*, relied on by counsel, has been rejected by the supreme court of the United States. *Taylor v. Merchant's Fire Ins. Co., 9 How., 390; Beckwith v. Cheever, 1 Foster, (N. H.), 41; Brisbam v. Boyd, 4 Paige, 17; Averill v. Hedge, 12 Conn., 436; Mactier v. Frith, 6 Wend., 103; Levy v. Cohen, 4 Ga., 1; Chiles v. Nelson, 7 Dana, 281; Falls v. Gaither, 9 Port. (Ala.), 605; Hamilton v. Lycoming Mut. Ins. Co., 5 Pa. St., 339.*

Both the later English and American authorities sustain the view cited from Parsons.

SMITH, J. Cohn sued Kempner for the non-payment of an alleged agreement to convey a certain lot on Main street in the

city of Little Rock. He claimed damages for the loss of his bargain, for expenses incurred in investigating the title, for the loss of interest upon the money which he had raised by the sale of interest-bearing securities in order to comply with the terms of purchase and which he had been unable immediately to reinvest to his satisfaction, and for the loss of a profitable lease of the lot which he had made on the faith of getting the lot.

The answer denied the existence of any contract between the parties for the sale of the lot. Upon a trial before a jury, the plaintiff recovered a verdict and judgment for $611.50. The assignments in the motion for a new trial were, the admission of improper evidence, the refusal of the court to give a certain charge to the jury and want of evidence to sustain the verdict.

The plaintiff lived in Little Rock, the defendant at Hot Springs. The two cities are about sixty miles apart and there is communication by mail twice a day. On the 28th of January the plaintiff wrote the defendant inquiring his terms. The answer was as follows:

"HOT SPRINGS, January 30, 1885.

"M. M. Cohn, Little Rock, Ark.:

"Dear Sir—Yours of the 28th received and contents noted. In reply will say, in regard to the lot, I will sell you for $10,000, $5000 cash and $5000 give your note with ten per cent. interest. If that is satisfactory, send the deed and I will send you properly acknowledged. Respectfully yours,

"J. KEMPNER."

This letter was sent in the care of A. Kempner, the defendant's uncle, and agent for the payment of taxes and collection of rents, but who had no authority to contract for the sale of the lot; so that it was not delivered to Cohn until February 2. On February 5 Cohn told A. Kempner he would take the

property and requested him to inform the defendant. And in reply to the letter of January 30 he wrote, himself, as follows:

"LITTLE ROCK, ARK., February 7, 1885.

"J. Kempner, Hot Springs, Ark.:

"Dear Sir—I hand you herewith the deed for your property, which you and your wife will please sign and have duly acknowledged. In order that I may get possession as soon as possible, I would like for you to return the deed, as well as all the deeds, memoranda, agreements, contracts, etc., that you have in connection with this property, at your earliest convenience—say by Monday's mail, if you can. I am having the title looked up now, which, if found correct, I will comply with your terms contained in your letter of January 30, to-wit: $5000 in cash and my note for balance or other $5000. If you should prefer, I will give you Mr. A. Kempner's indorsement, the note to bear ten per cent. per annum. You can send the deed to Mr. A. Kempner if you want to, or to the Merchants National Bank, if you prefer. Though, if convenient, I would rather you would come up, because it is always easier to talk than to write. By the memoranda, agreements, etc., I mean your papers relating to the walls on each side, so as to know what to claim. Hoping you will give this your early attention, I am, yours truly, M. M. COHN."

This letter was put into one of the government letter boxes before Cohn had received any notice that the offer was withdrawn. The envelope is postmarked Little Rock, February 7, 9 p. m. It reached Kempner on the 9th of February. The defendant being informed by letter from A. Kempner that Cohn was making his arrangements to buy the property, wrote, on the 7th of February, to Cohn, that he had changed his mind and now declined to sell.

Evidence was given, over objection, that Cohn, immediately after receiving the letter of January 30, had set to work to procure an abstract of the title, paying therefor $11.50, and

had employed attorneys to examine the same at a cost of $50. Also that he had parted with valuable securities to raise the money for the cash payment, and that after Kempner's refusal to consummate the trade, he had tried unsuccessfully, for some two months, to reinvest the money, whereby he had lost $80 or $100 in interest. It was further proved, without objection, that Cohn, about the time he wrote accepting the offer, had made a contract with another person, for a lease of the lot. The property was variously estimated by different witnesses to be worth from $10,000 to $12,500.

The plaintiff requested no special directions to the jury.

The instructions given at the defendant's instance were as follows:

1. The court instructs the jury that before they will be authorized to find damages for plaintiff in any sum whatever, they must believe from a preponderance of the evidence that the contract between plaintiff and defendant for the sale of said lot was definite and complete and without condition.

2. That before the jury can say that the contract in this case was completed, they must find from the evidence that the offer made by Kempner was accepted by Cohn absolutely and without qualification, and unless the offer of Kempner was thus accepted you will find for the defendant.

3. If the jury finds from the evidence that the letter of Cohn to Kempner in regard to accepting the offer of said lot contained any qualification of Kempner's proposition whatever, or that said letter was not an absolute acceptance of said proposition, Kempner is not bound and you will find for defendant.

4. Nor would Kempner be bound by the unconditional and unqualified acceptance of his offer unless the acceptance was made within a reasonable time, and it is for the jury to say what is a reasonable time, taking into consideration the situa-

tion of the parties and their facilities for communication, and unless you find from the evidence that Kempner's offer was accepted unconditionally and within a reasonable time by Cohn, you will find for defendant, Kempner.

5. The court instructs the jury that Cohn cannot recover damages for being kept out of the interest of his money, unless he tried to secure investment and failed, even if there was an absolute contract for the sale of the land.

7. The court instructs the jury that the statements made by Cohn to A. Kempner, that he, Cohn, would take the property, cannot be considered as an acceptance of J. Kempner's proposition.

And the court denied the sixth prayer, which was:

"If the jury find from the evidence that Kempner rescinded his offer to sell the lot for $10 000, and mailed that revocation before Cohn mailed his acceptance of the offer, they will find for the defendant."

1. CONTRACTS BY MAIL: When completed.

I. The most material inquiry is, whether the minds of the parties ever met, or mutually assented to the same thing. When parties are conducting a negotiation through the mail, a contract is completed the moment a letter accepting the offer is posted, provided it be done with due diligence, after receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn. *2 Kent's Comm., 477; Adams v. Lindseil, 1 Barn. and Ald., 681; Dunlop v. Higgins, 1 H. L. Cas., 381; Abbott v. Shepard, 48 N. H., 14; ~~Martin~~ Master v. Frith, 6 Wend., 103; Stockham v. Stockham, 32 Md., 196.*

2. SAME.

II. Whether an offer remains open is a question of fact. Of course the proposer may limit the time for acceptance, as every man has the right to dictate the terms upon which he will sell his property. Where an answer by return mail is requested, or may be expected from the usage of trade, or nature

of the business, the making of the offer is accompanied by an implied stipulation that the answer shall be immediate. But unless the time is limited, the proposition is open until it is accepted or rejected, provided an answer is given in a reasonable time. *Wharton on Contracts, sec. 9; Mactier v. Frith, supra.; Dunlop v. Higgins, supra.; Hollock v. Insurance Co., 2 Dutcher, 268; Maclay v. Harvey, 90 Ill., 525; S. C. 32 Am. Rep., 35.*

Averill v. Hedge, 12 Conn., 423, is distinguishable from the case at bar in at least two particulars. There A., on the 16th of March, wrote offering to sell iron at a certain price, and the letter reached B., at Hartford, on the evening of the 18th; on the 19th, B. wrote a letter, accepting the offer, but it was not mailed until the 20th, and there being no mail on that day the letter did not get off until the 21st. And it was held the acceptance came too late. But the parties were dealing in a commodity that then was undergoing great fluctuations in value from day to day, and A. said in his letter: "We shall not consider ourselves holden to the offer made you unless you signify your acceptance thereof by return mail."

The defendant, having caused the question of reasonable time to be submitted to the jury, under an instruction drawn by his counsel, and having met with an adverse decision, now asks us to declare, as matter of law, that Cohn's acceptance was unreasonably delayed. But we think the question was properly resolved in favor of the plaintiff. The subject of negotiation was real estate, which requires more deliberation than if it had been a transaction in cotton or other article of merchandise. It is also less subject to sudden and violent fluctuations in price. Five days was not an unreasonable time within which to come to a determination, have the title looked into, and a conveyance prepared.

3. Withdrawal of offer.

Then as to the attempted retraction: An offer made by letter, which is to be answered in the same way, can not be

withdrawn unless the withdrawal reaches the party to whom it is addressed before he has accepted. An uncommunicated revocation is in law no revocation at all. *Benjamin on Sales, sec. 44; Taylor v. Merchants Fire Ins. Co., 9 Howard, 390; Stevenson v. McLean, 5 Q. B. Div., 346; S. C. 29 Moak's Eng. Rep., 341; S. C. 20 Amer. Law Reg., 16; Byrne v. Van Tienhoven, 5 C. P. Div., 344; S. C. 30 Moak's Eng. Rep., 833.*

When Kempner penned his withdrawal of the offer he did not know that it had been accepted at that time. But it was not necessary that he should know of it; and the acceptance was effectual to complete the contract, notwithstanding Kempner had previously mailed a letter to Cohn announcing the retraction of the offer. The case of *McCullough v. Eagle Ins. Co., 1 Pick., 283,* which holds a different doctrine, has been very generally rejected as authority.

4. DAMAGES: For breach of contract to convey.

The only error that we find in the record is the admission of the testimony tending to show that the plaintiff had lost interest on his $5000, which lay idle and unproductive for two months, and that he had made a lease before he was advised of the defendant's refusal to go forward with his contract. These are not proper elements of damages, for two reasons: First. They are too remote, not flowing naturally from the wrong complained of, nor presumably within the contemplation of the parties; and, second: To allow them would be in effect to give double compensation for the same injury. In an action by a purchaser of land for breach of the contract to convey, the measure of damages is the difference between the contract price and the value of the land when the breach occurred, with interest on such difference. To this the cases usually add the expense of investigating the title, when any expense has been incurred. The vendee is entitled to have the thing bargained for, whether it be land or chattels, at the price agreed upon, and to resell it himself at its market price. And when he has received the profit, which it is shown he could have made on a resale, he

has been fully indemnified. *Hanna v. Harter, 2 Ark., 397; Hopkins v. Lee, 6 Wheat., 109; Engel v. Fitch, L. R. 3 Q. B., affirmed in Exchequer Chamber, L. R. 4 Q. B., 659; Purpelly v. Phelps, 40 N. Y., 59; Doherty v. Dolan, 65 Me., 87; Kirkpatrick v. Downing, 58 Mo., 32; S. C. 17 Amer. Rep., 678; Plummer v. Rigdon, 78 Ill., 222; S. C. 20 Amer. Rep., 261.*

If the plaintiff shall, during the present term, enter a remittitur upon the usual terms, of $100, his judgment will be affirmed, otherwise he must submit to another trial.

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TEAVER ET AL. v. AKIN.

1. BETTERMENT ACT: *Who entitled to benefit of.*

In order to have any benefit of the betterment act, (*Mansf. Dig., Secs. 2644-48,*) a party must, first, have held under color of title, and secondly, have believed himself to be the legal or equitable owner of the land.

2. COLOR OF TITLE: *Title bond.*

Whether a title bond is sufficient to confer color of title, *Quere?*

3. PRACTICE IN CHANCERY: *Receivers.*

When property in litigation is placed in the hands of a receiver it is error to proceed to a final decree without requiring him to account.

4. RENTS: *On improvements.*

A defendant in a suit for land not within the betterment act, cannot withhold rents on improvements made by himself, except for a time sufficient to compensate him for making them.

APPEAL from *Little River* Circuit Court in Chancery. Hon. H. B. STEWART, Circuit Judge.

Dan. W. Jones for Appellant.

The plaintiffs are entitled to recover damages for the pulling down and hauling off the houses, to their value, and equitable damages to the estate by way of loss of rents for

want of buildings to house tenants in. *Sedgwick & Waite's Trial of Land Titles, sec. 668; 1 Story's Equity, sec. 518a.*

Defendant took possession of the land in February, 1870, and enjoyed and consumed the rents to January, 1884. He testifies that the rents were worth $150 per annum. If *Secs. 2644–46, Mansf. Dig.*, limits plaintiffs' right to recover for rents, to three years previous to bringing suit, plaintiffs can only recover rents for 1879 to 1883, both years included; for the first action was brought in February, 1882, and the receiver took possession in January, 1884. *Sedgwick's Trial of Land Titles, secs. 663–4–5.*

Equity and justice left unhampered would give plaintiffs the full amount of all rents and profits defendant has realized since 1870 up to 1884. The proof is clear that the rents have been large. There is no proof of substantial or lasting improvements to be set off against the rents. Plaintiffs were infants of tender age in 1870, and brought suit before their majority. They have done no act to mislead or injure defendant, and the denial of rents by the chancellor certainly was a wrong, and shocks every sense of justice and equity.

SMITH, J. This was an action for the recovery of eighty acres of land and mesne profits, and damages for waste in pulling down and removing buildings. The plaintiffs claimed by inheritance from their father, who died intestate in 1865, seized and possessed of the premises by virtue of a patent from the United States. The land was the father's homestead, and the plaintiffs, his only children, were infants at the commencement of the action.

The defendant set up a purchase by him from one Cowling, who, it was averred, had bought from the widow of the deceased intestate. He asserted a claim for taxes paid, and for clearing land. The cause was transferred to equity without opposition, and the answer was made a cross-bill against Mrs.

Teaver. She denied that she had ever sold the land, or any interest therein, to Cowling or to any other person. She had remained on the land for one year after her husband's death, and had then removed to a distant part of the state. Her dower had never been assigned, either by the heirs or by any court; and she had released all claims to the plaintiffs before the action was begun, in order that they might have a marketable title.

At the hearing the defendant confessed the superior title of the plaintiffs, but contended for the refunding of his taxes and the value of his improvements. The court was unable to discover that the defendant had made any permanent or valuable improvements, but, on the other hand, it refused to decree against him for the rents and profits. The plaintiffs alone have appealed.

From the depositions on file, it appeared that the uncle of the plaintiffs, who was neither their guardian, nor curator of their estate, had attempted to make an oral sale of the land to Cowling; had received $100 in cash, which was applied to the use of the plaintiffs and their mother, and Cowling's note for $250, which was still unpaid. The undertaking of the uncle was, upon payment of the price agreed upon, to get authority from the probate court to convey the land. But Cowling had shortly afterwards died. Before his death, however, it seems that he sold the land to Akin, and according to Akin's testimony, was paid in full. Akin says that he held Cowling's bond for title; but this instrument was not exhibited, nor its loss satisfactorily accounted for. Akin had entered in January, 1870, and had taken the rents and profits thenceforward until a receiver was appointed in the present suit. He had moreover, torn down the houses, hauled off the materials and built a house out of them upon his own land adjacent. He had permitted the fencing to rot and decay without renewing them. When he was informed in 1880 by the plaintiffs' attorney that

the land belonged to them, he had attorned to them and made his note for the rent of that year; but had afterwards refused to pay it, or to yield possession. There were some eleven acres of tillable land, when he went upon the place; and he had cleared some nineteen acres during his occupancy. But he had worn and abused the land by slovenly culture; so that, in the opinion of some of the witnesses, it was doubtful whether the land he had cleared was now worth more than if it had remained in forest. But at all events it was proved that the use of the land for three years would compensate him for getting it ready for the plow.

1. BETTERMENT ACT:—Who entitled to.

The denial of rents to the plaintiffs is shocking to the sense of justice. And the only question is, whether under the betterment act of March 8, 1883, (*Mansf. Dig., secs. 2644–48,*) they should be limited in their recovery to such as accrued within three years next before the commencement of the suit. In order to have any benefit from the act, the defendant, must, first, have held under color of title; and, secondly, have believed himself to be the legal or equitable owner of the land. The circuit court found that the defendant was an occupant in good faith. But the correctness of this finding is extremely problematical upon the testimony. Color of title is defined to be that which in appearance is title, but which in reality is no title. *Wright v. Mattison, 18 Howard, 56.*

"Whenever an instrument, by apt words of transfer from grantor to grantee, in form passes what purports to be the title, it gives color of title." *Hall v. Law, 102 U. S., 461.*

2. COLOR OF TITLE:—Title bond.

Now, a bond for title does not, *ex vi termini*, purport to convey the title to the obligee. It is, at most, an executory agreement, entitling him to a deed at a future day, on the performance of certain conditions. *Felkner v. Tighe, 39 Ark., 363; Rigor v. Frye, 62 Ill., 507.*

It is true that some courts have taken the distinction that, though the vendor's bond, conditioned to make title when the

purchase money is paid, cannot give color of title, so long as the purchase money remains unpaid, yet it becomes such when payment is made. But this cannot aid the defendant, because he did not hold under any person who himself had color of title. *Sedg. & Wait on Trial of Titles to Land, sec. 781, and cases cited; Briggs v. Prosser, 14 Wend., 227.*

At all events, in the absence of the title bond, no presumption will be indulged in favor of the nature of defendant's holding. If it had been produced, its recitals might have shown that Cowling did not claim the title, but admitted it to be in the heirs of Teaver; as was the case in *Simmons v. Lane, 25 Ga., 178.*

We conclude then, that the betterments act does not apply to this case. But before that law was passed, it was the doctrine of equity, that a party in possession, failing to make good his title, might set off valuable and lasting improvements against rents. *West v. Williams, 15 Ark., 682; Marlow v. Adams, 24 Id., 109; Jones v. Johnson, 28 Id., 211; Felkner v. Tighe, 39 Id., 358.*

3. PRACTICE: Receiver.

We should, in order to cut short the litigation, state the account ourselves and render the appropriate decree, but for two circumstances: First. The court below, after having placed the property in the hands of a receiver, proceeded to a final decree without requiring him to account. This is a very great irregularity. *Kelly's heirs v. McGuire, 15 Ark., 557.* Second. We are unable to determine from the evidence the dates when Akin's successive clearings were made.

4. Rents on improvements.

The decree, so far as it denied rents to the plaintiffs, is reversed, and the cause remanded with directions to require the receiver to pass his accounts at once, and pay into court the net balance, if any, that is in his hands, and to cause the same to be turned over to the plaintiffs, and let it be referred to a master to take an account upon the following basis: Charge the defendant with $100 for his waste and spoliations; also,

with rent upon eleven acres of old land at $3 per acre, per annum, from the date of his entry to the time when the receiver took charge; also, with rent at the same rate upon nineteen acres of new ground, allowing him the use of the land three years free of rent from the date of clearing. Then credit him with the $100 paid by Cowling and of which the plaintiffs and their mother received the benefit, the same being regarded as rents paid in advance; and further credit him with the annual taxes, say $5 per annum, during the period of his occupation. Let the testimony to be taken before the master be directed to the fixing of the dates of the several clearings made by Akin. This is the sole point left open for determination.

R. G. Atkinson & Co. v. W. A. & C. A. Ward.

1. Trust: *Funds of principal converted by agent.*

The relation of an agent to his principal is one of confidence and trust as to all funds coming to his hands from the principal's business; and a court of equity may follow the funds into whatever property or change of form they may have been converted by the agent if it be possible to identify them, unless they have passed into the hands of a *bona fide* purchaser without notice.

2. Same: *For purchase money for land.*

The rule that no trust will arise in favor of one whose money has been used in payment for land *after* the legal title has vested in the party sought to be charged as trustee, has no application where a trustee appropriates trust funds to the payment or improvement of land previously purchased for himself.

3. Bona Fide Purchaser: *Notice of adverse claim.*

The possession of property at the time of its purchase by another is notice to the purchaser of the claim and equity of the party in possession.

4. Confusion: *Agent mixing principal's funds with his own.*

When an agent mixes his own funds with his principal's he must show the amount of his own funds, or his principal will take the whole.

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APPEAL from *Cleveland* Circuit Court in Chancery.

Hon. J. M. Bradley, Judge.

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

The evidence of the Wards bears upon its face evidence of falsity on many material points, and the maxim "*falsus in uno, falsus in omnibus,*" is applicable. *24 Ark., 410.*

Atkinson's testimony is clear, distinct, specific and minute, and is corroborated by many circumstances, while the Wards' is general, and amounts to nothing, except that W. A. Ward bought the property for $1500 and without notice. They failed to state material facts indisputably within their knowledge, and this strengthens Atkinson's testimony. The evidence clearly establishes a trust.

The possession of appellants was sufficient to charge W. A. Ward with notice of appellants' equities, hence he is not a *bona fide* purchaser. *16 Ark., 340.*

C. A. Ward was a trustee and confidential agent, and having converted trust funds to his own use, the appellants can follow them as long as they can be ascertained. The trust arises by operation of law. *1 Perry on Trusts, secs. 126, 132, 146; 2 Id., 836; 15 Ark., 312; 42 Id., 186.*

W. P. Stevens and *N. T. White* for Appellees.

It is clear that appellee, C. A. Ward, purchased the lots with his *own money*, and the *subsequent* using of appellant's money in erecting the house, if true, would not create a trust. *Perry on Trusts, sec. 133, and notes; 4 Kent Com., pp. 12, 75, 306; 2 Wash. R. P., 4 ed., 472; Ib., 480; 69 Ind., 419; 62 Ala., 129; 40 Ark., 62; Botsford v. Bunn, 2 John. Chy., 405; 64 Ala., 98; 3 Paige, 390; 27 Ark., 77.* To create a resulting trust the purchase money must be paid at the time or prior to the purchase and as a part of the same transaction. Cases *supra*, and *30 Ark., 612; 29 Ark., 612.* See also, *1 Smith L. C., 4 Am. ed., 339; 2 Paige, 217; 14 Gray, 119.*

The evidence clearly shows that W. A. Ward was a *bona fide* purchaser without notice.

COCKRILL, C. J. W. A. Ward brought his action for the possession of a lot in the town of Kingsland, against the tenants of the appellants. The appellants were substituted as defendants and filed an equitable answer and cross-complaint, in which it was alleged that they were merchants in business in the city of Pine Bluff; that in 1882 they had established a branch store at a railroad camp at the point now known as Kingsland, and placed Charles A. Ward, who is the son of W. A. Ward, in sole charge thereof, as their agent, and gave him power to conduct their mercantile business at that point; that he converted large sums of money which came to his hands in the course of his employment, to his own use, and used a part of it in the purchase of the lot in question, the conveyance being taken to him in his own name, and a part in erecting an expensive store-house on the lot; that he afterwards promised and agreed to convey the premises to them in payment of the amount he owed them, but that instead of doing so, he had conveyed the same to his father, the said W. A. Ward, and that the latter was fully apprised of their equities at the time of the conveyance to him. The prayer was that the Wards be declared trustees for their benefit, that they be compelled to convey the legal title to them, and for general relief.

The cause was transferred to equity, and W. A. Ward there answered the cross-complaint, denying that the lot was purchased or the house built with Atkinson & Co.'s money, and alleging that, if it was, he was a *bona fide* purchaser for value without notice of their equities.

The cause was tried upon the pleadings and upon the depositions of the two Wards upon the one side and that of R. G. Atkinson on the other. The chancellor found that there was no trust in favor of Atkinson & Co., and entered a decree

against them for the possession of the land and $360 for the rent of the premises. Atkinson & Co. appealed.

The testimony shows that C. A. Ward was a minor at the time the appellants entrusted him with the conduct of their business at Kingsland, possessed of no property, and was without income except the salary to be paid him by them, which amounted to $65 per month. In less than a year he was the owner of two town lots, and had erected a store-house upon one at the cost of $1500, and was $2000 behind in his accounts with his employers. R. G. Atkinson testifies that he admitted to him that he had used the firm's money in erecting the store-house, and had offered to convey it to them in part settlement of his account, and agreed also to remain in their employ in the Pine Bluff business until his account was fully settled; and that in pursuance of this agreement he placed his firm in possession of the house, promising to make a conveyance of the premises to them, as soon as he became of age. This was a few months only before his majority. He entered Atkinson's employ at Pine Bluff, but, before arriving at his majority, he left, and soon after gave them written notice that he repudiated the agreement they claimed he had made about the property. He also denied, in his testimony, that he had used any of the funds of Atkinson & Co. in the purchase of the lot, or in erecting the building on it, and says that his father aided him by advancing money and devoting his personal services to the erection of the house, and that he rented the premises to Atkinson & Co., and did not put them in possession in pursuance of an agreement to convey; but it is not shown how much money his father advanced him; and his father was, himself, a part of the time, a clerk in the store under the son, taking the price of his salary in supplies for his family's support.

Moreover, Atkinson was able to specify particular bills of goods which had been ordered by C. A. Ward and paid for by

the firm on account of the Kingsland business, which had gone into the erection of a store-house. No rent was ever paid by Atkinson & Co., and it does not appear that it was ever demanded, although they had been in possession more than a year when suit was brought. Altogether, Atkinson's testimony is specific, and is corroborated by circumstances, while the Wards content themselves with general assertions where it is apparent that details ought to have been given, and the withholding them weakens their testimony. They have not denied many of the circumstances pointed to by Atkinson, or offered to explain them.

We must take it as established that C. A. Ward used the funds of his principals in the improvement of the lot in controversy, but the proof fails to establish that he used any of their funds in the purchase of the lot itself. The purchase was made January 1, 1883, and the amount due him as salary was ample to satisfy the purchase price at the time of its payment. The erection of the store-house was begun in March of that year, and Atkinson testifies that Ward's business was "straight" up to that time. Atkinson knew before then that the purchase of the lots had been made, and actually negotiated with the young man about the erection of a store-house on them for the firm's use, the clerk desiring that the firm should advance the money to build the house, but his offer was not accepted.

It is not contended, under the circumstances, that the parol agreement by the minor to convey the premises can be enforced, but the appellants' contention is that they should recover upon the grounds of a constructive trust.

1. TRUST:—Funds of principal converted by agent.

That C. A. Ward's relation to Atkinson & Co., was one of confidence and trust, is abundantly sustained by authority. *Pomeroy Eq., secs 959, 1049, 1088; National Bank v. Ins. Co., 104 U. S., 54, 70; McMurry v. Mobley, 39 Ark., 309; Wells, Fargo & Co. v. Robinson, 13 Cal., 133.*

The funds in his hands which arose from their business were held by him for their use and as their property, and they must be considered as so far impressed with a trust as to give a court of equity jurisdiction to follow them into whatever change of form they may have taken, so long as it is possible to identify them, unless they have passed into the hands of a *bona fide* purchaser without notice. *Authorities supra; 2 Pom. Eq., sec. 1051; 2 Story Eq., sec. 1258.*

2. SAME:—For purchase money for lands

The appellee contends that no trust will arise in any case from acts done after the legal title has vested in the party sought to be charged as trustee, or in other words, to quote the language of Chancellor Kent that "the trust must have been coeval with the deed, or it cannot exist at all;" *Botsford v. Burr, 2 Johns. Ch., 405.*); and it is argued from this that no trust or equity is shown in this case, because C. A. Ward erected the house after he had purchased the lots for himself with his own means.

The case of *French v. Sheplor, 83 Ind., 266,* relied upon by the appellees, goes far toward sustaining their position, but it seems to us that a wrong application is made of a correct principle in the argument used.

It is a well settled principle that a trust which springs from the intention of the parties, or is dependent upon contract, either express or implied, can be raised only by virtue of the original contract of purchase, and that it cannot be brought into existence so as to divest the legal estate by the subsequent application of the funds of a third person to the payment of the purchase money, or to the improvement of this estate. This court has frequently recognized and enforced the principle. *Freeman v. Milner, 40 Ark., 62, and cases cited.* But it is properly applicable only to purely resulting trusts where there is no relation of trust or confidence between the parties, except that one advances the purchase money to the other, and the latter takes the title in his own name. This is

seen by an examination of the case of *Botsford v. Burr, supra,* which is the source of authority for most of the American cases on the subject. There the person seeking to have the trust declared in his favor had loaned another, whom he sought to charge as trustee, money to pay the purchase price of lands long after the purchase had been made and the deed executed. The vendee was a simple contract debtor without fiduciary relation to the person whose money was used, and it was held that the transaction subsequent to the purchase created no equity to hold the land.

But in the case in hand a trustee diverts the trust fund from its proper channel and converts it into a house on his own land. The fund has been followed and definitely located there, and it would be monstrous for a court of equity to give the wrong-doer the benefit of his wrong by refusing relief to the *cestuis que trust.* An agent or trustee is never allowed to profit at the expense of the beneficiary, by the use or abuse of his trust, and equity will so mould and apply the remedy as to prevent it. *May v. Le Clair, 11 Wall., 217, 236; 2 Perry Trusts, sec. 835.* Whenever another's property has been thus wrongfully appropriated and converted into a different form, equity impresses a constructive trust upon the new shape it may take, and the right to follow and claim, or charge with a lien, the product of or substitute for the original thing in the hands of the trustee, "only ceases," as Lord Ellenborough says, "when the means of ascertainment fails." *Taylor v. Plummer, 3 M. & Sel., 562; 2 Pom. Eq., secs. 1051, 1080; 2 Story's Eq., sec. 1258; Tiederman Real Prop., sec. 501; Hill, Fontaine & Co. v. Cooledge, 33 Ark., 621.*

Inasmuch as it is the conversion of the trust fund into the new form that raises the equity in this class of cases, it can make no difference whether the conversion is made at the time of the contract of purchase or afterwards. So long as the rights of innocent purchasers have not intervened, the only

question is the identity of the trust fund. *Preston & Stetson v. McMillen, 58 Ala., 84; Lehman v. Lewis, 62 Ib., 129; Burks v. Burks, 7 Baxter, (Tenn.), 353; Turner v. Pettigrew, 6 Humph., (Tenn.), 438; Haines v. Haines, 54 Ill., 74.*

This distinction was applied by this court in the case of *Dyer v. Jacoway, 42 Ark,, 186*, where the right of the creditors of an estate to charge a lien upon the lands of an administrator's wife was allowed, upon the creditors showing that the administrator had erected a dwelling-house upon the wife's lands with the funds of the estate by and with her connivance. See too, *Haines v. Haines, supra.*

3. BONA FIDE PURCHASER:—Notice of adverse claims.

II. If the proof sustained the claim of W. A. Ward to the effect that he was a *bona fide* purchaser without notice of the equities of Atkinson & Co., he would be entitled to hold the land freed of their claims. But if there was nothing else in the case upon this point except the possession of the premises by Atkinson & Co., at the time he purchased, that alone would be sufficient to charge him with notice, (*Hamilton v. Fowlkes, 16 Ark., 340; Byers v. Engles, Ib., 543; Bird v. Jones, 37 Ib., 195*), and deprive him of the protection extended to an innocent purchaser. *2 Pom. Eq., sec. 1048.* It is unnecessary then to consider the other facts which tend to break down his claim of *bona fides.*

4. CONFUSION: By agent, of principal's funds with his own.

III. An effort was made by C. A. Ward to show the source from which the means came to enable him to erect the house. It was shown that his father had rendered personal services in building the house and that he owed him $150 therefor. No other item was specifically pointed out or designated. But if he mixed his own funds with those of his principal in the erection of the house it was incumbent upon him to show the amount of his own funds used, else his principals must take the whole. This is not upon the notion that strict justice will be done between the parties, but upon the ground that it is the

only justice that can be done, and that it would be inequitable to suffer the fraud of the agent or trustee to prejudice the rights of the beneficiary. *1 Perry on Trusts, sec. 128; 1 Story Eq., 468; 2 Pom. Eq., sec. 1076.*

The store-house is shown to have cost $1500. It must be taken then as proved that that amount of Atkinson & Co's. funds, less the sum of $150, went into its construction, and under the prayer for general relief they were entitled to have a charge declared upon the premises and a sale to satisfy it. They have, however, enjoyed the rents and profits, and should be charged therewith after allowing them for any taxes paid and necessary repairs made by them, treating them in the nature of mortagees in possession; but the record affords no means of determining the rental value of the premises. The order, therefore, will be that the decree be reversed, and the cause remanded with instructions to take proof upon the single issue of the net rental value of the premises during the period Atkinson & Co. have held possession, and after ascertaining the amount due on that account, to deduct it, and the sum of $150, from the $1500 which the house cost, and to declare the remainder a charge upon the premises in Atkinson & Co.'s favor, and, if necessary, sell the lands to discharge it—the $1350 of A. & Co.'s money to bear interest at 6 per cent. per annum from July 1, the date of the completion of the building, and the rents due Ward to bear interest at the same rate from the end of each month of A. & Co.'s occupancy.

St. L., I. M. & S. Ry. v. Camden Bank.

1. Negotiable Instruments: *Certificate of Indebtedness; Action.*

A certificate of a road-master, who is authorized to issue it, that the bearer is entitled to a specific sum for labor performed, and its acceptance by the laborer, constitute an account stated, on which an action may be maintained by the

47 541
d69 66
47 541
74 618
47 541
80 168
80 472
47 541
88 378

laborer, or his assignee, against the railroad company, as upon an implied promise to pay it, without reference to the items of the original account.

2. SAME: *Same.*

A written acknowledgment of a debt, signed by the maker, is an assignable instrument under the statutes, (*Mansf. Dig., Sec. 473,*) and may be sued on by the holder without making his assignor a party, though there be no written assignment upon it.

3. NON-NEGOTIABLE INSTRUMENTS: *Action on; Parties.*

An open account is not an assignable instrument, within the meaning of the statute, and a party to whom it is transferred cannot sue on it alone, but must make his assignor a party to the suit.

4. AMENDMENTS: *Parties.*

A suit in the name of a corporation, or partnership, without any allegation of incorporation or partnership, may be amended by showing the incorporation, or the members of the partnership.

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

Dodge & Johnson for Appellant.

1. The *first* query is, were these time checks negotiable paper, and if not, what were they?

2. If negotiable paper, was it not necessary to have the assignment or indorsement thereon, and if not indorsed, then were not the payees necessary parties to the suit, for the protection of defendant?

3. And in any event, were they not necessary parties for defendant's safety and protection?

It is respectfully submitted, that the identification or time check, are not negotiable papers in the eye of the law merchant, nor under the statutes of Arkansas. *Mansf. Dig., sec. 473; 1 Dan. Neg. Inst., secs. 31 to 63.*

The complaint or account, was for "money paid out to certain laborers." At whose instance and request, the account

does not state. The certificates disclosed to whom the money was paid, and defendant by this *plea* plead a non-joinder of parties. By an inspection of the certificates filed, it was discovered that none of them were indorsed, and for that reason, we presume, the plaintiff elected to sue in an action of *assumpsit* upon an open account, rather than upon the certificates. The action being to recover the amounts claimed to be due the laborers named, which plaintiff claimed it had bought, and not being assignable under our statute, the assignors of these claims were necessary parties to the action. *Mansf. Dig., sec. 4934; Newman on Pleading and Practice, pp. 78, 79, 80; Bullitt's Kentucky Code, p. 4 and notes; Dicey on Parties, pp. 60, 72, 115.*

2. The court erred in allowing the amendment to the complaint.

If the Bank of Camden was a body corporate, then the amendment was erroneous. If the Bank of Camden was a fiction, and had no existence, then there was nothing before the court to amend, and for that reason the amendment was erroneous. See *1 New Eng. Reporter, p. 432; 57 Vt., 358; 34 Arkansas, 157–8.*

Such a proceeding is the substitution of new parties and the commencement of a new action. *3 Abb. Pr., 89; Pom. on Rem., sec. 420; 1 Handy, 573; Newman Pl. and Pr., 287–8; 1 Barb., 200; 9 Ind., 273; 2 Handy, 67.*

3. The original holders of the checks should have been made parties, and not being so made, the checks were inadmissible as evidence.

At the time they were offered, the defendant objected to each of them as incompetent evidence.

1. Because, defendant having plead *non est factum*, there was no competent proof that it ever made or authorized the making of these papers.

2. Because, being in writing, there was no indorsement thereon showing that plaintiff was a *bona fide* owner of the same for value.

3. Because, being simply an open account, if anything, and not negotiable, the party named therein was a necessary party to the suit. *1 Daniel on Neg. Inst., 553; Ib., 554-5.*

B. W. Johnson for Appellee.

Under the law of assignments, in this state, every chose in action, of every class whatever, is assignable, whether notes, bonds, etc., or railroad time checks. See *Gantt's Dig., sec. 563.*

The foundation of this suit, being a "time check," signed by the proper officer of the road, and delivered to the holder, was a contract in writing, and was, at common law, only assignable in equity. *Story on Promissory Notes, sec. 117; Leading Cases in Equity, vol. 2, pp. 205, 221.*

The code, as well as the statute of this state, provides that all choses in action—things in action—that is, all contracts or rights of action growing out of contracts, either expressed or implied, may be assigned so as to vest the legal title or right of action in the assignees. *Pleadings and Practice Under the Code; Green, secs. 228, 229, 230, 233, 240, 241, 243, 623; Jacks et al. v. Nelson & Hanks, 34 Ark., 531.*

When the indorsements, both on the face and back, of these checks (stating that they were not negotiable), were placed upon them, they were mere nullities, and could have had no greater effect, and that was what was intended by them, to keep other parties from purchasing them. If they had been illegally issued, which was not the case, still the company would be bound for their payment. *Iron Mountain and Helena Railroad v. Stansel, 43 Ark., 275.*

Suit properly brought in the name of the true owner or holder of the checks. *Mansf. Dig., sec. 4933.*

COCKRILL, C. J. This action was instituted before a justice of the peace to recover upon eighteen road-master's checks, as they are called in the record, and a number of memoranda of accounts delivered by the company's section foremen to laborers employed upon their road, certifying to the road-master the amount due the several laborers for services. All are filled in on printed forms furnished by the company for the purpose. Those of the same form differ from each other only in the date and amount of the account and the person to be paid. The following is a sample of the first form, viz.:

Form 407.

$..... ROAD DEPARTMENT.

Time Check, No. 11.

St. Louis, Iron Mountain & Southern Railway,

August 31, 1882.

The bearer, Ben. Dorsey, is entitled to pay for nineteen and one-half days' service as scraper on Section No. 113, in month of August, 1882, at $4 per day. - - - - $78 00

Less board due, etc. - - - 27 16

Balance due him - - - $50 84

The above has been duly audited, and will appear upon the proper roll for the above month.

P. MCGRURY,

Division Road Master.

Received.....188.....of the Missouri Pacific Railway Company, the sum of..... dollars, in full for services rendered as..... in month of....., 18....., as above stated.

Witness: .....

WM. KERRIGAN, Supt. Division, HOUDLETTE.

Approved,

Not negotiable. See back.

And the second runs in this wise :

Form 403.

St. Louis, Iron Mountain & Southern Railway Co.

No. 22. Certificate of Time Worked.

August 31, 1882.

To Pat McGrury, Division Road Master.

I certify that Tom Cross has worked sixteen and one-half days as laborer on Section No. 113, in month of August, at $4 per day. - - - - - $66 00

And owes board, etc. - - - - 48 73

Balance due. - - - - $17 27

GEO. M. WRIGHT,
Foreman Section No. 113.

TAKE NOTICE.

This certificate will not be paid. It is given to be exchanged for Road Master's Time Check in favor of the person to whom this certificate is issued.

The company denied that it was indebted upon the accounts; (2), pleaded *non est factum*, and (3), insisted upon bringing in the assignors of the accounts as parties to the action.

A demurrer was sustained to the last paragraph of the answer.

Upon the trial it was proved that the section foreman was authorized by the company to give laborers under his control at stated periods a statement of the amount that he ascertained to be due them for services rendered, in accordance with the printed form furnished him by the company for the purpose. This statement was intended to be presented to the road-master—the section foremen's superior officer—who had authority to finally audit the accounts and put them in shape for payment by the company's paymaster. This he did by the use of the printed form designated as the road-master's time check. The

checks in suit were issued in this way, and were assigned without written indorsement to the appellees.

1. NEGOTIABLE INSTRUMENT, CERTIFICATE of INDEBTEDNESS:—Action.

The auditing of the account by the authorized agent of the company, and the acceptance of the statement by the laborer, constituted, in each case, an account stated, called in the old law *insimul computassent*. A balance being thus admitted by the company, a promise to pay it is implied, and upon this promise an action may be maintained without reference to the original items of the account. *Laycock v. Pickels, 116 Eng. Com. Law (4 B. & S.), 496; Chace v. Trafford, 116 Mass., 529; Holmes v. Drake, 1 Johns, *34.*

2. SAME.

The acknowledgment of this indebtedness being signed by an agent of the company having authority to do so, the statement becomes the evidence of an admission in writing of the debt, and is assignable within the meaning of the statute making "all agreements and contracts in writing for the payment of money" assignable. *Mansf. Dig., sec. 473; Jacks v. Nelson & Hanks, 34 Ark., 531.* As the agreement is the subject of assignment under the statute and the appellees are the real parties in interest, their assignors were not indispensable parties to the litigation. *Mansf. Dig., sec. 4933–4; Heartman v. Franks, 36 Ark., 501.* And the fact that there was no written assignment does not affect the practice. *Heartman v. Franks, supra.*

3. NON-NEGOTIABLE INSTRUMENTS:—Action on. Parties.

But this reasoning cannot apply to the foremen's memoranda of indebtedness. There is no evidence that any section foreman had authority to finally state accounts between the company and its laborers, and it is evident from the forms used by them, and put in evidence in this case, that they were intended only as memoranda or a means of information to the road-master, who alone was authorized to finally state the accounts. The implied promise to pay the balance struck that is raised from a mutual settlement of accounts is expressly repelled by the notice appended to the statement. The only ob-

ject of the foreman's certificate is there expressly stated to be for presentation to the superior officer who has authority to bind the company by his action in the matter.

The foreman's certificate cannot then be said to be an account stated and signed by the party to be charged. The appelleès are, however, the assignees of whatever amounts are due upon these open accounts and are entitled to collect them by suit in their own name. But the accounts are not contracts or agreements in writing for the payment of money or property, and are not therefore assignable so as to permit the assignee to bring his action upon them without the appearance of the assignor in some form in the action so that the judgment will bind him and protect the party to be charged. It is difficult to give a reason for dispensing with the presence of the assignor when suit is brought upon a non-negotiable instrument assigned by delivery merely, that does not apply with equal force to a suit upon an open account, but the statute makes a distinction and the courts are not at liberty to disregard its peremptory terms. "Where the assignment of a thing in action is not authorized by statute, the assignor must be a party as plaintiff or defendant." *Mansf. Dig., sec. 4934.* The defect as to parties was aptly made and the court erred in disregarding this provision of the statute. *Hicks v. Doty, 4 Bush. (Ky.), 420.*

4. AMENDMENT: Parties.

In the outset the plaintiff was described in the short statement filed with the justice of the peace as the "Camden Bank" without any allegation as to incorporation or partnership. After objection had been made upon this score by the company in the circuit court, an amendment was allowed, showing that the Camden Bank was the firm name under which C. N. Rix and John R. Rowe were transacting business, and it is argued that this was a substitution of new parties plaintiff within the inhibition of the case of *State v. Rottaken, 34 Ark., 144.* But there was in fact no substitution of parties.

The amendment only made specific what was not apparent before, and it is certain from the record that the company was not prejudiced thereby. It is only for an error prejudicial to an appellant that a judgment is reversed.

So much of the judgment as is based upon the road-master's time checks, with interest from their respective dates, is affirmed; as to the residue, it is reversed and the cause remanded for further proceedings.

CASES ARGUED AND DETERMINED

—IN THE—

SUPREME COURT

—OF THE—

STATE OF ARKANSAS

—AT THE—

NOVEMBER TERM, 1886.

STATE v. WITHROW.

1. INDICTMENT: *For obstructing public road; Certainty.*

As a road district may contain several different roads, an indictment for obstructing a public road in a given district must designate the particular road obstructed.

2. CRIMINAL PRACTICE: *Appeals to supreme court.*

This court can be more profitably employed than in settling immaterial differences of opinion between prosecuting attorneys and circuit judges; and when an indictment is quashed on demurrer, and its defects, real or supposed, can be easily amended by re-submission of the matter to the grand jury, it should be done, instead of appealing the judgment on the demurrer to this court.

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

Dan W. Jones, Attorney-General, for Appellant.

The appellee was indicted for obstructing a public highway. A demurrer to the indictment was sustained. The indictment was drawn with sufficient particularity and charges an offense against the statute. *Sec. 1865, Mansf. Dig.* It was unnecessary to define the termini of the way. *2 Arch. 1763, 8 Am. ed.; 2 Bish. Crim. Pro., sec. 1051.* The designation of the place by the number of the road district is more specific than the second count of *State v. Lemay, 13 Ark., 407.* The case of *Matthews v. State, 25 O. St., 539–40,* upholds an indictment very similar to this one.

The demurrer should have been overruled.

COCKRILL, C. J. The indictment alleges that "the said James Withrow, in the county of Madison, in the state of Arkansas, on the 10th day of March, 1885, unlawfully did obstruct a public road in district No. 21, the same then and there being a public highway," etc.

The court sustained a demurrer to the indictment and the state appealed.

1. INDICTMENT: For instructing public road—Certainty.

The description of the road given in the indictment is not certain. It is made the duty of the county courts to divide their several counties into road districts. *Mansf. Dig., sec. 5890.* This is commonly done by designating a single highway as road district of a given number. But the county court may, if it sees fit, embrace the whole or a part of several highways in a single district and put them all under the supervision of one overseer. *Dig., 5894.* When, therefore, there is no other designation than "a road in a given district," it may mean any one of several roads. It is not, therefore, certain from the indictment what road is meant. Any general designation or special description, by which the road can be definitely ascertained, will be sufficient; but that a designation which leaves it uncertain which of many or several roads in the county is in-

tended is not definite enough to sustain the charge, is seen by an inspection of the first count in the indictment in Lemay's case in *13 Ark.. 405*. See *State v. Town, etc., 12 Vt., 422; Alexander v. State, 16 Ala., 661.*

2. CRIMINAL PRACTICE:—Appeals to Supreme Court.

There is no public end to be subserved in the prosecution of an appeal by the state in any criminal case unless it is important to the correct and uniform administration of the criminal law that this court should settle the question involved in the case (*Mansf. Dig., sec. 2452*); or unless the correction of the error complained of will prevent a particular individual deemed guilty by the prosecuting officers from escaping from the meshes of the law. This appeal does not come within either category. It was an easy matter to give a certain description of the highway in this case, and when the demurrer was sustained and the indictment quashed, the matter should have been re-submitted to the grand jury instead of encumbering the records of this court with it. Our time may be more profitably employed than by settling immaterial differences of opinion between prosecuting attorneys and circuit judges.

Affirm.

STATE v. NEES.

INDICTMENT: *Perjury; Materiality of the false testimony.*

An indictment for perjury need not charge in *hæc verbæ* that the alleged false testimony was material, if it states facts from which its materiality results as a legal conclusion.

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

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

The indictment charges the appellee with perjury in willfully, feloniously and corruptly swearing falsely to a material matter, in a trial of a case before a justice of the peace, duly commissioned, acting and authorized to administer oaths, and having jurisdiction to try the case then pending.

A demurrer to this indictment was sustained.

It is submitted that the indictment was without defect of any kind, and fully complies with the requirements of *Secs. 1703–5, Mansf. Dig.*, and the rule laid down in the case of the *State v. Green, 24 Ark., 591.* The demurrer should have been overruled.

COCKRILL, C. J. The appellee was indicted for perjury and demurred to the indictment. The demurrer was sustained and the state appealed.

1. INDICTMENT: For perjury—materiality of false testimony.

The introductory averments of the indictment are not clear and concise, and it contains a great deal that is clearly useless. A studied analysis of it, however, discloses all the elements of perjury that need be charged or proved. It sets out facts from which the court can see that O. L. Nees is charged with false swearing in a judicial proceeding before a justice of the peace; that the justice had jurisdiction to hear the cause and administer the oath; that issue was joined and a trial had; that O. L. Nees was sworn as a witness, and that his testimony in the particulars set out was false. These allegations are made with the usual particularity as to time, place, the names of the parties to the suit, the justice before whom it was pending, with other details and technical averments. It was not expressly averred that the alleged false testimony was material to the issue in the cause in which it was given; but it was charged that the action was against the defendant and another, for money had and received by the defendant for the use of one Squire Rorseley; that the issue was whether the defendant had so received the

money; that he swore he had not, when in fact he knew that he had.

It is apparent from these averments that the evidence which is charged to be false was material, and when that is made to appear, it is not essential that the pleader should state the legal conclusion by alleging that the evidence was material. The court being apprised of the facts may draw the conclusion without the allegation. *Nelson v. State, 32 Ark., 192; 2 Bish. Cr. Pro., 921.*

The indictment then is direct and certain as to the party charged, the offense charged, the county in which it was committed, and the circumstances necessary to constitute it. *State v. Green, 24 Ark., 591.* This constitutes a good indictment. *Mansf. Dig., secs. 2105–7.*

Let the judgment be reversed, and the cause remanded with instructions to overrule the demurrer and for further proceedings.

GILLAN V. STATE.

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1. LIQUOR: *Selling to minor.*

One who sells liquor to another for a minor, without notice that he is purchasing for the minor, can not be convicted of a sale to the minor.

2. SAME: *Same.*

Giving liquor to a minor, or bartering, or exchanging it with him, is not within the terms of the statute prohibiting the sale of it to them, and is not indictable.

APPEAL from *Nevada* Circuit Court
Hon. L. A. BYRNE, Judge.

C. C. Hamby for Appellant.

Criminal statutes are construed strictly, and the word *sale* has a technical legal signification. *Bouvier, vol. 2., p. 492; Rapalje Law Dic., vol. 2, p. 1144.*

Sec. 1878, Mansf. Dig., only applies to *sales* to minors, and there is no law against the exchange of liquor. See *45 Ark., 351; 30 Ala., 591; 12 N. H., 390; 32 Barb., 630; 5 Heisk., 555; 65 Ind., 409.*

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

The sale to the negro and the exchange to the minor are all one transaction for the same consideration; and constitute a *sale. 45 Ark., 356.*

1. LIQUOR:—Selling to minors.

COCKRILL, C. J. The appellant was indicted for selling liquor to a minor without the consent of his parent or guardian and was convicted.

It was proved that the minor gave money to a negro to purchase liquor for him, and that the negro made the purchase of the appellant, at his saloon, in the minor's absence, without disclosing his agency. The liquor, it seems, was not to the minor's taste, and he returned it to the appellant in person at his saloon and received a different brand from him in lieu of it.

It is not contended that the appellant, when he delivered the liquor, had any reason to suspect that the negro was acting as agent for the minor. He could not then, upon that state of proof alone, be convicted of making a sale to the minor. *Foster v. State, 45 Ark., 361–67.* If the appellant was apprised, however, before the exchange was made with the minor, that he was the real purchaser, and thereafter treated the sale as incomplete by receiving back from the minor the liquor delivered to his agent and by delivering to him other liquor in its stead, upon being assured that it was not the article he desired, this would have been a delivery upon the original consideration,

and therefore a sale to the minor. The minor's testimony tended to show this was the state of the case.

2 SAME:—Exchange, etc.

But the appellant maintained that he did nothing more than exchange liquor for liquor, without an intimation that the minor had purchased the liquor of him through an agent; and he asked the court to instruct the jury that, if they believed his version to be the true state of facts, he should be acquitted. The court, however, charged the jury that an exchange was in legal effect a sale, and that the defendant should be convicted if the proof showed that he delivered liquor to the minor in exchange for other liquor.

The statute makes it a penal offense for any one to "sell, exchange, give, barter or dispose of, any spirituous liquors or wine to an Indian," (*Mansf. Dig., sec. 1879,*) but when the subject of minors is dealt with, we find that the legislature has seen fit to extend the prohibition to the single act of selling. *Ib., sec. 1878.* Giving liquor to a minor, or bartering or exchanging it with him, is not within the terms of the statute. And the statute is penal and cannot be extended by the courts to cover other cases not within its terms. That would be judicial legislation. In *Ward v. State, 45 Ark., 351,* we were forced to hold that one who gave liquor to a minor could not be convicted of selling him the liquor under this statute. Quoting with approval *Seigle v. People, 106 Ill., 89,* the court there say: "We cannot construe the word 'sell' in such a statute to mean something different from its ordinary legal import." An exchange or a barter has a different legal import from a sale, as was pointed out by this court in *I. Z. Cooper's case, 37 Ark., 412,* determined under the statute making it penal to sell, barter or otherwise dispose of, mortgaged property. See also *Meyer v. Rousseau, ante.*

Where one commodity is exchanged for another of the same or a different kind without agreement as to price or reference to money payment, the transaction is not a sale, but a

barter or exchange. *Cases supra, Gunter v. Leckey, 30 Ala., 591; Mitchell v. Gill, 12 N. H., 390; Woodford v. Peterson, 32 Bart., 630; Lampkin v. Wilson, 5 Heisk., (Tenn.), 555.*

The court erred in instructing the jury that proof of an exchange would justify a conviction under the indictment. *Stevenson v. State, 65 Ind., 409.*

Reverse the judgment and remand the cause for a new trial.

GARLAND COUNTY V. GAINES.

1. STATUTE OF LIMITATIONS: *Action to recover taxes illegally exacted.*

An action under *Section 5857, Mansf. Dig.*, to reclaim taxes paid on lands which were not taxable, is in the nature of assumpsit for money had and received, and the limitation is three years.

2. SAME: *Married women.*

The act of April 28, 1873, (*Mansf. Dig., secs. 4623–31*) which gives to married women entire control over their property and the right to sue alone in reference to it, took away their disability of coverture, and by implication repealed so much of *Section 4489 of Mansf. Dig.*, as exempted married women from the operation of the statute of limitations. This does not conflict with *Hershey v. Latham, 42 Ark., 305.*

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

J. P. Henderson, Prosecuting Attorney, and *Dan W. Jones*, Attorney General, for Appellant.

Appellee was barred by the statute of limitations under *Sec. 4478, Mansf. Dig.*, the last payment of these taxes being on the 10th day of April, 1876, and the suit not commenced until 8th October, 1879. If these taxes were erroneously paid as alleged, the amount paid could at best only amount

to a liability against the appellant; and to recover the same back, under *Section 4478*, the action must be for money had and received. *Sec. 5587, Ib.*, provides for the recovery of taxes paid on property "erroneously assessed," and it is only by this provision of the statute that it can be recovered as a liability created by law. *5 Cent. L. J., 430.*

And the action must be for money had and received. *Bur. Tax., 252, 265–6, 368–9, 439–40; Ark. Just., 127–8; 2 Greenl. Ev., 123; 27 Ark., 675; 2 Dill. Mun. Cor., 935, 947; Peo. v. Brooklyn, 1 Wend., 318, S. C., 19 Am. Dec., 502.*

An action for money had and received under our statute would have to be commenced within three years next after the cause of action accrued. It is not a suit by contract because there has been nothing done by either party that by any construction of law can be construed into a contract to pay or repay the taxes. The authority is from the legislature. *Blackwell Tax. Tit., 7; Const. Ark., art. 10, 2 and 5, 1868; 2d sec. 25, 1874; Bur. Tax., 194, 253.*

But the appellee was and is a married woman, and on this account alone the court held that the statute of limitations did not run as to her. In actions at law plaintiffs are held strictly to the allegations of their complaint, and to remove the bar of the statute by reason of disability must allege and prove it strictly. *7 Wait's Act. & Def., 273.* The complaint in this cause fails to do this; she joins her husband with the other plaintiffs and the allegation as to her being a married woman is only descriptive and not intended for the purpose of claiming any disability. When the claims were found to be barred the demurrer should have been sustained. *31 Ark., 684.* Appellee's husband rested under no disability and was responsible to her, and if he failed to inform her of what was done she cannot take anything by his negligence. She must recover of her agent, if she has actually paid out money of her own, of which there is no allegation or proof. *10 Ark., 228; Story Agen., 3*

ed., secs. 217 to 235. Being a married woman she must sue within the period of limitation or wait until discoverture. *16 Ark., 154; Sec. 4489, Mansf. Dig.* The last named section was perhaps repealed by the act of 28th April, 1873, in so far as her disability to sue during coverture is concerned. This idea is not inimical to the holding in *Hershy v. Latham, 42 Ark., 305. Section 4471* says after "discoverture;" *4489* after "disability." A payment by one joint debtor is payment by all. *Burr v. Williams, 20 Ark., 189.* Recovery by appellee would be a recovery by all, and would she not be recovering money she never paid? Does this case not come within *Carter v. Carter, 16 Ark., 154?* The payment was voluntary. *Burrill's Dict., Voluntary payment of Taxes; Burrough Tax, 266–7–8–9, 442–3–6; 3 Cent. L. J., 596; 4 Ib., 58, 215, 429; 19 Ib., 457; 34 Ala., 400; 30 Conn., 394; 16 Kans., 587; 14 Ia., 68; Ib., 226.*

The words erroneously assessed in *Sec. 5857 Digest,* mean by mistake; there could have been no mistake when the taxes were voluntarily paid. *1 Story Eq., 110.*

R. G. Davies for Appellee.

The statute means what it says and not what the law was before it was passed. *Mansf. Dig., sec. 5857.*

SMITH, J. The heirs of Ludovicus Belding, four in number, applied to the Garland county court to refund certain taxes which, it was claimed, had been erroneously paid upon a tract of land, of which they had supposed themselves to be the owners, but which was afterwards discovered to be the property of the United States. The taxes were paid in the years 1874, 1875 and 1876, the last payment being made April 10, 1876.

The petition alleged that Maria Gaines was at the time the cause of action accrued, and still is, the wife of William H. Gaines.

The county court rejected the claim and the petitioners appealed. In the circuit court the defendant interposed a general demurrer, which was overruled. The answer set up, among other defenses, the statute of limitations. The issues of fact were submitted to the court, a jury being waived, and the finding was, that all of the claimants were barred except Mrs. Gaines. Judgment was therefore given in her favor for the recovery of her share of the taxes paid, being one-fourth of the whole. The county alone appealed.

1. STATUTE OF LIMITATIONS :— On action to recover taxes illegally exacted.

The general rule is, that in the absence of a statutory enactment, money voluntarily paid for illegal taxes, under mistake of law, but with knowledge of all the facts, cannot be recovered back. However, *Sec. 5857, Mansf. Dig.*, enables the taxpayer to reclaim taxes which he has paid on land that is not taxable. The action is in substance assumpsit for money had and received, and the limitation is three years. *Mansf. Dig., sec. 4478.* But by act of December 14, 1844, (*Mansf. Dig., sec. 4489,*) if any person entitled to bring any action, shall, at the time of the accrual of the cause of action, be under twenty-one years of age, or insane, or a married woman, etc., such person shall be at liberty to bring such action within the time limited by law, after such disability may be removed. To prevent the running of the statute, the disability to sue must exist at the accrual of the action.

2. SAME: Married woman.

Now, Mrs. Gaines labored under no disability at the time that any of these payments were made; for the common law disability of coverture had been removed by the act of April 28, 1873. (*Mansf. Dig., secs. 4623–31.*)

This act gave her sole and entire control over her property, and authorized her to sue alone or be sued in the courts in respect of her property. It repealed by implication so much of the act of December 14, 1844, as exempted married women from the operation of the statute of limitations. Mrs. Gaines might have sued, without joining her husband, to recover these

taxes on the day after she had paid them. *Kibbe v. Ditto, 93 U. S., 674; Castnor v. Walrod, 83 Ill., 172; Brown v. Cousens, 51 Me., 305; Cameron v. Smith, 50 Cal., 303; Pope v. Hooper, 6 Neb., 178; Ball v. Bullard, 52 Barb., 146.*

This is the true ground of decision in *McGoughy v. Brown, 46 Ark., 25.* Mrs. Price, the married woman in that case, was barred of her suit, not only because the five years' statute, applicable to judicial sales, contained no exemption in favor of married women, for the general saving clause in the subsequent act of 1844 would have protected her, but because the legislature had removed her disability more than five years before she exhibited her bill. *Hershy v. Latham, 42 Ark, 305,* stands on the peculiar language of the act of 1851, (*Mansf. Dig., sec. 4471,*) limiting actions for the recovery of lands. That act gives a married woman three years within which to sue, after she becomes discovert; not after removal of her disability.

Reversed and remanded for further proceedings.

RICHARDSON V. STATE.

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PHYSICIANS: *Practising without registration.*

The statute regulating the practice of medicine (*Mansf. Dig., sec. 4641, et seq.,*) does not require a license to practice, but registration in the office of the county clerk of some county in the state. But upon trial of a defendant in the circuit court, on appeal from a justice of the peace, on a warrant for practising without *license,* he may be convicted if the court explains to the jury that the offense for which he is on trial is the failure to register.

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

DuVal & Cravens for Appellant.

1. The affidavit and warrant do not charge a public offense. The charge is of *practising medicine without license.* There is no law requiring license to practise medicine in this state. *Sec. 4641, Mansf. Dig.*, only requires registration, and an indictment which does not in some form allege a failure to register charges no offense. *State v. Fussell, 45 Ark., 658.*

2. The evidence fails to show that appellant practised medicine in any sense.

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

In *State v. Fussell, 45 Ark., 65*, the *indictment* did not charge an offense; this case originated before a justice of the peace, and the charge was immaterial after the appellant was once brought into court. *Watson v. State, 29 Ark., 299; Kinkead v. State, 45 Ib., 538.* The court having acquired jurisdiction could try and punish him for his offense. The jury found that he practised, his own witness saying, "he was not eligible to the practice of medicine." He himself did not testify. If he was "ineligible" he was unregistered; if he was unregistered he committed an offense in practising, which the court had jurisdiction to try and punish. It devolved on him to show this, as it was a matter peculiarly within his own knowledge, that is, if he was registered. *45 Ark., 298; Greenl. Ev., 12 ed., sec. 79; 3 B. Monroe, 342; 7 Blackf., 99.* He should have shown his certificate of registration. He appears to have been a cancer cure quack and a charlatan, and the court tried him for practising without registration and imposed the fine for that offense. *Sec. 4655, Mansf. Dig.*

1. PHYSICIAN: Practising without registration.

SMITH, J. The defendant was charged before a justice of the peace with practising medicine without license. Having

been convicted, he appealed to the circuit court, where he was again tried, convicted and fined. He filed a motion for a new trial upon the following grounds: First. That the affidavit (and warrant) did not charge a public offense. Second. That the verdict of the jury was contrary to the weight of evidence. Third. That the verdict was contrary to law. Fourth. That the verdict was contrary to the instructions of the court. Fifth. That the defendant has discovered new evidence since the trial.

The last mentioned ground is not sustained by any affidavit setting forth what the newly discovered testimony is.

Of the third and fourth grounds, it suffices to say that the charge of the court is not contained in the record; therefore, we are unable to judge of the truth of these assignments.

But it is insisted that the first and second grounds are sufficient to secure a reversal.

The statute prohibits, under a penalty, all persons from practising medicine or surgery as a profession without being first duly registered as a practitioner in the office of the clerk of the county court of some county in the state. And it defines a physician or surgeon to be one who prescribes or administers medicine for, or in any manner treats, diseases or wounds, for pay. Registration is granted upon a certificate of qualification, after examination by a medical board, or upon satisfactory proof before the county clerk that the applicant was continuously engaged in reputable practice of his profession for a period of five years next before the passage of the act. (March 9, 1881.) *Mansf. Dig., sec. 4641, et seq.*

Such legislation is a valid exercise of the police power of the state. The object is to protect the public health against the impositions of charlatans and empirics, who pretend to an art requiring skill, without a previous special training.

Now the law does not require a license. Registration is the substantive thing, as was pointed out in *State v. Fussell,*

45 Ark., 65. Still proceedings before a justice of the peace are not very narrowly scrutinized in matters of form. A defective statement in the affidavit and warrant of arrest, of the offense for which the defendant was prosecuted, could not be taken advantage of. *Watson v. State, 29 Ark., 299; Kinkead v. State, 45 Id., 536.*

The act of registering might be called in popular parlance a license to practise; just as the enrolment of an attorney in a court of record is his license to practise law. At all events, in the absence of the court's charge, it will be presumed that it was properly explained to the jury that the offense for which the appellant was on trial was a failure to register.

It remains to consider the second assignment; whether the testimony showed that the appellant practised medicine.

Miss Alice Stewart, being sworn on the part of the state, said: "I am acquainted with J. K. Richardson. I was acquainted with Mrs. Hattie Goff. I was present on two occasions when J. K. Richardson was at Mrs. Goff's, when Mrs. Goff requested me to get some money of hers and give it to J. K. Richardson. Mrs. Goff was afflicted with dropsy and cancer. Dr. H. Brandon treated her for dropsy. I saw J. K. Richardson, then with Brandon, at Mrs. Goff's several times with H. Brandon. J. K. Richardson came several times by himself and applied medicine or plaster to Mrs. Goff's cancer. I understood that J. K. Richardson charged the money that I handed him at the request of Mrs. Goff."

The same witness, on cross-examination, said: "I might have sworn on the trial before, of this cause, that I did not know anything about a contract with J. K. Richardson and Mrs. Goff."

And the defendant, in his behalf, offered the following testimony:

"STATE OF KANSAS, }
"SEDGWICK COUNTY. } SS.

"WICHITA, KANSAS, April 8, 1886.

"Personally appeared before me, a Notary Public, Dr. H. Brandon, who is a citizen of Wichita, Kansas, and being duly sworn, says: That during the fall and summer of last year, 1885, he was practising medicine in the city of Eureka Springs, Arkansas. That whilst there, perhaps in latter part of September, or October, 1885, he met Dr. J. K. Richardson, who was not eligible to the practice of medicine. At the time he spoke to me he claimed to be a student of medicine and said he wished to continue his studies under me; that if I would furnish the books and give him all the instructions I could, he would compensate me as much as he could; said he had but little money, but was in possession of a very excellent remedy for curing cancer. I told him if he would give me his treatment for cancer that I would get the books and take him as a student and give him instruction as much as possible, to which we agreed. He then went into my office as a student of medicine. While he was with me I treated several cases of cancer, amongst whom was a Mrs. Goff. I agreed to doctor her for five dollars per week, which she paid. At different times I told Dr. Richardson to go and see the case and report to me the condition of the same. I told him on several occasions that if any one wanted to pay him any money, he might receive it and report the same to me, which he did on one or two occasions. Mrs. Goff paid him some money which he turned over to me. Dr. Richardson never collected any money that he did not turn over to me while he was in my office, to my knowledge. H. BRANDON."

The verdict is not at all satisfactory to us. It was not a case of conflicting evidence; every word of the evidence can be reconciled. Taken altogether, it fairly shows that the defendant rendered such services as a nurse might have rendered,

and that the money he received was collected by him as an agent and was paid over to his principal. But the weight of evidence and the credibility of witnesses are to be determined by the jury. It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence. But when the case reaches us, the question is no longer whether the evidence preponderates on one side or the other, or whether due credit has been given to the statements of a witness who has testified fully and fairly. But the question is, whether there is a failure of proof on a material point. To order a new trial because we differ in opinion from the circuit judge as to the weight of the testimony, or the truth or falsity of a witness, is to substitute our discretion for his discretion. And in this matter he is supposed to enjoy some advantages over us. *Funkhouser v. Pogue, 13 Ark., 295; Bivens v. State, 11 Id., 455; Stanton v. State, 13 Id., 317; Bennett v. State, 13 Id., 694; Hubbard v. State, 10 Id., 378; Miller v. Ratliff, 14 Id., 419; McDaniel v. Parks, 19 Id., 671.*

There were but two questions of fact in the case. 1. Was the defendant registered as a physician or surgeon? 2. If not, did he practise? His own witness said, "he was not eligible to the practice of medicine." We take this to mean that he was unregistered. At any rate, if he held a certificate of registration, it devolved upon him to show it; this being a fact particularly within his own knowledge. *Flower v. State, 39 Ark., 209, and cases cited; K. C., S. & Memphis R. R. v Summers, 45 Id., 295.*

Then, discarding the deposition of Dr. Brandon, as the jury seems to have discarded it, and looking alone to the statements of the state's witness, the conclusion cannot be said to be without evidence to support it. He administered medicine to Mrs. Goff; he treated her for a certain disease, and he received money for his services.

The judgment must be affirmed.

WARWICK v. STATE.

CRIMINAL LAW: *Lawful jury.*

By agreement of the parties a defendant in a misdemeanor case may be tried by a jury of less than twelve jurors; but mere waiver of the requisite number by failing to object to less will not authorize a trial by less than twelve.

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

E. W. Rector for Appellant.

1. The constitution fixes the number of jurors in criminal cases at *twelve*, and the number cannot be less even by agreement. *Sec. 7, art. 11, Bill of Rights.*

The defendant may *waive* a trial by jury, in misdemeanors, under *Sec. 2184, Mansf. Dig.*

But *Sec. 2219, Ib.*, providing for a trial by less than *twelve* jurors by agreement, is unconstitutional.

The word jury, as used in the constitution, means *twelve* men, and the legislature cannot change it even by agreement of parties. *C. & F. Ry. v. Trout, 32 Ark., 25; Govan v. Jackson, Ib., 553; 18 N. Y., 128; 1 How., (Miss.), 163; 4 Ib., 163; 5 Sm. & Marsh., 664; Cooley Const. Lim, 5 ed., top p. 391; 38 Tex., 504.*

2. Appellant never agreed or consented to be tried by eleven jurors. The case should have been withdrawn from the jury, and tried anew. *19 Am. Rep., 30.*

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

It was not known until the evidence had all been adduced, and the instructions given, that only eleven jurors had been

accepted. The appellee had not agreed to accept eleven instead of a full panel. When the discovery was made the judge ordered another juror to be sworn, and stated that the whole matter would have to be gone over. The appellant objected to the swearing of the other juror, whereupon, the court ordered the eleven to retire and consider of their verdict, and they acted accordingly.

The objection of appellant was equivalent to a waiver of a full panel, and this he could do. *Sec. 2219, Mansf. Dig.*

Appellant could not trifle with the court in the manner attempted. He had no merit in his case, and produced no evidence whatever against that of the state, and it is acknowledged the state made out the case. This is the only point raised.

SMITH, J. Warwick was indicted for being interested in the sale of liquor to a minor, pleaded "not guilty," was tried by a jury of eleven men, was convicted by their verdict, and was fined. He moved for a new trial, and also in arrest of judgment, because his trial had taken place before a jury of less than twelve, without his consent, as he alleged.

We will let the bill of exceptions tell the story.

"Upon the calling of said cause for trial, the defendant was asked by the court, if he would agree to try said cause with a less number of jurors than twelve, which agreement the defendant declined to make, and a full jury of twelve were ordered into the jury-box by the court; but, by mistake, a jury of eleven were empaneled, and, without objection by defendant, were sworn to try the cause.

"The plaintiff, to maintain the issue upon its part, offered evidence which clearly proved the allegations in the indictment, and which was all the evidence offered in said trial by either party, the defendant having offered none. Whereupon,

the case was submitted without argument, and said court, upon its own motion, instructed the jury upon the law of the case; to which instructions there were no objections made; and while the jury were being instructed as to the law of the case, it was discovered that the jury was composed of only eleven men. Whereupon, the court ordered another juror into the jury-box for the purpose of completing the panel, and stated that the cause would all have to be gone over; to which order the defendant, at the time objected. Whereupon, the court directed said jury of eleven to retire and consider of their verdict. The jury under said instructions of the court, found the defendant guilty."

The bill of rights provides that the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties, in all cases, in the manner prescribed by law.

1. Requisite number of trial jury.

Sec. 2219, Mansf. Dig., is as follows: The jurors for the trial of criminal prosecutions shall be selected and summoned as provided by law, and shall be composed of twelve jurors. Provided, That cases other than felony may, by agreement of the parties, be tried by a jury of less than twelve jurors.

The word "jury" is used in the constitution in its common law sense, and means twelve men. *C. & F. R. Co. v Trout, 32 Ark., 25, and cases there cited.* It is said in the last mentioned case that the legislature cannot abridge the number. And it is contended here, that the statute above quoted is an attempted abridgment, and, therefore, unconstitutional. But we do not so regard it. The trial jury still consists of twelve, unless the prisoner consents to be tried by a less number. We see no constitutional objection to the giving of such consent, when the same instrument permits him to waive a jury altogether, and submit his case to the court. *Volenti non fit injuria.* Accordingly, in a case of misdemeanor, a verdict against him

rendered by less than twelve jurors, after an agreement to abide their finding, would be allowed to stand. The authorities cited by counsel show, however, that the decisions are not entirely harmonious on this question. Compare *1 Bishop Cr. Pro., sec. 898, 3 ed.*

Does the bill of exceptions show that the defendant agreed to be tried by a jury of eleven? Certainly not, at the time of empaneling a jury. For not only did he expressly refuse to waive his constitutional right, but he was ignorant, until near the close of the trial, that the panel was not full. So, if there was any such agreement, it must be implied from the defendant's objection, when the mistake was discovered, to the addition of another juror and beginning the trial anew. The court seems to have considered that proceeding with the trial before the eleven already empaneled was the necessary consequence of sustaining the objection interposed by the defendant himself, and was therefore not without his consent.

"Waiver is analogous to estoppel, or a species of it. The principle is, that one should not object to what has been done with his consent. And the consent may be as well implied as expressed. . . . . If the defendant has consented to any step in the proceeding, or if it had been taken at his request, or he did not object at the proper time, when he might, he cannot afterwards complain of it, however contrary it was to his constitutional, statutory or common law rights." *1 Bishop Cr. Pro., sec. 117–18.*

This doctrine was applied in *Rush Johnson's case, 43 Ark., 391*, where the prisoner was put upon trial without having been furnished with a copy of the indictment.

But the phrase "agreement of the parties" in the statute is stronger than waiver. It implies that the attorney for the state and the defendant, with the commission of the presiding judge, gave their consent to a departure from established forms of trial in criminal cases.

Now, it does not affirmatively appear from this record that the defendant ever consented to be tried by eleven men. True, he objected to taking the case from the eleven, swearing another juror, and rehearing the evidence and instructions before the augmented body. No doubt the defendant shaped his course so as to take advantage of every legal right, however the court might rule. But the discharge of the eleven jurors would not have operated as an acquittal. *Whitmore v. State, 43 Ark., 271,* was a case of felony. And the doctrine of former jeopardy has not the same application to misdemeanors punishable by fine alone. *Jones v. State, 15 Ark., 261; State v. Czarnikow, 20 Id., 160; State v. Nichols, 38 Id., 550; Southworth v. State, 42 Id., 270; Taylor v. State, 36 Id., 84; Steck v. State, 28 Id., 113.*

Besides, the jury being illegally constituted, without the defendant's consent, he was in no peril even of suffering the punishment denounced by the law against petty offenders. The proper course to pursue was to discharge the eleven jurors and award a venire *de novo.*

Reversed and a new trial ordered.

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ELSEY ET AL. V. STATE.

1. CRIMINAL PLEADING: *Indictment for conspiracy.*

A conspiracy to commit a felony is merged in the felony when actually consummated; and so an indictment for a conspiracy to commit a felony must allege that the felony was not committed. After the felony is consummated, the conspiracy is not indictable.

2. CRIMINAL LAW; *Forgery.*

To constitute the offense of uttering and publishing a forged writing, there must be an intent to defraud and a knowledge of the falsity of the instrument.

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

Ed. H. Mathes, for Appellants.

Under our statute, *Mansf. Dig., sec. 1822*, only a conspiracy to commit "any felony" is indictable, and that, too, where "some advance thereto" is "made without committing the felony." An overt act is an essential incident of the offense. *2 Fed. Rep., 754; 2 Bish. Cr. Law, sec. 151, et seq.*

It seems entirely clear that the legislature, having provided explicitly what kind of conspiracy, and under what particular attending circumstances, should be indictable and punishable, excludes all others.

1. The misdemeanor charged in the indictment, to-wit: Conspiring to commit a felony, was merged when the felony was committed.

2. The demurrer should have been sustained because the indictment did not charge, substantially, in the language of the statute, that there was a conspiracy, an overt act, etc., and that the felony was not committed. *6 Ark., 131; 5 Mass., 105; 51 Am. Dec., 75; 9 Cow., 578; 4 Wend., 230; 66 Ind., 223; Wharton Cr. Law, sec. 566.*

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

Appellants were charged with conspiracy in taking forged county warrants, knowing them to be such, and directing and having suit brought upon them with the intent to defraud Franklin county of a large sum of money. That is, they had conspired to obtain money under false pretenses. *Sec. 1645, Mansf. Dig.* Though the institution of the suit may have been an utterance of the forged instruments, yet it was not a consummation of the conspiracy; it was merely "an advance

thereto." They conspired to get money; not merely to bring an action. *Sec. 1822, Mansf. Dig.*, became applicable.

BATTLE, J. The appellants, F. M. Elsey and H. Elsey, and E. A Cope, were jointly indicted in the Franklin circuit court for the Ozark district, for a conspiracy to utter and publish for true and genuine, certain forged Franklin county warrants, purporting to be good, genuine and valid warrants of Franklin county, for the payment of money, well-knowing the same to be forged, with intent to defraud and cheat Franklin county out of a large sum of money. Cope died, and the indictment was dismissed as to him. Appellants demurred to the indictment because it does not state facts sufficient to constitute a public offense. The demurrer was overruled, and appellants pleaded not guilty, and were tried.

In the trial, evidence was introduced tending to prove that appellants and Cope, at the time and place mentioned in the indictment, had in their possession a large amount of forged warrants of Franklin county, which they knew to be such; that they conspired to institute suit against Franklin county upon the warrants in the district court of the United States for the Western District of Arkansas, in the name of Mathes & Whittaker, of St. Louis, Mo., but in fact for their own use and benefit; that, on the 28th of August, 1884, in Franklin county, in furtherance of their conspiracy, they placed the warrants in a letter, directed to S. D. McReynolds, of Bentonville, Ark., and deposited it in the post-office at Ozark, for the purpose of having suit brought, as they had conspired to do; and that, on the 1st of September, 1884, they placed the warrants in the hands of Ed. H. Mathes with instructions to take the same to Fort Smith, Ark., and deliver them to DuVal & Cravens, attorneys at law, and to direct them to bring suit thereon as the defendants had agreed to do. It was proven that DuVal & Cravens, in October, 1884, instituted suit upon the warrants according to the instructions sent to them.

Appellants asked the court to instruct the jury as follows:

"If the jury find from the evidence that the defendants, or either of them, actually brought the suit in the United States court, at Fort Smith, as mentioned in the indictment as being one of the objects of the conspiracy, or that they or either of them, directly or by agent or attorney, delivered the scrip to W. M. Cravens, or DuVal & Cravens, at Fort Smith, for the purpose of having suit brought thereon in the United States court at Fort Smith, they will acquit the defendants."

But the court refused to give the instruction.

Appellants were convicted. They moved for a new trial, which was denied; saved exceptions and appealed.

I. The indictment in this case fails to state that the defendants therein did not publish and utter the Franklin county warrants as they had conspired to do. Appellants contend that it is fatally defective on account of this failure. 1. Indictment for conspiracy.

It is contended that a conspiracy to commit a felony merges in the felony when it is actually consummated, and that the conspiracy is not indictable after the merger. This doctrine has been held by many of the American courts and has been sturdily resisted and rejected by others. It was, doubtless, with the view of settling this question in this state the statute was enacted, which provides that, "if two or more persons shall agree and conspire to commit any felony, and make some advance thereto, without committing the felony, they shall be deemed guilty of a misdemeanor." Under this statute there cannot be any doubt about the rule contended for by appellants being the law in this state. *Mansf. Dig., sec. 1822.*

It is a familiar rule of criminal pleading that when an act is only indictable under certain conditions, these conditions must be stated in the indictment in order to show that the act is indictable. Under the statutes of this state a conspiracy to commit a felony is not indictable after the felony has been com-

mitted. It was, therefore, necessary for the state to have alleged in the indictment in this case that the felony appellants are charged with conspiring to commit was not committed.

2. FORGERY: What is uttering.

II. Another question in the case, presented by the evidence, and the instruction requested by appellants and refused by the court, is, what is necessary to constitute an uttering? To utter and publish a document is to offer, directly or indirectly, by words or actions, such document as good. To constitute the offense of uttering and publishing a forged writing it is necessary that there be an intent to defraud, and that there should be a knowledge of the falsity of the document. A receipt may be uttered by the mere exhibition of it to one with whom the party is claiming credit for it, though he refuse to part with the possession. The putting of a forged deed upon record as genuine has been held to be an uttering of it; and so has the bringing of a suit upon a forged paper. *Wharton's Criminal Law, 9 ed., secs. 703, 705; 2 Bishop on Criminal Law, 6 ed., sec. 605; People v. Caton, 25 Mich., 388; Perkins v. People, 27 Mich., 386; Chahoon v. Com., 20 Grat., 733.*

The court below erred in overruling appellants' demurrer and motion for new trial.

The judgment of the court below is, therefore, reversed, and this cause is remanded with an instruction to that court to sustain the demurrer.

SYLLABUS INDEX.

ACTION.

See ADMINISTRATION, 3.

1. *None on an illegal or immoral act.*

No court will aid a man whose cause of action is founded upon an illegal or immoral act. Whenever the action appears to arise *ex turpi causa*, or from the transgression of the law, the courts refuse their assistance—not for the sake of the defendant, but because they will not aid such a plaintiff. *Martin v. Hodge*, 378

2. *Test as to illegality.*

The test to determine whether an action arises *ex turpi causa* is the plaintiff's ability to establish his case without any aid from an illegal transaction. If his claim or right to recover depends on a transaction which is *malum in se*, or prohibited by law, and which he must prove in order to make out his case, he cannot recover. *Ibid.*

3. PARTIES: *Action for property of decedent.*

Although the debts of an estate have not been paid and there has been no final settlement of it, and notwithstanding the administrator is the proper party to sue for a conversion of the intestate's effects, his heirs cannot be forever kept out of their rights in the property by the neglect of the administrator, or of creditors to enforce payment of their demands, but may sue for them. *Graves v. Pinchback*, 470

ACKNOWLEDGMENT.

1. *Curing act.*

A justice of the peace of another state is not authorized to take acknowledgments of deeds for lands in Arkansas, and such an acknowledgment does not authorize the recording of the deed, but the defect of such acknowledgment was cured by the curing act of 1883 (*Mans. Dig, sec. 683,*) in all deeds recorded prior to the 1st day of January, 1883. *Apel v. Kelsey*, 413

ADMINISTRATION.

See ACTION, 3. RES JUDICATA. TRUSTS, 3.

1. *Rights of creditors and distributees.*

The claims of creditors of an estate are paramount to those of distributees, and the latter can assert no claims to assets which are needed to pay creditors. *State, use, etc., v. Roth*, 222

2. *Same.*

The probate court is the tribunal to determine who are creditors of an estate and when there is a sufficiency of assets to pay their claims without resort to a particular fund claimed by the distributees. *Ibid.*

3. *Action on administrator's bond.*

No action can be maintained upon an administrator's bond for a *devastavit*, either by creditors or distributees, until an order of the probate court, directing payment of the amount found due to the plaintiffs upon settlement there, has been violated. *Ibid.*

4. *Petition to sell land; Where to be filed.*

The petition for the sale of a decedent's lands for payment of debts must be filed in the probate court of the county in which the administration is pending. *Apel v. Kelsey,* 413

5. *Notice of application to sell land.*

The omission to give any notice of an intended application for the sale of lands or to have the lands appraised by three householders of the county, or to advertise the sale as required by law, are all merely errors to be corrected on appeal, and do not affect the jurisdiction of the court to order the sale or confirm it after it is made. These are all cured by a confirmation of a sale made under an order of the court. *Ibid.*

6. *Sales must be confirmed.*

A probate sale of land for payment of debts is a judicial sale and passes no title until it is confirmed; and confirmation must be proved, it cannot be presumed. *Ibid.*

AFFIDAVIT.

See ATTACHMENTS, 2, 3, 4, 5.

AGENTS.

See COUNTY, 1.

AMENDMENTS.

1. *Parties.*

A suit in the name of a corporation, or partnership, without any allegation of incorporation or partnership, may be amended by showing the incorporation, or the members of the partnership. *St. L., I. M. & S. Ry. v. Camden Bank,* 541

APPEAL AND WRIT OF ERROR.

See CRIMINAL PRACTICE.

1. *Parties to.*

Heirs of a decedent who were not parties to the suit of an administrator in the court below for the sale of a decedent's lands for the payment of his debts, can not prosecute an appeal or writ of error from the judgment of the lower

court. None but parties to the proceedings below, or the legal representatives of parties, can prosecute an appeal or writ of error. The case of *Gregg v. Gregg, 35 Ark., 89,* is, on this point, overruled. *Arnett v. McCain.* 411

APPROPRIATION OF PAYMENTS.

See MORTGAGE, I.

1. *Running account.*

When, in the absence of appropriation by a debtor, the creditor appropriates payments from him to a running account, the law will apply them to the items of the account in the order of their dates. *Kline v. Ragland,* 111

2. *Debts not due.*

A creditor cannot appropriate payments to debts not due without the consent of the debtor. *Ibid.*

ASSIGNMENTS.

1. *Preferences; Releases; Reservation of surplus; Attachment.*

An assignor may make preferences, and exact releases from creditors who assent to the assignment, but if he reserves to himself, to the exclusion of non-assenting creditors, the surplus that remains, the deed is fraudulent upon its face, and will justify an attachment by a non-assenting creditor, of the property assigned. *McReynolds v. Dedman,* 348

2. *When void as to creditors; Clayton v. Johnson, 36 Ark., 406, overruled.*

An assignment of a debtor for the benefit of creditors which provides that no creditor shall participate in the assets unless he will accept his share in full satisfaction of his claim, and gives no direction for the application of the surplus after satisfying assenting creditors, (which is the same in legal effect as directing such surplus to be returned to himself,) is void upon its face. The case of *Clayton v. Johnson, 36 Ark., 406,* is, on this point, overruled. *Collier v. Davis,* 367

3. *Same.*

Such deed of assignment is also void for not designating a time within which creditors are to accept the provision made for them and surrender their debts, *Ibid.*

4. SAME: *To be administered under direction of assenting creditors.*

An assignment which provides that it be administered and closed up under the supervision of the creditors who assent to it is void. The effect of such provision is to give a bare majority of the assenting creditors complete control and power to delay the closing of the trust *ad libitum,* without any redress to creditors who are injured by the delay, for the assignee is executing the trust according to its terms. *Ibid.*

5. SAME: *Giving discretionary power to assignee.*

The statute prescribes the duties of an assignee, and an assignment which gives him any discretionary powers, or authorizes him to dispose of the property assigned, or to settle up the estate, in a manner different from that prescribed by the statute, is void. *Ibid*

ATTACHMENTS.

See ASSIGNMENTS, 1.

1. *Intervention by second attacher.*

A junior attaching creditor may intervene in a prior attachment suit, and there contest his rights with the plaintiff in that suit; but he can not be let in to defend the suit and dispute the grounds of the attachment in lieu of the defendant, nor to defeat the attachment for mere errors or irregularities in the proceedings; but only for imperfections which are unamendable and render the proceedings void. *Sannoner v. Jacobson & Co.*, . 31

2. *Complaint and affidavit.*

There can be no attachment without a complaint; and properly the affidavit for attachment should be distinct from the complaint, but both may be included in one paper; and if only the affidavit be filed it will be sufficient for both, if it contains all the essentials of both. *Ibid.*

3. *The affidavit on belief.*

An affidavit for an attachment must be positive. If made upon belief only, the attachment may be quashed. But it is amendable, and not void, and therefore is not assailable by an intervenor in the action. *Ibid.*

4. *Affidavit not signed.*

An affidavit for attachment made by one of a firm, thus, "I, Robert Powell, state," etc., and signed, "Forrester & Powell," is sufficient; but if not signed at all it would be cured by amendment. *Fortenheim v. Claflin*, 49

5. AFFIDAVIT; *Without jurat, amendable.*

An affidavit is not a nullity for the omission of the jurat of the officer administering the oath, but is amendable. *Ibid.*

6. *Affidavit under Sec. 348, Mansfield's Digest.*

The affidavit required by *Sec. 348, Mansfield's Digest*, of the non-existence of personal property before an order for sale of attached lands can be made, is not required where a constable has levied an attachment on land and certified that the defendant has no personal property. . *Webster v. Daniel & Straus*, 131

7. *Indemnifying bond before sale; Presumption.*

In an action by the former owner for the recovery of land from a purchaser at a sale under an attachment, his deed from the sheriff duly acknowledged and recorded and containing the recitals required by the statute is *prima facie* evidence of the legality and regularity of the attachment proceedings, and in the absence of evidence whether the indemnifying bond required by the statute was or was not filed before the sale, it will be presumed that it was filed. *Ibid.*

8. *Return of nulla bona before filing transcript from J. P.*

The failure of a constable to make a return of *nulla bona* before the transcript of a J. P. is filed in the clerk's office, is at most but an irregularity, which can be taken advantage of only by the defendant in the judgment by a direct proceeding to quash the process issued upon the judgment. *Ibid.*

9. *Confirmation of sale.*

A sale of land under an execution issued by the clerk of the circuit court upon the transcript of a justice of the peace in proceedings by attachment needs no confirmation by the court. *Ibid.*

10. *Jurisdiction as to garnishee.*

Since the adoption of the civil code the jurisdiction of the circuit court over the funds in the hands of a garnishee does not depend upon the amount of his indebtedness to the debtor, and it is error to dismiss the garnishee because his indebtedness does not exceed one hundred dollars. *Moore & Co. v. Kelley et al.,* 219

ATTORNEY AND CLIENT.

1. *Attorney's lien for fees.*

A solicitor has no lien upon his client's land for his fee for services rendered in removing a cloud from his title to it. The lien provided by *sec. 3937, Mansf. Dig.*, is limited to cases where there has been an actual recovery, and can not be extended to professional services which merely protect an existing title or right to property. *Hershey v. Du Val & Cravens,* 86

BETTERMENTS.

1. *Taxes and improvements.*

Caruthers purchased land in the name of his son and had it conveyed to him, but took possession himself and occupied and made improvements on it and then sold it to Joseph Cossart. Afterwards the son sold and conveyed it to Kemp. While Caruthers was in possession he represented the land to be his son's, and it was so regarded. After Cossart's purchase he sold to Nancy J. Cossart, who assessed the land and paid taxes on it as her own, and being sued for it by Kemp she asserted title as *bona fide* purchaser, and also claimed reimbursement for the improvements and taxes paid by herself and Caruthers. Held: That the purchase and improvements by Caruthers were an advancement to the son; that he did not hold under any color of title, and therefore Mrs. Cossart could not reclaim the value of the improvements, but could recover the taxes paid by herself. They were a necessary charge upon the land, and paid by her as owner and not officiously, and it was for Kemp's benefit and should be made a lien on the land. *Kemp v. Cossart,* 62

2. *Who entitled to benefit of.*

In order to have any benefit of the betterment act, (*Mansf. Dig., Secs. 2644-48,*) a party must, first, have held under color of title, and secondly, have believed himself to be the legal or equitable owner of the land. *Teaver v. Akin,* 528

3. COLOR OF TITLE: *Title bond.*

Whether a title bond is sufficient to confer color of title, *Quere?* *Ibid.*

BILL OF EXCEPTIONS.

1. PRACTICE: *Bill of exceptions.*

It is improper to incorporate the pleadings in a case in the bill of exceptions. The object of a bill of exceptions is to bring upon the record for the supreme court that which does not already appear therein, and which it is necessary to bring to the notice of the appellate court. *Kirksey v. Cole,* 504

BILL OF REVIEW.

See CHANCERY PLEADING AND PRACTICE, 1.

CERTIORARI.

See JUSTICES OF THE PEACE, 1, 2.

CHANCERY PLEADING AND PRACTICE.

See SALES, 4.

1. BILL OF REVIEW: *Essentials of.*

A bill of review for newly discovered testimony should set forth the names of the witnesses, and the substance of what each witness will swear; also, how and when the plaintiff first came to a knowledge of the new matters alleged; the means, if any, that were used to keep him in ignorance, and that he was not negligent in failing to discover and produce the evidence at the former trial. *Greer v. Turner,* 17

2. PRACTICE IN CHANCERY: *Receivers.*

When property in litigation is placed in the hands of a receiver it is error to proceed to a final decree without requiring him to account. *Teaver v. Akin,* 528

COMMON CARRIERS.

See RAILROADS, 3, 4.

CONFUSION.

1. *Agent mixing principal's funds with his own.*

When an agent mixes his own funds with his principal's he must show the amount of his own funds, or his principal will take the whole.

CONSPIRACY.

See INDICTMENT, 12.

CONSTRUCTION OF CONTRACTS.

1. STATE COMITY: *Contract made in another state.*

The courts of this state will adjudicate the rights of parties in contracts made and to be performed in another state precisely as they would be adjudicated in the courts of that state. *Matthews v. Paine,* 53

CONSTRUCTION OF STATUTE.

See FEES, 4.

CONTRACTS.

See CONSTRUCTION OF CONTRACTS, 1.

1. *Prohibited by statute, void.*

Every contract made for or about anything which is prohibited and made unlawful by statute is void, though the statute does not declare it so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute. *Martin v. Hodge,* 378

2. *Conducted by mail; When completed.*

When parties conduct a negotiation through the mail a contract is completed the moment a letter accepting the offer is mailed, provided it be done with due diligence after receipt of the letter containing the proposal and before any intimation is received that the offer is withdrawn. *Kempner v. Cohn,* 519

3. *Same.*

Whether an offer remains open is a question of fact. When an answer by return mail is requested, or may be expected by the usage of trade or the nature of the business, the making of the offer is accompanied by an implied stipulation that the answer shall be immediate. But unless the time is limited the proposition is open until it is accepted or rejected, provided an answer is given in a reasonable time. *Ibid.*

4. *Withdrawal of offer.*

An offer made by letter which is to be answered in the same way, cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before he has accepted. An uncommunicated revocation is no revocation at all. *Ibid.*

CORPORATIONS.

1. *Their existence not assailable collaterally.*

The existence of a corporation once formed can be questioned only by a direct proceeding; and that at the suit of the state. *Searcy v. Yarnell,* 269

2. *Breaches of conditions subsequent to organization.*

The failure of stockholders to pay their subscriptions, the failure to hold elections for directors, and similar omissions, are not sufficient grounds for the destruction of a corporate existence, even at the suit of the state, where the by-laws and the law of the state provide that the directors named in the charter shall serve until their successors are elected and qualified. *Ibid.*

3. *Railroad, must have five stockholders.*

There never has been a time since the adoption of our general incorporation laws when railroad corporate rights could be owned and exercised by a sole owner. There must be five owners or there is no franchise to own; and a corporation stockholder in another corporation, though composed of many individuals, is, as a stockholder, but one person. *Ibid.*

4. ESTOPPEL: *In pais.*

One who deals with an ostensible corporation, whereby rights become vested in it, can not afterwards question its corporate character. *Ibid.*

COST.

See FEES.

COUNTY.

1. *Public; Their contracts beyond authority void.*

The agents of a county have no power to bind the county to pay more in county warrants for labor and materials furnished than their cash value in currency, and all who deal with such agents are bound to take notice of the limitations upon their authority. *Dorsey County v. Whitehead,* 205

2. *Liability for services to paupers.*

Our statutes for the aid of the poor, imply no promise by the county to pay for services rendered by a physician or surgeon, even in cases of emergency, if there has been no judicial ascertainment that the person treated is a pauper. *Cantrell v. Clark County,* 239

3. *Same; Presumption.*

It is presumed that a physician's or surgeon's services to the poor and indigent are bestowed as a charity, or that he looks to the patient for his pay, and when such is his intent he cannot afterwards charge the county with liability. *Ibid.*

COUNTY COURT.

1. JURISDICTION: *Of county court over county expenses.*

The county court has original exclusive jurisdiction to audit, settle and direct the payment of all demands against the county, including contingent expenses in the circuit court. *Chicot County v. Kruse.* 80

2. COUNTY COURT: *Certificate of circuit judge not conclusive as to expenses.*

The certificate of the circuit judge of expenses of the circuit court to be paid by the county is not conclusive upon the county court as to the amount of compensation to be allowed where the fees for the services rendered are not fixed by law. *Ibid.*

CRIMINAL LAW.

1. *Dealing in futures; Statute construed.*

The Act of March 30, 1883, to prohibit dealing in futures is not in restraint of trade. It does not prevent contracts for future delivery when entered into in good faith and with an actual intention of fulfilment, but is intended to suppress mere speculations upon chances, where the grain, cotton or stocks dealt in exist only in imagination, and where no delivery is contemplated, but the parties expect to settle upon the difference in the market. *Fortenbury v. State,* 188

2. SAME: *Futures; Indictment for dealing in.*

An indictment for dealing in futures in the language of the statute is sufficient. *Ibid.*

3. CRIMINAL LAW: *Broker in dealing in futures.*

One who acts as a broker in dealing in futures is *particeps criminis* and punishable as principal. *Ibid.*

4. *Obstructing highways.*

It is a misdemeanor, punishable by common law procedure, to obstruct a road which has become a public highway by long continued use by the public. *Howard v. State,* 431

5. PHYSICIANS: *Practising without registration.*

The statute regulating the practice of medicine (*Mansf. Dig., sec. 4641, et seq.,*) does not require a license to practice, but registration in the office of the county clerk of some county in the state. But upon trial of a defendant in the circuit court, on appeal from a justice of the peace, on a warrant for practising without *license,* he may be convicted if the court explains to the jury that the offense for which he is on trial is the failure to register. *Richardson v. State,* 562

6. *Lawful jury.*

By agreement of the parties a defendant in a misdemeanor case may be tried by a jury of less than twelve jurors; but mere waiver of the requisite number by failing to object to less will not authorize a trial by less than twelve. *Warwick v. State,* 568

7. *Forgery.*

To constitute the offense of uttering and publishing a forged writing, there must be an intent to defraud and a knowledge of the falsity of the instrument. *Elsey v. State,* 572

CRIMINAL PRACTICE.

1. *Competency of juror.*

A juror who states upon his *voir dire* that, while he has neither formed nor expressed an opinion as to the guilt or innocence of the accused, and has no partiality for or prejudice against him, yet has impressions on his mind in regard to the case which it would require evidence to remove; that the impressions were not derived from conversations with the witnesses or with any one who professed to know the facts connected with the homicide, but were based upon rumor, and that he could and would decide the case from the evidence as honestly and impartially as if he had never heard of the case, is a competent juror for the trial. *Sneed v. State,* 180

2. *Same.*

The entertainment of preconceived notions about the merits of a criminal case, renders a juror *prima facie* incompetent. But the disqualification is removed by showing that the impression is founded upon rumor, and not of a nature to influence his conduct. *Ibid.*

3. *Postponement of trial.*

Whether Section 5108 of the Civil Code is applicable to criminal trials, or if so is constitutional, *quere?* *Ibid.*

4. PRACTICE: *Motion in arrest; What it cures.*

Under a motion in arrest of judgment the sufficiency of the testimony cannot be questioned, but only the sufficiency of the indictment; or, at most, only such errors as appear of record. *State v. Bledsoe,* 233

5. *Information; Removal from office.*

A sheriff can not be removed from office by information, for permitting a prisoner, convicted of a misdemeanor and placed in his custody to be hired out until the fine and costs are paid, to go at large without paying the fine and costs. The proceeding must be by indictment. *Haskins v. State,* 243

6. *Same:*

When an alleged cause of removal from office is a matter not cognizable by a grand jury, *e. g.*, incompetency, drunkenness, immorality, etc., then the state's attorney may proceed upon his own motion, by information filed under oath; but if it is for an indictable offense the proceeding must be by indictment. *Ibid.*

7. *Appeals to supreme court.*

This court can be more profitably employed than in settling immaterial differences of opinion between prosecuting attorneys and circuit judges; and when an indictment is quashed on demurrer, and its defects, real or supposed, can be easily amended by re-submission of the matter to the grand jury, it should be done, instead of appealing the judgment on the demurrer to this court. *State v. Withrow,* 551

DAMAGES.

See EVIDENCE, 7. FRAUDULENT REPRESENTATIONS, 3, 4.

1. *For breach of contract to convey.*

In an action by a purchaser of land for breach of the contract to convey, the measure of damages is the difference between the contract price and the value of the land when the breach occurred, with interest on such difference. *Kempner v. Cohn,* 519

DONATION TITLE.

1. *Obtained by fraud as to improvement.*

A donee, in making the required improvement necessary to perfect his title to donated land, by mistake made it on an adjoining tract, not the property of the state, and then filed with the land commissioner the required certificate of a justice of the peace, of the improvement, and obtained his deed. The state sued in equity to vacate the deed for fraud. Held: That though no fraud was intended, it was a fraud to obtain the title on the false though honest certificate, and a court of equity had power to vacate the deed at the instance of the state. *Wilson v. State,* 199

2. *Same.*

No one but the state can complain that the donee has not made the improvements required to secure title to donated land. *Ibid.*

EJECTMENT.

1. *Evidence of title.*

A plaintiff in an action for the recovery of real property must succeed upon the strength of his own title, and not upon the weakness of his adversary's; and until he proves title and a consequent right of possession the defendant needs not to offer any evidence in support of his own right. *Dawson v. Parham,* 215

2. *Same; Administrator's deed.*

An administrator's deed of his intestate's land, made without an order of a court of competent jurisdiction, is a nullity, and no evidence of title in the grantee. *Ibid.*

3. *Evidence.*

In an action of ejectment the plaintiff must succeed, if at all, on the strength of his own title. *Apel v. Kelsey,* 413

4. *Compensation for improvements.*

In ejectment as well as in equity, a defendant may set off against the claim for rents the value of his improvements made in good faith, believing himself to be the owner of the premises, to the extent that they have enhanced the rents. *McCloy & Trotter v. Arnett,* 445

EMBEZZLEMENT.

See INDICTMENT, 8.

EQUITY.

1. *When taxes, etc., refunded to fraudulent purchaser.*

When money paid by a fraudulent purchaser of land at an administrator's sale is used in paying the debts of the estate, it and the taxes paid by him after his purchase, less the value of the rents, must be refunded to him. *Neel v. Carson,* 421

ESTATE.

See HUSBAND AND WIFE, 1.

ESTOPPEL.

See EXECUTION SALES, 3. FRAUDULENT CONVEYANCE, 2. FRAUDULENT REPRESENTATIONS, 4. MUNICIPAL CORPORATIONS, 2. VENDOR AND PURCHASER, 2, 4.

1. ESTOPPEL: *Acts against public policy.*

No one can estop himself from taking advantage of that which is contrary to public policy. *Shorman v. Eakin,* 351

EVIDENCE.

See EJECTMENT, 1, 2. USURY, 4. SWAMP LANDS, 1. NOTES AND BILLS, 1.

1. *Action on judgments; Plea, nul tiel record.*

To maintain an action on a judgment against a plea of *nul tiel record*, a certified copy of the judgment alone is not sufficient, but all the pleadings and proceedings on which the judgment is founded, and to which as matter of record it necessarily refers, must be produced. *Hallum v. Dickinson,* 120

2. *Issuing of summons; Proof of.*

Upon proof of the loss or destruction of a writ, the date of its issue and its contents may be proved by secondary evidence. *Ibid.*

3. CRIMINAL EVIDENCE: *Confession of prisoner.*

The confession of a prisoner of the locality of stolen property, though induced by threats, is admissible when verified by finding the property where he locates it; and all he says in conveying the information which is directly connected with or explanatory of the discovery is also admissible, but his confession that he stole it is not admissible. *Yates v. State,* 170

4. CRIMINAL EVIDENCE: *Former testimony of witness out of jurisdiction.*

The testimony of a witness, in the presence of the defendant, on the hearing of his application for bail, may be read on the final trial, if the witness is out of the jurisdiction of the court, or cannot be found. *Sneed v. State,* 180

5. CRIMINAL EVIDENCE: *Dealing in futures.*

The written contracts for future purchase and delivery are not conclusive upon the question of good faith. The real question always is, did the parties intend an actual, *bona fide* sale, or a wager. *Fortenbury v. State,* 188

6. *Copy of recorded deed.*

A certified copy from the registry of a recorded deed, is admissible as evidence of the contents of the original deed. *Apel v. Kelsey,* 413

7. DAMAGES: *Estimate of; Opinion of witness.*

A witness is never permitted to estimate the amount of damages which a party has sustained by the doing or not doing of a particular act. That is the province of the jury and not of a witness. He may state the facts showing the extent of the injury, and any other pertinent matter; but the measuring of damages is not a fact, but matter of opinion or speculation. *L. R., M. R. & Tex. Ry. v. Haynes,* 497

EXECUTION.

See SHERIFFS, 1, 2.

EXECUTION SALES.

1. *Errors and irregularities.*

A mistake in the notice of a sale under execution, or even a failure to give notice, or errors or irregularities in the proceedings which do not render the writ a

nullity, will not invalidate a sale to an innocent purchaser. *Huffman v Gaines,* 226

2. *Same; Purchase by attorney.*

An attorney of the plaintiff who purchases property sold under the plaintiff's execution, is charged with notice of the vices and infirmities of the judgment and process, and stands in no better attitude than a stranger who buys with actual knowledge of the same facts. *Ibid.*

3. *Same; May be waived by debtor.*

A debtor may waive an improper notice of the sale of his property under execution, and does waive it when he suffers the execution to be satisfied, and accepts the surplus of the proceeds of the sale and retains them, after notice of the irregularity. *Ibid.*

4. *Not signed by the clerk.*

The omission of the clerk to sign a writ issued by him, or the affixing by inadvertence the name of another person instead of his own, is a mere clerical error—a matter of form and not of substance—and the defect will be treated as amended whenever it is collaterally assailed. *Jett v. Shinn,* 373

EXEMPTIONS.

1. *Judgments; Set-off.*

Pittman recovered judgment against Atkinson & Co. for $379. In the same court Thompson recovered judgment against Pittman for $548, and Atkinson & Co. purchased this judgment and filed a motion to set it off against the judgment of Pittman against them. Thereupon Pittman filed his schedule claiming the judgment recovered against Atkinson & Co. among his exemptions, and showing that he was a married man, a resident of the state and head of a family, and his whole personal property—including the judgment—did not exceed $500. Held: that he was entitled to the exemption and the judgments could not be set off. *Atkinson v. Pittman,* 464

FEES.

1. *For certificate of tax sale.*

If a collector of revenue for his own convenience includes several different tracts of land in one certificate, he can collect of the purchaser the fee of one certificate only; but if he does so at the request of the purchaser he is entitled to the aggregate fees of a certificate for each separate tract. *Bagley v. Shoppach,* 72

2. FEES AND FINES: *In what payable; On change of venue.*

The fine imposed, and fees accruing in a criminal conviction are payable in the warrants of the county where the crime was committed and the prosecution instituted, notwithstanding the trial and conviction be in another county to which the cause was removed. *Russell v. Rowland,* 203

3. FEES: *Of sheriff in criminal cases; Construction of statute.*
The word "return" in *Sec. 3248, Mansf. Dig.*, does not mean "service;" and the statute does not exempt the county, when liable for the cost in a criminal case, from payment for serving every subpœna served in the case, regardless of the number. *Phillips County v. Pillow,* 404

4. COST: *Construction of statute.*
Statutes regulating costs are construed strictly, and all doubts as to their meaning are resolved against the officer claiming them; and fees for constructive service are in no case allowed. *Fanning v. State,* 442

5. FEES: *Prosecuting attorney's.*
However numerous may be the parties convicted under a joint indictment, the prosecuting attorney is entitled to but a single fee for one conviction against all and not a separate fee against each. *Ibid.*

FRAUD.

1. *Purchase with intent not to pay.*
A debt is created by fraud where one intending not to pay for goods induces their owner to sell them on credit. The purchaser in such case takes only a defeasible title, and on discovery of the fraud the vendor may disaffirm the contract and reclaim the goods unless they have passed into the hands of a *bona fide* purchaser. An attaching creditor of the fraudulent vendee is not a *bona fide* purchaser for value as against the defrauded vendor. *Taylor v. Mississippi Mills,* 247

2. *Evidence of fraudulent intent.*
The fraudulent purpose of a vendee not to pay for goods purchased can rarely be proved by direct evidence, such as declarations to that effect. It is usually established by circumstances from which a jury may infer the intent. *Ibid.*

3. *Same; Test of the fraudulent intent.*
The test of a fraudulent purchase is the preconceived intention to get the goods without paying for them, and not a mere legal or constructive fraud. *Ibid*

FRAUDULENT CONVEYANCE.

1. *How far good.*
A conveyance to defraud creditors is good as between the parties and their privies, but may be avoided by creditors of the grantor. If they condone the fraud the conveyance will stand against all comers. *Millington v. Hill, Fontaine & Co.,* 301

2. *Estoppel of creditor.*
If a creditor of a fraudulent grantor, with knowledge of the fraud, accepts from the grantee the purchase price agreed to be paid for the land, he thereby affirms the sale and waives the right to complain of the fraud. *Ibid.*

3. *Fraudulent grantee without remedy.*

A party bargaining with a debtor with fraudulent intent, does so at the peril of having that which he receives taken from him by the creditors of the debtor whom he is attempting to defraud, without having any remedy to recover what he parts with in carrying out the bargain. *Ibid.*

FRAUDULENT REPRESENTATIONS.

1. ACTION FOR DECEIT: *Fraudulent representations.*

The principles of law applicable to a suit in equity for the rescission of an executed contract for land, on account of fraudulent representations of the land. are applicable to an action at law for damages for similar false and fraudulent representations. *Matlock v. Reppy,* 148

2. SAME: *Same; What essential to.*

To maintain an action for damages for false and fraudulent representations as to land sold, the vendee must prove: 1. That the fraud related to some matter of inducement to the making of the contract. 2. That it wrought injury to him. 3. That the relative position of the parties was such, and their means of information such, that he must necessarily be presumed to have contracted upon the faith reposed in the statements of the vendor; and, 4. That he did rely upon them, and had a right to rely upon them, in full belief of their truth. *Yeates v. Pryor, 11 Ark., 58.* *Ibid.*

3. DAMAGES: *Measure of, for fraudulent representations.*

In an action for deceit the injured party may have his damages measured by the difference in the value of the property purchased as it really was and what it would have been if the representations made concerning it had been true; or, if he prefers, he may have the difference between the real value of the property in its true condition and the price paid, or the value placed upon the property in the transaction. *Goodwin v. Robinson, 30 Ark., 540.* *Ibid.*

4. FRAUD: *Waiver of; Estoppel.*

The fact that a party injured by fraudulent representations as to the property sold to him, accepts and holds the property after ascertaining the fraud, neither waives the fraud nor estops him from suing for damages. The false representations are in the nature of warranties and must be made good. *Ibid.*

5. FRAUD: *False representations; Relief against.*

Equity will not relieve a party from the consequences of his own inattention and carelessness in relying upon the representations of another, instead of his own judgment, when the means of information are open to both parties alike; but when the representation is of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the other has the right to rely on it, though the means of ascertaining its falsity were fully open to him. It does not lie in the mouth of the declarant to say it was his folly to believe it. *Gammill v. Johnson,* 335

FUTURES.

See CRIMINAL LAW, 1, 2, 4. EVIDENCE, 5.

HOMESTEAD.

1. LIEN: *For debt on homestead.*

No lien can be fixed upon land entered under the homestead act of the United States, for any debt contracted before the issuance of the patent for the land. *Shorman v. Eakin,* 351

2. *Covered by extension of corporate limits.*

Quere? Where a homestead is established on the confines of a town does the subsequent extension of the corporate limits over it curtail it? *Chambers v Perry,* 400

3. *How protected from sale.*

A debtor who would preserve his exempted property from sale, whether homestead or chattels, must claim his exemption and file his schedule as prescribed by the statute, and see that a supersedeas issues. If the officer refuses or neglects to issue it, mandamus or an appeal lies according to the fact whether he is a ministerial or judicial officer. And a failure to prosecute the remedy is a waiver of the right. *Ibid.*

4. *Right of infants in; Ejectment.*

Under the constitution of 1868 the exemption of the homestead from sale for debt descended to the widow and infant children of a deceased debtor; and after the termination of the widow's right, by death or re-marriage, the infant children have such an estate and right of possession as will support an action of ejectment against any one in possession, who does not hold under a better title than their father. *McCloy & Trotter v. Arnett,* 445

5. *Liability of purchaser of.*

A purchaser of a decedent's homestead, at a probate sale, must take notice of the minor's right; and if he use the homestead for his profit or convenience, must account to the minor for the rents. *Ibid.*

6. *Power of probate court to sell reversion in.*

Under the constitution of 1868, the reversionary interest in a decedent's homestead, after the termination of the homestead rights of his widow and infant children, could not be sold for payment of his debts, and an order of the probate court for the sale of the homestead, subject to the homestead right of the widow and children, was without jurisdiction and void. *Ibid.*

HUSBAND AND WIFE.

See TRUSTS, 1, 2.

1. ESTATE IN ENTIRETY: *Deed to husband and wife.*

A deed to husband and wife vests in the grantees an estate in entirety. *Kline v. Ragland,* 111

2. *Curtesy; Construction of statute, etc.*

The effect of *Section 4624, Mansfield's Digest*, and the Constitution of 1874, upon the rights of husband and wife in her real estate, was to exclude his marital rights during her life and to secure to her the right to use and dispose of it at will; but if she makes no disposal of it, and there be issue of the marriage, born alive, his title by curtesy consummate attaches at her death as at common law. *Neelley v. Lancaster,* 175

3. *Title bond to wife.*

When a bond is executed by the vendor for conveyance of land to a wife upon payment of purchase notes executed by her and her husband, and she afterwards dies, the husband can not upon payment of the notes take title to the land to himself. It belongs to the heir of the wife. *Tillar v. Cleveland,* 287

IMPROVEMENTS.

See EJECTMENT, 4. RENTS, 1.

INDICTMENT.

See LIQUOR, 1, 4. CRIMINAL LAW, 3. CRIMINAL PRACTICE, 5, 6.

1. *Form of.*

It is not necessary that an indictment should state that it was presented by the grand jury "in the name and by the authority of the state." *Holt v. State,* 196

2. *Form; Contra pacem, etc.*

Each count of an indictment must conclude "against the peace and dignity of the state," or it will be defective. *Williams v. State,* 230

3. *Same.*

In an indictment for being interested in the sale of liquor without license, it is not necessary that the offense be stated in the caption. It is sufficient to charge it in the body of the indictment. *Ibid.*

4. *Disturbing religious worship; Duplicity.*

An indictment for disturbing religious worship "by talking and laughing" and by indecent gestures, is not bad for duplicity. It charges but one offense; the words "by talking and laughing" being mere surplusage. *State v. Bledsoe,* 233

5. SABBATH BREAKING: *Indictment for.*

An indictment for Sabbath breaking which charges that the defendant "on the third day of May, 1885, said day being Sunday, unlawfully was found *laboring* and performing other services, the same not then and there being of household duty of daily necessity, comfort or charity," charges the offense in the language of the statute and is sufficient to apprise the defendant of the nature of the charge against him, and to enable him to prepare his defense and to plead the judgment in bar of a second prosecution against him for the same offense. *Scales v. State,* 476

6. SAME: *Repeal of Section 1886, Mansf. Dig., constitutional.*

The act of March 2, 1885, repealing Section 1886, of Mansf. Dig., is not in violation of any provision of the constitution; and since the repeal no person is excused for laboring or performing other prohibited service on the Christian Sabbath by observing some other day as the Sabbath agreeably to the faith and practice of his church or society. All persons, without regard to religious faith or practice, are now prohibited from labor or other service on Sunday, which is not of household duty, of daily necessity, comfort or charity. *Ibid.*

7. THE SABBATH LAW: *A civil regulation.*

The Sabbath statute is essentially a civil regulation providing for a fixed day of rest in the business, the ordinary avocations and amusements of the community. It imposes upon no one any religious ceremony, or attendance upon any form of worship, and leaves every one to the religious observance of any day he may deem suitable or appropriate. *Ibid.*

8. EMBEZZLEMENT: *By public officer; Indictment.*

The act of July 9, 1868, (*Gantt's Dig., sec. 1375,*) for the punishment of embezzlement by public officers, was by implication repealed by the act of 20th February, 1883, (*Mansfield's Dig., sec. 1643,*) and an indictment under the last act must charge that the accused had taken the oath of office. *Wood v. State,* 488

9. *For statutory offense; Essentials.*

An indictment upon a statute must state all the circumstances which constitute the statutory offense; no case being brought within a statute unless it is completely within its words. The precise words of the statute need not be followed. Words of equivalent import, or more extensive signification, which necessarily include the words of the statute, may be substituted. *Ibid.*

10. *For obstructing public road; Certainty.*

As a road district may contain several different roads, an indictment for obstructing a public road in a given district must designate the particular road obstructed. *State v. Withrow,* 551

11. *Perjury; Materiality of the false testimony.*

An indictment for perjury need not charge in *hæc verba* that the alleged false testimony was material, if it states facts from which its materiality results as a legal conclusion. *State v. Nees,* 553

12. *Indictment for conspiracy.*

A conspiracy to commit a felony is merged in the felony when actually consummated; and so an indictment for a conspiracy to commit a felony must allege that the felony was not committed. After the felony is consummated, the conspiracy is not indictable. *Elsey et al., v. State,* 572

INFANTS.

See HOMESTEAD, 4, 5. PLEADING AND PRACTICE, 5. 6. PROBATE COURT, 1. TRUSTS, 3.

INFORMATION.

See CRIMINAL PRACTICE, 5, 6.

INSTRUCTIONS.

See PLEADING AND PRACTICE, 3.

1. *Duty of court to give, in writing.*

The provisions of the statute and constitution which require the court to reduce its charges or the instructions to writing when required by either party to do so, are mandatory, and it is error for a judge to refuse to do so. But the court is not required by the statute or constitution to reduce to writing an instruction to be given to the jury on its own motion, before argument to the jury. The court is vested with a sound discretion to instruct the jury at any time, even after they have retired to consider their verdict. *National Lumber Co. v. Snell,* 407

JURISDICTION.

See ADMINISTRATION, 4. ATTACHMENTS, 10. COUNTY COURT, 1. HOMESTEAD, 6. PARTITION, 2. PROBATE COURT, 1.

1. *Of J. P. for damages to personal property.*

Justices of the peace have concurrent jurisdiction in all matters of damage resulting from the loss, conversion or destruction of personal property, as well as from injury to it, when the amount in controversy does not exceed one hundred dollars. *St. L., I. M. and S. Ry., v. Briggs,* 59

2. JUSTICE OF THE PEACE: *Jurisdiction not presumed.*

Nothing can be presumed which is necessary to give a justice of the peace jurisdiction; but when jurisdiction appears upon the face of the proceedings, its action cannot be collaterally attacked for mere error or irregularity. The same presumption that it was correctly exercised will arise as prevails with reference to the action of courts of superior and general jurisdiction. *Webster v. Daniel & Straus,* 131

3. *In personam; Irregular service.*

Courts can acquire jurisdiction over a defendant only by service of summons either actual or constructive, or of some other process issued in the suit, or by his appearance to the action in person or by attorney. And objections for mere irregularity in the process or in the manner of its service must be made in the action. They cannot be set up in a collateral proceeding. *Ibid.*

4. WARNING ORDER: *Proof of publication.*

When a warning order from a justice of the peace has been properly published, the failure to make proof of the publication by the person and in the form prescribed by law, is a mere irregularity which will not defeat the jurisdiction, and can not be taken advantage of in a collateral proceeding. *Ibid.*

5. JURISDICTION OF J. P.: *Whether title to land involved.*

Upon rescission of a parol contract for the sale of land the vendee may recover money paid upon the contract; and a justice of the peace has jurisdiction if the amount is within his jurisdiction. The title to the land is not involved in the action. *Benton v. Marshall,* 241

6. *Lex rei situs.*

The law of the *situs* of immovable property governs exclusively as to all rights, interests and title in and to the property, and as to the capacity or incapacity of a testator, and the extent of his power to dispose of it, and the descent and heirship thereof, and the manner of its disposal for the payment of debts. *Williams v. Nichol,* 254

7. *As to legacies charged upon lands.*

Courts of equity in the state in which lands are situated have exclusive jurisdiction as to legacies charged upon them. *Ibid.*

8. *Appellate.*

It is the essential criterion of appellate jurisdiction that it revises and corrects errors committed in the progress of a cause, but does not create the cause. *Arnett v. McCain,* 411

JURY.

See CRIMINAL LAW, 6. CRIMINAL PRACTICE, 2, 3.

JUSTICE OF THE PEACE.

See JURISDICTION, 1, 2, 5.

1. CERTIORARI: *None for mere errors of J. P.*

When a justice of the peace has jurisdiction of a cause and of the person of the defendant, his judgment cannot be assailed collaterally, nor quashed by *certiorari,* for any mere irregularity or error in his proceedings. The writ of *certiorari* cannot be used for the correction of errors as upon appeal. *Carolan v. Carolan,* 511

2. SAME: *Judgment before J. P. without proof.*

The rendering of judgment by a justice of the peace without proof, or the striking out of his answer for want of verification, and refusing to let him defend for want of a verified answer, are but errors correctable by appeal, and do not subject his judgment to quashal by *certiorari.* *Ibid.*

LEGACIES.

See WILLS, 1.

LICENSE.

See TAVERNS, 1.

LIENS.

See ATTORNEY AND CLIENT, 1. HOMESTEAD, 1. VENDOR'S LIEN, 1.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LIQUOR.

See INDICTMENT, 3.

1. *Indictment; Selling to minor without consent.*

An indictment for selling liquor to a minor "without the written consent" of his parents or guardian is sufficient without including the words " or order." To negative consent is to negative the order. An oral order will not justify the sale. *Mogler v State,* 109

2. *Sale by bar-tender.*

The absence of a saloon-keeper when a sale of liquor is made by his bar-tender and his directions not to sell to a minor will not exempt him from liability for the sale. *Ibid.*

3. *Selling to minor.*

One who sells liquor to another for a minor, without notice that he is purchasing for the minor, can not be convicted of a sale to the minor. *Gillan v. State,* 555

4. *Same.*

Giving liquor to a minor, or bartering, or exchanging it with him, is not within the terms of the statute prohibiting the sale of it to them, and is not indictable. *Ibid.*

MANDAMUS.

1. *None to compel unlawful acts.*

Mandamus never lies to compel the officers of a county to do an act which is forbidden, or not authorized, by the laws of the state. *Chicot County v. Kruse,* 80

MARRIED WOMAN.

See STATUTE LIMITATIONS, 10.

1. *Her deed without acknowledgment.*

Since the adoption of the constitution of 1874 a wife may convey her separate estate as a *femme sole* without acknowledgment of the deed. Acknowledgment is necessary only for registration and notice to subsequent purchasers and incumbrancers. *Criscoe v. Hambrick,* 235

2. *Her earnings, etc.*

The earnings of a married woman arising from her services done and performed on her sole account become her separate property, and she may appropriate them if she chooses to the payment of her husband's debts, and where she does so appropriate them she is bound by it and can not reclaim them. *Sellmeyer v. Welch,* 485

MORTGAGE.

See TRUSTS, 2.

1. APPROPRIATION OF PAYMENTS.

Where a debtor owes to the same creditor two distinct debts, one of which is secured by a mortgage of real estate, and the other by a mortgage upon a growing crop, the proceeds of the mortgaged crop that come to the creditor's hands must be applied to that debt which the crop mortgage was made to secure. No specific appropriation is required at the time such proceeds are received in order to fix the rights of the parties. By the terms of the mortgage they have agreed in advance how the proceeds shall be disposed of; and neither party can, without the consent of the other, change the appropriation. *Greer v. Turner,* 17

2. *Title acquired after mortgage.*

Title acquired by a mortgagor after his mortgage, enures under our statute to the benefit of the mortgagee, without any warranty of title expressed in the mortgage. *Kline v. Ragland,* 111

3. *Redemption.*

The act of March 17, 1879, (*Mansf. Dig., sec. 4759,*) for the redemption of property from mortgage sales, has no application to mortgages executed before the passage of the act. *Morris v. Hudgins,* 515

4. *Power of sale not revoked by death of mortgagor.*

A power of sale coupled with an interest cannot be revoked by a mortgagor, and his death cannot defeat or suspend the right to execute the power. *Ibid.*

MUNICIPAL CORPORATIONS.

1. *Power to sell corporate property.*

A municipal corporation has power to dispose of property held for general convenience, pleasure or profit. *Searcy v. Yarnell,* 269

2 *Estoppel; Ultra vires.*

A contract of sale by a municipal corporation, which is fair and lawful and fully performed by both parties, cannot afterwards be avoided by the corporation on the ground of *ultra vires.* *Ibid.*

NEGLIGENCE.

See RAILROADS, 3, 4, 7. TELEGRAPH, 1.

NEGOTIABLE INSTRUMENTS.

1. *Certificate of indebtedness; Action.*

A certificate of a road-master, who is authorized to issue it, that the bearer is entitled to a specific sum for labor performed, and its acceptance by the laborer, constitute an account stated, on which an action may be maintained by the

laborer, or his assignee, against the railroad company, as upon an implied promise to pay it, without reference to the items of the original account. *St. L., I. M. & S. Ry., v. Camden Bank.*, 541

2. *Same.*

A written acknowledgment of a debt, signed by the maker, is an assignable instrument under the statutes, (*Mansf. Dig., Sec. 473,*) and may be sued on by the holder without making his assignor a party; though there be no written assignment upon it. *Ibid.*

3. NON-NEGOTIABLE INSTRUMENTS: *Action on; Parties.*

An open account is not an assignable instrument, within the meaning of the statute, and a party to whom it is transferred cannot sue on it alone, but must make his assignor a party to the suit. *Ibid.*

NEW TRIAL.

1. *New evidence to impeach witness.*

Newly discovered evidence going only to the impeachment of a witness, is not ground for a new trial. *Holt v. State,* 196

NOTES AND BILLS.

1. *Payment; Evidence.*

The possession of a promissory note by the maker is presumptive evidence of its payment, and if obtained without payment the owner must show it. *Hollenberg v. Lane,* 394

PARTIES.

See ACTION, 3. AMENDMENTS, 1. APPEALS, 1.

PARTITION.

1. *Plaintiff must have possession or admitted title.*

Unless a tenant in common is in possession or his title is admitted, he can not maintain a bill in equity for partition. He must first establish his title at law and then bring his action in equity. *Criscoe v. Hambrick,* 235

2. PROBATE COURT: *Jurisdiction.*

The probate court has no jurisdiction in suits for partition to create a lien upon land, or render a money judgment for one heir against another for equality of partition. *Dismukes v. Halpern,* 317

PAUPERS.

See COUNTIES, 2, 3.

PHYSICIANS.

See CRIMINAL LAW, 5.

PLEADING AND PRACTICE.

See BILL OF EXCEPTIONS, 1. INFANTS, 1. INSTRUCTIONS. 1.

1. PLEADING: *Complaint omitting prayer for judgment.*
The omission from the complaint of a prayer for judgment is not a fatal defect. *Sannoner v. Jacobson & Co.* 31

2. PRACTICE: *Judgment; Adding interest to verdict.*
The court has no power to add interest to the verdict of a jury in rendering judgment. *Hallum v. Dickinson,* 120

3. CRIMINAL PRACTICE: *Desired instructions must be asked for.*
If either party desires other instructions than those given by the court, he must ask for them. If he remains silent, he cannot afterwards complain of the mere omission of the court to give what was not asked. *Holt v. Sneed,* 196

4. PRACTICE: *Transfer of cause.*
A mere transfer to the equity docket does not make a cause which is properly brought at law, one for equitable relief. *Dorsey County v. Whitehead,* 205

5. INFANTS: *Not prejudiced by admission.*
An infant can not be prejudiced by admissions of his guardian or attorney. *McCloy & Trotter v. Arnett,* 445

6. INFANTS: *Pleading and practice.*
The rights of an infant can not be judicially affected except upon proper pleadings and proof. A guardian cannot admit anything prejudicial to his interest. *Driver v. Evans,* 297

PRACTICE IN SUPREME COURT.

1. *Verdict on conflicting evidence.*
When the evidence is conflicting, the verdict of the jury is conclusive in this court. *Holt v. State,* 196

2. *When no bill of exceptions.*
When there is no bill of exceptions in the transcript the review of the supreme court is limited to errors apparent on the record proper, disregarding what took place at the trial, though there is copied in the transcript the testimony of witnesses and instructions of the court to the jury. *Williams v. State,* 230

3. *Infant's appeal.*
This court will protect the rights of infants, though they have not appealed from the decree of the chancellor to their prejudice. *Tillar v. Cleveland,* 287

PROBATE COURT.

1. *Power to exchange lands of infants.*
The probate court has no power to order the lands of a minor to be exchanged for other lands. *Meyer v. Rosseau,* 460

RAILROADS.

See CORPORATIONS, 3.

1. *Trains cannot stop at forbidden stations.*

The taking up of a passenger's ticket to a station at which the train is forbidden to stop by the regulations of the company, does not make it the duty of the conductor to stop the train there. *St. L., I. M. & S. Ry. v. Atchison,* 74

2. *Same.*

It is the duty of a passenger to inquire before embarking on a train whether it will stop at the station of his destination; and if he does so, and is misled by an agent authorized to speak for the company, he has his action against the company for the misdirections, but not for the refusal of the conductor to stop there if it be a station at which the train is forbidden to stop by the regulations of the company. *Ibid.*

3. COMMON CARRIERS: *Exemption from liability for losses.*

In the absence of a contract limiting his liability, a common carrier is liable for all losses except those caused by the act of God, by the public enemy, by the inherent defect, quality or vice of the thing carried, by their seizure under legal process, or by some act or omission of the owner of the goods. He may, however, contract for exemption for unavoidable accidents, but not for exemption from liability for losses occurring from his, or his servant's negligence, or for any other exemption not just and reasonable in the eyes of the law. *L. R., M. R. and Tex. Ry. v. Talbot & Co.,* 97

4. *Common carriers; Exemption from liability for fire.*

When a common carrier contracts for exemption from liability for injury from fire he is bound to exercise ordinary diligence to prevent such injury; that is, such care and diligence as a reasonable, prudent and honest man would exercise in respect to his own concerns under all the circumstances of the particular case; and if he uses this diligence he is not guilty of culpable negligence and not liable for the loss. *Ibid.*

5. *Power of stockholders to sell.*

A majority of the stockholders of an incorporated railroad company can not sell the property of the company against the wishes of the minority and thus defeat the objects for which the company was formed. *Searcy v. Yarnell,* 269

6. *Same; The franchise.*

The directors of a railroad company may, by unanimous consent of the stockholders, sell the corporate property, and thus denude themselves of the power to exercise the rights of the franchise, and can not afterwards avoid the sale by pleading the inalienable character of the franchise; only the state can question that. *Ibid.*

7. *Killing stock; Negligence.*

The killing or injuring stock by a railroad train is, under the statutes, presumed to be from negligence; but this may be repelled by proof of due diligence. *St. L. & S. F. Ry. v. Basham,* 321

8. *Right of way; Diversion of water-course.*

Where a grant of a right of way authorizes a railroad company to change a water-course, the company is not liable for the consequential damages resulting from the change, unless it be unnecessarily or negligently or unskillfully made. *St. L., I. M. & S. Ry. v. Walbrink,* 330

9. *Fencing track; Cattle-guards.*

A railroad company is not bound to fence its track, nor to construct cattle-guards where its road traverses improved lands. *Ibid.*

10. *Right of way; Damages.*

In the condemnation of the right of way through enclosures, the additional fencing made necessary by the road passing through them is an element of damages to be awarded to the owner; but a grant of the way waives such damages in advance. *Ibid.*

11. *Right of way; Change of water-courses.*

A grant of a right of way to a railroad company, with the right "to change water-courses," does not authorize the company to divert streams from other lands upon the land of the grantor, to his injury. *St. L. I. M. & S. Ry. v. Harris,* 340

12. *Contributory negligence.*

A trespasser on a railroad track cannot recover for running him down in the absence of reckless or willful conduct of the company or its agents. *L. R., M. R. & Tex. Ry. v. Haynes,* 497

13. SAME: *Same.*

Though an engineer sees one lying upon the track at a distance before him, yet if he honestly mistakes him for some inanimate object until it is too late to avoid running over him, the company is not liable for the mistake and injury. *Ibid.*

REMOVAL FROM OFFICE.

See CRIMINAL PRACTICE, 5, 6.

RENTS.

1. *On improvements.*

A defendant in a suit for land not within the betterment act, cannot withhold rents on improvements made by himself, except for a time sufficient to compensate him for making them. *Teaver v. Akin,* 528

REPLEVIN.

1. *Surety's liability on retaining bond.*

A surety on a defendant's retaining bond in replevin is liable for the damages and costs of the suit, as well as for the return of the property. *Morrill v. Daniel,* 316

2. *Possession evidence of title, etc.*

Proof of the plaintiff's possession of the property, and of a wrongful taking from him, without more, is sufficient to maintain replevin for the property, though it appears that he intends an unlawful disposition of it when recovered. *Martin v. Hodge,* 378

3. *Dismissal before trial no bar to new suit.*

The dismissal of an action of replevin and return of the property to the defendant before trial, will not bar a new action for the same property. *Ibid.*

4. *Liability of sureties in capias bond.*

The sureties in a bond executed to the sheriff for the release of a defendant arrested upon a *capias* in replevin, under *Sec. 5577, Mansf. Dig.,* are not liable for the judgment rendered against the defendant, unless an execution against the body of the defendant has been issued under *Sec. 284,* and returned "not found," under *Sec. 295. Duncan v. Owens,* 388

RES JUDICATA.

1. *Effect of nonsuit.*

A nonsuit, whether voluntary or involuntary, is not a judgment upon the merits and will not prevent another suit on the same cause of action; or, if it has that effect in the state where taken, it will not in other jurisdictions where such a rule does not exist. *Hallum v. Dickinson,* 120

2. *Final judgment on imperfect pleading.*

A final judgment against the distributees of an estate, solely on account of the omission of material allegations in their complaint against the administrator and his sureties for a *devastavit,* will not bar another action for the same cause if the omitted allegations are supplied. *State, use, etc., v. Roth,* 222

3. *Application.*

No one has a vested right to claim the application of an erroneous decision of this court upon a given question as the law upon the same question in another case, arising afterwards and before the decision is overruled. It is only in subsequent proceedings in the same case that the decision of this court is the fixed law. *Taliaferro v. Barnett,* 359

RIGHT OF WAY.

See RAILROADS, 11.

1. *Acquired by prescription.*

A right of way cannot be acquired by one across another's land by use for any length of time unless the use be confined to a definite line, and be open, notorious and adverse to the owner, and continuous for the whole period. *Johnson v. Lewis,* 66

ROADS AND HIGHWAYS.

See CRIMINAL LAW. RIGHT OF WAY, 1.

1. *By prescription.*

A road becomes established as a public highway by prescription, where the public, with the knowledge of the owner of the soil, has claimed and continuously exercised the right of using it for a public highway for the period of seven years, unless it was so used by leave, favor or mistake; and this though the public travel may have somewhere slightly deviated from the original track by reason of any obstacle that may have been placed in it. *Howard v. State,* 431

2. *Statutory road by adoption.*

A road which has been long used as a public road and has been recognized as such by the county court making it a part of a road district and appointing an overseer to work it, is *prima facie* a statutory highway. *Ibid.*

3. *Order establishing not assailable collaterally.*

The judgment of the county court establishing a public highway is not assailable collaterally for not providing compensation to the land owner for the land taken, though he was not *personally* notified of the proceedings as required by the statute. *Ibid.*

SABBATH BREAKING.

See INDICTMENT, 5, 6, 7.

SALES.

See VENDOR AND PURCHASER, 5.

1. *Delivery; Subsequent bona fide purchaser.*

Tomlinson sold to Meyer & Co., a bill of dry goods, tobacco and two guns, in part payment of his indebtedness to them. The dry goods were packed in a box and placed under the counter, the box not nailed up nor marked. The guns and tobacco were not separated from the balance of Tomlinson's stock. No money was paid, but the bill was charged to Meyer & Co. on Tomlinson's books, and a bill of parcels delivered to them, and Tomlinson was directed to send the goods to a particular warehouse for the purchasers. Afterwards, on the same day, Tomlinson mortgaged his entire stock of merchandise to Davis, Mallory & Co., for a debt he owed them, and delivered them immediate possession. They had no notice of the sale to Meyer & Co., and refused to surrender the goods to them, and sold them under the mortgage. Thereupon Meyer & Co. sued them for the conversion. Held: That there was no such actual delivery to Meyer & Co., no such visible and substantial change of possession, as was necessary to make the sale effectual against subsequent creditors and attaching creditors. *Davis, Mallory & Co. v. Meyer & Co.,* 210

2. *When set aside for inadequacy of price.*

Inadequacy of price alone will not authorize the setting aside of a sale, but is significant only when connected with other facts tending to show bad faith, mis-

take, or undue advantage taken of the weakness or ignorance of persons whose property rights are affected by the sale, or with some other ground of equitable relief. *Morris v. Hudgins,* 515

SET-OFF.

See EXEMPTIONS, 1.

SHERIFF.

1. *Liability for failure to return execution.*

The irregularity of an execution is no excuse to a sheriff for failing to execute and return it, unless the irregularity be such as to render it void. If it is amendable, or a valid sale may be made under it, he is bound to execute it, disregarding the irregularities. *Jett v. Shinn,* 373

2. *Sheriff misled by plaintiff.*

The sheriff is not excused for not returning an execution by any conduct of the plaintiff which does not show that the non-return resulted from the act or instruction of the plaintiff, or was ratified or waived by him. *Ibid.*

SLAVERY.

1. *When abolished in Arkansas.*

The emancipation proclamation of President Lincoln had no legal efficacy in liberating slaves except so far as it was actually put in operation by the federal army in the field setting free captured slaves. The adoption of the constitution of 1864 is the true date of the liberation of slaves in this state. *Graves v. Pinchback,* 470

STARE DECISIS.

1. *Application.*

The doctrine of *stare decisis* applies only where erroneous precedents have so far become a rule of property that it would effect less injury to follow than to overrule them; and is a rule of policy that addresses itself to the discretion of the court upon consideration of the erroneous decision. *Taliaferro v. Barnett,* 359

STATE COMITY.

See CONSTRUCTION OF CONTRACTS.

STATUTE OF LIMITATIONS.

See EVIDENCE, 2. USURY, 2.

1. *Commencement of suit.*

The filing of a complaint is not, alone, the commencement of an action. Process on it must also be issued, and until then the running of the statute of limitations is not arrested. *Hallum v. Dickinson,* 120

2. *Absconding debtor.*

The absconding of a debtor to prevent the institution of a suit against him does not suspend the statute of limitations under *Sec. 4502 Mansf. Dig.*, unless such

obstruction to the suit existed at the time the cause of action accrued. *Richardson v. Cogswell,* 170

3. *In suits for legacies.*

The rule that the statute of limitations will not bar a suit for a legacy, applies only when the suit is against an executor or another who is charged by the will with an expressed trust in relation to the legacy. *Millington v. Hill, Fontaine & Co.,* 301

4. *In equity.*

The statute of limitations is as binding in equity as at law. *Ibid.*

5. *Legacy charged on land.*

The acceptance of a devise binds the devisee personally for the payment of a legacy charged upon the devise. But the obligation is an implied one, not in writing, and an action on it is barred by the statute of limitations of three years. *Ibid.*

6. *Tacking disabilities.*

A married woman cannot tack her coverture to her infancy to avoid the statute of limitations. She must sue within the period allowed by law after coming of age, or be barred, whether married or unmarried. *Ibid.*

7. *On implied obligation.*

The obligation to perform the terms of a deed which arises from mere acceptance of it is an implied one, on which no action can be maintained after three years from the time it accrued. *Dismukes v. Halpern,* 317

8. *Homestead.*

Under the homestead act of 1852, the homestead of a decedent vests (where there is no widow) in his minor children alone, as an entirety. As each child arrives at age his interest in the homestead as such expires, and he has no right to the possession and can bring no action for it until the youngest child arrives at age; and so, until then, the statute of limitations of seven years does not begin to run against him or his vendee in favor of any adverse occupant of the land. *Kerksey v. Cole,* 304

9. *Action to recover taxes illegally exacted.*

An action under *Section 5857, Mansf. Dig.,* to reclaim taxes paid on lands which were not taxable, is in the nature of assumpsit for money had and received, and the limitation is three years. *Garland County v. Gaines,* 558

10. *Married Women.*

The act of April 28, 1873, (*Mansf. Dig., secs. 4623–31*) which gives to married women entire control over their property and the right to sue alone in reference to it, took away their disability of coverture, and by implication repealed so much of *Section 4489 of Mansf. Dig.*, as exempted married women from the operation of the statute of limitations. This does not conflict with *Hershey v. Latham, 42 Ark., 305.* *Ibid.*

SUBROGATION.

1. *Paying lien on land.*

One who lends money to pay off a lien on land is not subrogated to the rights of the lien-holder when the money is so applied. *Kline v. Ragland,* 111

SURETIES.

See REPLEVIN, 4.

SWAMP LANDS.

1. *Evidence of entry.*

The purchase of swamp land from the state can be proved only by the certificate or deed of purchase, or, in their absence, by certified transcript of the records and official documents of the proper land office. The certificate of the state land commissioner of what the records in his office show is not admissible. *Driver v. Evans,* 297

TAVERNS.

1. *Must be licensed.*

The provisions continued from the Revised Statutes of 1838, requiring tavern keepers to take out license, and making the failure to do so a misdemeanor, have not been repealed and are not unconstitutional. *Bostick v. State,* 126

TAXES.

1. *Overdue tax act; Assessment.*

The legislature had power to provide, as in the overdue tax act of March 12, 1881, for the assessment of lands by a court of equity which had escaped assessment in any year, and to charge the lands with the cost of the assessment. *St. L., I. M. & S. Ry. v. State,* 333

2. *Same.*

The provisions of the overdue tax act of 1881, which requires the court to have the assessment certified to the clerk of the county court, relates only to cases in which the lands were not assessed for the current fiscal year in which the proceedings for their condemnation and sale were instituted. *Ibid.*

3. *Same.*

When lands were assessed for taxes by order of a court of equity under the overdue tax act of 1881, there must have been a levy of taxes extended on the assessment before the court could condemn and sell them for taxes. *Ibid.*

TAX SALES.

See FEES, 1.

TELEGRAPH.

1. *Negligence; Penalty; Damages.*

The stipulation upon the printed telegraph blanks that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message" does not exempt the company from the statutory penalty for negligent delay in the transmission or delivery of a telegram. "Damages" means compensation for an injury; but the penalty is inflicted by law to quicken the diligence of the company, and the plaintiff is entitled to it whether damaged or not. *Western Union Tel. Co. v. Cobbs,* 344

TITLE BOND.

1. *Color of Title.*

Whether a title bond is sufficient to confer color of title. *Quere: Teaver v. Akin,* 528

TRUST.

1. *Husband and wife; Purchase with funds of wife.*

Where the purchase money for land conveyed to the husband is paid in whole or in part by the wife, she has an equity to have a trust declared and enforced against him to the extent of her payment. But when the consideration is paid by the husband, and the deed taken to the wife, it is presumed a gift by him. and no trust arises in his favor unless he overcome the presumption by evidence of a different intention. *Kline v. Ragland,* 111

2. *Mortgage; Land paid for in part by wife.*

When part of the consideration for land conveyed to the husband is paid by his wife and part by himself, he has an interest in the land to the extent of his payment, which may be subjected to the payment of his debts, and will be bound by his mortgage of the land and subject to foreclosure for payment of the mortgage debt. *Ibid*

3. *Arising from conversion of infants' property.*

One who intermarries with the widow-administratrix of her deceased husband's estate stands *in loco parentis* to the infant heirs of the estate, and if he intermeddle with the assets, by converting them into other property in his own name, he will be held as a trustee for the heirs as to the property acquired by the conversion. *Graves v. Pinchback,* 470

4. *Funds of principal converted by agent.*

The relation of an agent to his principal is one of confidence and trust as to all funds coming to his hands from the principal's business; and a court of equity may follow the funds into whatever property or change of form they may have been converted by the agent if it be possible to identify them, unless they have passed into the hands of a *bona fide* purchaser without notice. *Atkinson & Ward,* 533

5. *For purchase money for land.*

The rule that no trust will arise in favor of one whose money has been used in payment for land *after* the legal title has vested in the party sought to be charged as trustee, has no application where a trustee appropriates trust funds to the payment or improvement of land previously purchased for himself. *Ibid.*

TRUSTEES.

1. *When removable by chancery.*

Courts of equity have power to remove trustees for neglect or breach of duty, but will not remove them for every mistake or neglect of duty, but for such only as endanger the trust property, or show a want of honesty or capacity to execute their duties, or a want of reasonable fidelity. *Williams v. Nichol,* 254

2. *Removal for insolvency.*

A trustee appointed by a testator will not be removed for insolvency, nor required to give bond, when the testator has not required a bond and the bill does not show that he is less solvent than when he was appointed. *Ibid.*

3. *Sale to himself; Whether void or voidable.*

There is a distinction between the case of a sale to a sole trustee and the sale to one of several trustees. Even in the case of one trustee selling the property of his *cestui que trust* to himself, the rule seems to be that the sale is void, or only voidable, according to the circumstances of the case. *Searcy v. Yarnell,* 269

USURY.

1. *Actually paid, how recoverable.*

Where a statute provides for the recovery by suit of illegal interest which has been paid, that remedy is exclusive, and in an action for the principal debt the excessive interest can not be recouped. *Mathews v. Paine,* 53

2. *Statute of limitations against suit to recover.*

Where more than three years has elapsed since the payment of excessive interest any claim to recover this excess is barred. *Ibid.*

3. *Shift for.*

Cleveland asked of Tillar the loan of $270 to buy a town lot, offering to pay interest on it at ten per cent. per annum. Tillar replied that his money was worth more to him than ten per cent., and proposed to take the deed for the lot to himself, and to convey to Cleveland upon his paying rent at $30 per month for twelve months. This was agreed to, and the deed was executed by the seller to Tillar; Cleveland executed twelve notes for $30 each, and Tillar executed bond to convey the lot upon payment of the notes; and Cleveland also executed a deed of trust upon the lot to secure their payment. Afterwards, to a bill in equity by Tillar to foreclose the trust, Cleveland by cross-bill set up the above facts, and offered to pay the $270 and lawful interest, and demanded a

deed. Held: That the transaction was a shift for usury, and that Cleveland was entitled to the deed upon payment of the $270 and six per cent interest. *Tillar v. Cleveland,* 287

4. *Evidence.*

Parol evidence is admissible to show that a written contract for land was a cloak for usury. *Ibid.*

VENDOR AND PURCHASER.

See DAMAGES, 1. FRAUD, 1, 2, 3.

1. *Defects in title.*

In the absence of fraud, a purchaser who has been let into possession under a deed, cannot, without eviction, either actual or constructive, controvert his vendor's title, nor defend against payments of the purchase money on account of defects of title; but in a suit to foreclose the vendor's lien, he may have credit for amounts necessarily paid to perfect the title. *Morris v. Ham,* 293

2. ESTOPPEL: *Vendee and mortgagee.*

A purchaser of land who assumes to pay a prior mortgage on it as part of the purchase price is estopped to question the validity of the mortgage for any cause. *Millington v. Hill, Fontaine & Co.,* 301

3. ESTOPPEL: *Acceptance of deed imposing obligation.*

The acceptance of a deed imposing terms, binds the grantee to the performance of the terms. *Dismukes v. Halpern,* 317

4. *Estoppel as to title: Public Lands.*

As a general rule a purchaser receiving possession under his contract, cannot deny his vendor's title so long as he remains in possession; but where it turns out that the land was public land of the United States, the purchaser is not estopped to deny the title and refuse payment, though he has perfected his title by entering the land as a homestead under the laws of the United States. *Shorman v. Eakin,* 351

5. SALES: *Conditional; Title reserved until payment of price.*

When a chattel is sold with a reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser from the vendee acquires no title, though he buys in good faith for a valuable consideration and without notice of the condition. *McIntosh & Beam v. Hill.* 363

6. BONA FIDE PURCHASER: *Notice of adverse claim.*

The possession of property at the time of its purchase by another is notice to the purchaser of the claim and equity of the party in possession. *Atkinson v. Ward.* 533

VENDOR'S LIEN.

1. *Passes with note.*

A vendor's lien for the purchase money, when reserved in his deed, passes to any holder of the purchase money note, whether transferred before or after maturity, or upon a new or old consideration. *Morris v. Ham,* 293

2. *For purchase price payable in services.*

Preddy executed to Fain the following note for a town lot, which Fain sold and conveyed to him by deed: "$250. August 5, 1879. Sixteen months after date I promise to pay to John Fain, for lot purchased of him this day, two hundred and fifty dollars, in fees as attorney for said Fain, provided his business amounts to so much; otherwise balance to be paid in currency. Chas. W. Preddy." *Held:* That Fain had in equity a lien on the lot for the amount of the note, and after maturity could enforce it against the lot in the hands of a purchaser from Preddy with notice of the note, for so much in currency as had not been paid in fees or otherwise. *Winters v. Fain,* 493

WARNING ORDER.

1. *Certainty as to court issuing it.*

A warning order from a justice of the peace in the usual form, signed by the justice, sufficiently designates the court in which the defendant is summoned to appear, though the particular justice's court is not specified in the body of the order. *Webster v. Daniel & Straus,* 131

WILLS.

1. *Legacy charged upon lands.*

The acceptance of a devise of land renders the devisee personally liable for a legacy charged upon the land. *Williams v. Nichol,* 254

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