ARKANSAS REPORTS,

VOLUME 51.

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

MAY AND NOVEMBER TERMS, 1888,

AND THE

MAY TERM, 1889.

W. W. MANSFIELD,
Reporter.

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

STERLING R. COCKRILL, ... *Chief Justice.*

WILLIAM W. SMITH,[1]
BURRILL B. BATTLE,
MONTI H. SANDELS,[2]
WILSON E. HEMINGWAY,[3]
SIMON P. HUGHES.[4]
..... *Associate Justices.*

DAN W. JONES,[5] ..... *Attorney General.*

W. E. ATKINSON,[6] ..... " "

WILLIAM P. CAMPBELL, ... *Clerk.*

W. W. MANSFIELD, ... *Reporter.*

1 Died December 18, 1888.

2 Elected April 2, 1889, to fill the vacancy occasioned by the death of Mr. Justice Smith, and commissioned May 17, 1889.

3 Elected April 2, 1889, under act of February 20, 1889, entitled, "An act to increase the membership of the Supreme Court to five Justices," etc., and commissioned May 6, 1889.

4 Elected April 2, 1889, under act of February 20, 1889, and commissioned April 22, 1889.

5 Term expired January 17, 1889.

6 Elected September 3, 1888.

CHANCELLOR,

FIRST CHANCERY DISTRICT.

DAVID W. CARROLL.

JUDGES OF THE CIRCUIT COURTS DURING THE PERIOD OF THIS VOLUME.

1st Circuit	M. T. SANDERS.
2nd Circuit	J. E. RIDDICK.
3rd Circuit	J. W. BUTLER.
4th Circuit	J. M. PITTMAN.
5th Circuit	G. S. CUNNINGHAM.[1]
5th Circuit	J. E. CRAVENS.[2]
6th Circuit	J. W. MARTIN.
7th Circuit	J. B. WOOD.
8th Circuit	R. D. HEARNE.
9th Circuit	C. E. MITCHEL.
10th Circuit	C. D. WOOD.
11th Circuit	J. A. WILLIAMS.[3]
11th Circuit	J. M. ELLIOTT.[4]
12th Circuit	J. S. LITTLE.
13th Circuit	C. W. SMITH.
14th Circuit	R. H. POWELL.
15th Circuit	H. F. THOMASON.

1 Resigned July 29, 1889.

2 Elected September 11, 1889, to fill the vacancy occasioned by the resignation of Judge Cunningham.

3 Resigned May 29, 1889.

4 Elected June 22, 1889, to fill the vacancy occasioned by the resignation of Judge Williams.

Prosecuting Attorneys During the Period of this Volume.

1st Circuit	Stephen Brundidge, Jr.
2d Circuit	J. D. Block.
3d Circuit	J. L. Abernathy.
4th Circuit	S. M. Johnson.
5th Circuit	H. S. Carter.
6th Circuit	Robert J. Lea.
7th Circuit	W. H. Martin.
8th Circuit	W. M. Green.
9th Circuit	T. E. Webber.
10th Circuit	R. C. Fuller.
11th Circuit	J. M. Elliott.[1]
11th Circuit	S. M. Taylor.[2]
12th Circuit	J. B. McDonough.
13th Circuit	H. P. Smead.
14th Circuit	DeRoos Bailey.
15th Circuit	Oscar L. Miles.

1 Resigned May 29, 1889.

2 Elected June 22, 1889, to fill the vacancy occasioned by the resignation of J. M. Elliott.

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RULE 23.

ADOPTED BY THE SUPREME COURT, JUNE 29, 1889.

The abstract of the record required by Rule IX, and all briefs filed for the use of this court, shall be printed in clear type, not smaller than small pica, double leaded, except in cases where counsel shall certify that a litigant is unable to pay for his printing and that the counsel is serving in the cause without fee.

Six copies of the abstracts and of each brief shall be furnished for the use of the court, and one for each of the opposing counsel within the time and in the manner now provided by the rules.

The cost of printing, not to exceed $15 a side, shall be taxed against the losing party as costs of this court.

IN MEMORIAM.

IN MEMORIAM.

WILLIAM W. SMITH,

ASSOCIATE JUSTICE OF THE SUPREME COURT.

Mr. Justice Smith died on the 18th day of December, 1888. The sad intelligence of his death was announced to the people of the State by the following proclamation:

Again the State of Arkansas mourns the loss of one of her best citizens. The Hon. W. W. Smith, Associate Justice of the Supreme Court, departed this life at 11 o'clock p. m., the 18th inst., at his residence in the city of Little Rock In his death the family has lost a most excellent, kind and affectionate father and husband; society one of its most valued and best beloved members; the bar of the State a modest, earnest, able and upright member; the judiciary a just, conscientious and able judge, and the State a citizen of great worth, faithful, patriotic and true in all the relations of life; and the church a meek, devout and consistent member. In token of respect for his memory, the flag on the State-house will be lowered to half-mast until after his funeral, and the offices of the State government will be closed on Thursday, December 20, after 12 o'clock m., that the State officers and employes may attend the funeral.

SIMON P. HUGHES,
Governor of the State of Arkansas.

Immediately after this announcement a meeting of the bar of the Supreme Court was held in the Supreme Court-room. The meeting was called to order by Governor Hughes, and upon his motion Chief Justice Cockrill was requested to act as chairman. On taking the chair, and after making other remarks appropriate to the occasion, Judge Cockrill spoke of Judge Smith as follows:

He came upon the bench six years ago, admirably equipped and prepared for the discharge of the duties of his office. His previous training had been rigid from close and systematic study. Those who knew him had no apprehension as to his career upon the bench, for they knew that he brought to bear upon its duties an aptitude for labor, and a well-trained mind that was clear and logical and never uncertain in its conclusions. They have not been disappointed in the result. His labor was gigantic. Immediately upon his entry upon the bench it was perceptible that business was dispatched more expeditiously, and even the most critical will be compelled to acknowledge that his work was well done. He may have committed errors. He must have been more than mortal not to have done so. In the discharge of his duties he was industrious, unassuming and far-seeing.

He had the patience and willingness to hear and to learn, which it has been said is, in the assemblage of judicial qualities, perhaps the rarest and most valuable. His lucid and logical manner of statement is apparent to all who have listened to or who have read after him. His judicial style is simple and direct. It was never diffuse and rarely ambiguous. It was in these respects but the reflex of his character, for he was ingenuous, frank and direct to a greater degree than any man I have ever known. These qualities, aided by his clear perception and power of mental concentration, enabled him quickly to detect non-essentials in a cause, and penetrate at once into the very heart of a controversy—rarely being led

off from the controlling points by any wavering desire to follow up useless investigations.

The duties of his office circumscribed the limits of his ambition, and he delighted in their performance—not from any sense of pride of place or power, for he was of a sturdy mould that despised ostentation, and recognized more and more as the swift years went by that office-holding is among the least of the pleasures or personal benefits of life. His ambition was to be useful to his fellow-men by the faithful performance of a sacred trust. No standard of honor was higher or sense of justice more robust than his. He recognized that the importance of an upright and capable judiciary cannot be over estimated in its value to the State. His aim was to lend his aid in perfecting it as far as in him lay. His effort was not without its fruits; but what he accomplished was not by the exercise of the qualities I have mentioned alone. It avails nothing that a judge is only patient, laborious and able. There is another quality, without which these are useless. It is courage. I do not refer to personal courage, though Judge Smith was endued, as I am informed by his war comrades, with as tried a courage as ever marched up to the roaring throats of a deep ranged artillery—but I refer to a bravery of a higher and a rarer kind —bravery which could be steadfast under the criticism of friends and against the assaults of enemies. In this, no man, I believe, in modern or in ancient times, excelled him. No popular prejudice or partisan clamor could move him.

He was zealously devoted to duty and became a martyr to his devotion. He has as certainly sacrificed his life upon the altar of public service as did ever soldier who, at his country's bidding, met death upon the field of battle. Weary and worn with the travail of his office, he has dragged out the past year bravely battling to regain the strength he had lost in the service of his people. He is no longer

trammeled. He is delivered out of bondage. Though dead, he speaks. His voice, through his decisions, will still find audience among those to come after us. His impress is upon the bar and the judiciary, and through them upon the people. His influence was always for good; with him there was no retrograde movement. He despised hypocrisy and detested wrong.

While the hands of all who knew him are raised to do him reverence, would that mine had the cunning to bring the sweetest rose of all the field to deck his name, for none deserved it more. I trust that better words than I can speak will tell how his loss will be mourned and felt. I do not think it the exaggeration of praise to say that now, when he had just reached the mid-day of his usefulness, the State could have better spared any other of her best and most loyal citizens. In reverent gratitude I do thank God that he has blessed this land with the birth of such a man, and made it my privilege to know him.

Mr. W. S. McCain was appointed Secretary of the meeting.

Upon motion, the chair appointed a Committee on Resolutions, consisting of Messrs. S. F. Clark, U. M. Rose, E. W. Kimball, J. W. Blackwood and John Fletcher, who subsequently submitted the following report:

MR. CHAIRMAN: The committee to whom it has been referred to draft a suitable expression of the sentiments of the bar in regard to the recent death of our beloved brother, W. W. Smith, who was at the time of his demise the senior Associate Justice of the Supreme Court of this State, are profoundly and painfully conscious of the fact that in his death the bar and the State have sustained an irreparable loss; a loss by which they have been deprived of the services of a capable and eminent jurist, who has been cut off in the midst of his usefulness, in the meridian of his life, at a time when

his matured faculties, enriched by long, laborious and careful study, fitted him in a peculiar manner for the administration of justice, and for the acceptable discharge of all functions of his high office. As he attained not the honors of his position through any devices of personal ambition, but was called to it by the concurring voice of the bar and the people, he disappointed no expectation, and his performance of its important duties was distinguished in an eminent degree by learning, discrimination, judicial ability of a high order, unflagging devotion to labor, a sense of justice that presided over every investigation, perfect uprightness and integrity, and that impartiality, moral elevation and stainless purity of character that are the highest attributes and the most shining ornaments of the bench. Conservative in sentiment, he was yet the friend of every rational amelioration of the law; with a steady regard for legal precedents, he never ceased to search the principles which they were intended to illustrate; he neither believed that time could consecrate a wrong, or that innovation and novelty are necessarily meritorious expedients. His opinions, which will have a lasting effect on the development of our jurisprudence, clear without being diffuse, display in a forcible and convincing manner the resources of an active, earnest, able and well-disciplined mind. In private life, Judge Smith was very far above any shadow of reproach. At the foundation of his character was an unfailing sense of rectitude, a conscientious regard for the rights and a tender respect for the feelings of others. Not only in profession, but by long and habitual conduct, extending to every act and relationship, he displayed the graces and exemplified the virtue of a Christian life. Firm in his own beliefs, he was free from any taint of dogmatism; he instilled into his creed the animating principle of an all-pervading charity, which made him tolerant of differing opinions, and excited his sympathy and compassion for conduct having its

origin in human weakness, which he could not approve. The language of censure rarely fell from his lips, and in his intercourse with his fellow men he followed the great exemplar of the law in giving to the accused the benefit of every reasonable doubt.

1. *Be it resolved,* That to the bereaved family of the deceased, the bar tender their heartfelt and respectful condolence in their present deep distress.

2. *Be it further resolved,* That in token of our love and respect for the memory of the deceased, we wear the usual badge of mourning for the period of thirty days.

3. *Be it further resolved,* That we recommend that copies of these resolutions be presented to the Supreme Court, to the United States Court, to the Pulaski Chancery Court and to the Pulaski Circuit Court, by members of the bar to be appointed by the chairman of this meeting, with a request that they may be extended on the records of said courts.

With this imperfect estimate of the character of the deceased, keenly alive as we are to the sorrow and pain of the broken ties of family and friends, we consider his death at this time as nothing less than a great public calamity.

We therefore recommend that as a sincere and solemn declaration of the worth of the deceased, the bar here present may, by approving this report, give its public sanction to the sentiments that we have endeavored to express, in words which may be accepted as an inadequate memorial of the qualities and virtues of him whose loss we are called on to deplore.

We also recommend the adoption of the following resolutions:

4. *Be it further resolved.* That the bar attend the funeral of the deceased in a body.

5. *Be it further resolved,* That a copy of the proceed-

ings of this meeting be forwarded by the Secretary thereof to the family of the deceased.

Respectfully submitted,

SOL F. CLARK,
U. M. ROSE,
E. W. KIMBALL,
JOHN FLETCHER,
J. W. BLACKWOOD,
Committee.

The resolutions were adopted, and the chair appointed Judge Rose to present them to the United States Court; Mr. George W. Caruth to present them to the Supreme Court; Mr. W. C. Ratcliffe to present them to the Pulaski Chancery Court, and Mr. E. W. Kimball to present them to the Pulaski Circuit Court.

SUPREME COURT OF ARKANSAS,
SATURDAY, MAY 18, 1889.

Present: Sterling R. Cockrill, Chief Justice; Burrill B. Battle, Monti H. Sandels, Wilson E. Hemingway and Simon P. Hughes, Associate Justices.

Mr. Geo. W. Caruth addressed the court as follows:

MAY IT PLEASE YOUR HONORS: W. W. Smith, the senior Associate Justice of this Court, departed this life, after a long illness, on the eighteenth day of December, 1888.

On that day his professional brethren, keenly alive to the great calamity which had befallen both them and the State, took order touching his death, adopted a series of resolutions feebly expressive of their feeling of admiration, love and respect for their deceased friend, and deputed me to present them in this tribunal, that they may be writ upon your Honors' records, there to remain as long as those records themselves remain, as an earnest, heartfelt, but inadequate tribute to that upright Judge. As I speak these words I am pain-

fully impressed with the frequency with which death has flung its awful shadow over and about this chamber. When I came here but a few years ago to be enrolled at this bar—and oh, how short and swift have been those years—there sat on the bench, English, whose kindly features look down on us from yonder speaking likeness; Walker, whose strong, rugged personality made him so great a figure in our jurisprudence, and Harrison. English and Walker, after serving their country with fidelity and ability, now sleep with their fathers.

Harrison alone is left. Then came the courtly and learned Eakin, who soon wearied of the struggle and went to join the wife of his youth, who had preceded him to the great hereafter. There at the Clerk's desk sat Luke E. Barber, whose presence here was a benediction for so many years, and by his side his deputy, his brother Gwyn; both are gone.

Following fast and quick after these distinguished dead came our lamented friend, and another Judge of this Court ceased from his labors.

In delivering addresses of this character, one is naturally apprehensive, lest, following the admirable maxim, *de mortuis nil nesi bonum*, exaggerated phrases and extravagant eulogiums would find a place. But in this instance it is but the plain truth when I say my apprehension is not that I will say too much, but too little; in a word, that I will not be able to do simple justice to the exalted character, great abilities and lovable qualities of him of whom I now speak. No language I could employ would be too strong in expressing my own estimate of the man and the Judge.

Judge Smith was a native of South Carolina, born near Cokesburg, in the year 1838. He had the benefit of a collegiate education, having graduated from the South Carolina College in 1859.

The year after his graduation he came to this State and settled in Monroe county. At the commencement of hostilities in the late war he joined the First South Carolina Regiment, commanded by Col. Gregg. He subsequently served as Captain in the Twenty-third Arkansas under Col. Adams.

When the war ended, having shown himself a brave soldier and skillful officer, he returned to Clarendon, and in 1867 formed a partnership with Simon P. Hughes, afterwards Governor, and now a Justice of this Court, in the practice of the law.

Judge Smith continued the practice of his profession at Clarendon until 1877, when he removed to Helena, where he remained until he was elected an Associate Justice of the Supreme Court of Arkansas in 1882. In the spring of 1888 a pulmonary disorder discovered itself, making it necessary for him to seek relief in rest and travel.

He made a resolute and manly struggle with his dread antagonist, undertaking weary journeyings, striving vigorously

> "To hold death awhile
> At the arm's end."

Gallant as was his struggle, it was fruitless. To him the end was at hand, and finding himself mortally smitten in a distant State, he came back to his home to die.

Surrounded by his family, ministered to by loving hands, without a murmur, in full possession of his faculties, fully realizing that the supreme moment had arrived, he calmly bade the world farewell.

Thus passed away a great jurist, and as clear-souled and clean-handed a man as this age has produced. Great intellectually, he was no less great morally and spiritually. My acquaintance with him began in 1878. To have known him was a privilege, and to have had his friendship I account one of the most fortunate events in my career.

He was an admirable practitioner, splendidly equipped in

the learning of his profession, studious, careful, painstaking and the very soul of honor; but it was as a Judge, in the discharge of judicial functions, that his pre-eminence was so marked. It is said of poets they are born and not made. I sometimes think it might with equal truth be said of Judges.

The profession knows that to be a good lawyer is one thing and to be a good Judge is another. Something more is needed. It is the judicial mind, and Judge Smith had that to perfection. He had patience without limit, and although himself possessed of a quickness of apprehension which enabled him to grasp the situation in a moment, he was always willing to listen to the humblest and dullest of us with a courtly attention which made it an absolute pleasure to appear before him.

As a Judge in this court, I am sure I do but speak the unanimous sentiment of the bar when I say, no one could be more thoroughly competent to discharge its high, delicate and always responsible duties.

With great learning ever at hand and ready for the occasion, whatever may have been its exigency, he was always most happy and felicitous in its application to the case under consideration.

As for his judicial opinions, from the first to the last they were models.

For purity of style, for clearness of thought, for felicity of illustration and vigor of expression they stand among the finest of judicial deliverances.

His mind was clear, earnest and powerful, and all his faculties severely disciplined.

His analytical and logical powers were remarkable.

There was a delightful directness about all he said.

He called things by their right names, and no man had to read twice to ascertain what he meant. There was, in addi-

tion, a simplicity of expression which was always charming.

He wasted no words, but straightway went to the very core of things.

This characteristic directness and simplicity was exemplified in one of his last earthly utterances. But a little while before his dissolution he was asked if he was conscious of his condition. His response came clear-cut and direct, "Yes, the end is near. I am all right." That was all he said, and why should he not be "all right?" If this white-souled Christian gentleman, who had been faithful to every trust, had discharged every duty, could not afford to die, who could?

The Psalmist asks: "Who shall ascend into the hill of the Lord?" and on answering seems almost to have had our dead friend in view: "Even he that hath clean hands and a pure heart; and that hath not lift up his mind unto vanity, nor sworn to deceive his neighbor."

He loved the truth for the truth's sake; even-handed justice was what he sought, and to accomplish that no amount of labor was too great, no extent of research too much. His convictions were always followed, and it never concerned him how his conclusions were received. He neither claimed nor sought applause. His was indeed a striking and unique judicial personality. All his ambitions were centered on a faithful discharge of his duties. I have, if your honor please, no hesitation in saying that nearly as any one I ever knew he filled the measure of a perfect Judge. With abilities of a character to have commanded attention at any time or place, he never sought distinction in the political world, nor was he ever induced to seek any of its glittering prizes, because he loved the law.

He was under all circumstances a gentleman. No man more scrupulously observed those courtesies and amenities

which do so much to soften and beautify life. No man endeavored more earnestly to fulfill all the duties of society as they came to him, and a truer friend or one more willing to oblige could not be found.

He despised sham, cant and hypocrisy, and was as open as the day, being, indeed, an "Israelite in whom there was no guile."

His life was blameless as became a devoted Christian, for such he was. He believed implicitly in the truth of our holy religion, lived accordingly, and could well say at the end, "I am all right."

We have laid away in his last resting place our distinguished and lamented friend, whither he went in the full faith and belief of a blessed resurrection. A stately and beautiful column of the State has fallen.

This court can no longer profit by his wise and judicious counsel. His family, always so precious to him, is deprived of his protection and affection.

But, if your honors please, we have this consolation: We have left the recollection of a life full of purity, exalted abilities and duty performed.

We have this remembrance. Let us cherish that—

> "For memory is the only friend
> That grief can call her own."

Pursuant, therefore, to the request of my brethren, I now present these resolutions.

Mr. Caruth then read the resolutions adopted by the bar of the Supreme Court. They appear on a preceeding page.

Mr. W. P. Stephens addressed the Court as follows:

MAY IT PLEASE THE COURT: I am deputed by the Pine Bluff bar to make known the deep grief of its members because of the demise of one who but a short time ago worthily occupied one of those seats, and who for many years before had been a ceaseless laborer in our worthy profession.

Upon receiving the unwelcome intelligence that the Hon. Wm. W. Smith was no more, speedily the lawyers of our city assembled in sadness to bewail the great loss, to do honor to his name and to offer a fitting tribute to his memory, and I am under commission from them to express to the attorneys throughout the State our most intense feelings of regret, to mingle our sorrow with the general gloom, and moreover, to tender our sympathies to this honorable Court on this sorrowful occrsion.

In yielding to the mysterious workings of that *Vis Major* which is beyond human control, our minds involuntarily turn for respite to the life-work of our departed friend, brother, associate and co-worker, and cheer and comfort meet us, for his mind was brim full of pure thoughts, his habits were sinless, as they were uniform, and his daily intercourse with mankind was marked by the broadest charity and the most hearty and manly good will, and within his bosom there never entered an unpleasant motion of an evil design against his fellow-men.

Plainly, he was a good man.

We all do know how energetically he worked and how logically he thought and reasoned as a lawyer. It is my good fortune, when at my office, often to refer to the set of Arkansas Reports used by Judge Smith when engaged in the practice, and I am continually reminded of his labor and the care and accuracy with which he considered every question of law, whenever I read the marginal notes which his handiwork has interspersed here and there throughout these volumes. Work—work—work is the brief, but the truthful history of his life.

The bright and blameless record he made at *nisi prius*, and his briefs in this Court—gemmed and sparkling with the clear principles of truth and justice—remain with us as me-

morials of his talent, which the pitiless tread neither of progress nor of time can ever efface.

But in his exalted position here, the most honorable and, therefore, the most coveted that a lawyer of Arkansas can attain unto, his painstaking research, his splendid legal mind and his judicial acumen were more clearly manifest; and here, too, his virtues shone most brightly. If at times he was constrained by a sense of duty to adhere closely to the rigorous rules of the common law, nevertheless he was ever ready to season justice with mercy, and as far as possible to soften down all asperities by an application of the milder and more liberal doctrines of modern equity; and with a mind ever hungering and thirsting after truth, he aimed always at doing justice, and "offence's gilded hand" never dared attempt to shove it by.

His integrity stood without blemish, and his career was such that any eulogium seems superfluous; and the evidence of his industry, zeal and merit conserved in perpetual memory here in these records will be a monument as lasting as the rock-crowned and rock-ribbed hills that encompass this Capital City, and all sufficient to secure his fame to coming times, and in harmony with his deeds, the monument that marks the final place of repose for his body should be of white marble, typical of his purity of life, with inscriptions of something peculiar to Westminster Hall, mingled with reminiscences from our own courts — part English, part American—symbolizing his knowledge of the jurisprudence of both countries, and chiseled in the shaft, a tripartite engraven with a passage from each of the three great fountains of equity law—the code of Justinian, the opinions of Lord Hardwick and the works of our own immortal Story—to indicate to the passer-by the comprehensive views of him whose death we so justly deplore. He is gone, and the

State, though "contracted in one brow of woe," cannot call him back again, for

> "Who can win back the wind,
> Beckon lost music from a broken lute,
> Restore the redness of a last year's rose,
> Or dig the sunken sunset from the deep,
> Or call a gifted spirit back again?"

But his desert speaks yet, and we should wrong it

> "To lock it up in the wards of covert bosom,
> When it deserves, in characters of brass,
> A forted residence 'galnst the tooth of time
> And razure of oblivion."

By leave of the Court, I will read the resolutions of the Pine Bluff Bar:

"The Hon. Wm. W. Smith, the once able Associate Justice of the Supreme Court of our State, has passed away.

"To him the destroyer came not like a thunderbolt or a thief in the night, but after a long and painful illness, which made him fully aware of his approaching end and enabled the public, as well as his more immediate friends, to await with whatever of resignation comes with a sense of the inevitable, the great loss and sad bereavement which so certainly appeared in store.

"His integrity was never impeached, even in thought. His public course was as spotless as the ermine he wore, and his private life as pure and simple as that of a child.

"It is but proper that the bar of the Jefferson Circuit Court should give an expression of their appreciation of the departed Judge and as well also a sense of the public loss which has fallen on the bar and the whole State in common. Therefore, be it

"*Resolved*, 1. That in the death of Justice Smith, we have cause to mourn the loss of a truly good man, a citizen devoted to the good of his country, and a Judge upright and fearless, whose unswerving integrity and laborious and pains-

taking industry allowed investigation to stop at nothing short of iron-handed justice, wrought out and attained by and through the principles expressed in that learning by devotion, to which he had engrossed the best years of his life.

"2. That to the family of the deceased we tender assurances of our most sincere sympathy.

"3. That the Secretary be, and he is hereby requested to furnish a copy of these proceedings to W. P. Grace, Esq., M. L. Bell, Esq., and S. M. Taylor, Esq., with the request to act as a committee in presenting the same to the Jefferson Circuit Court for such action as to the court shall seem proper.

"4. That the Secretary be, and he is hereby requested to furnish W. P. Stephens, Esq., with a copy of these proceedings, with a request to present the same to the Supreme Court of Arkansas, for such action as to the court shall seem proper.

"5. That the Secretary be, and he is hereby requested to transmit an engrossed copy of these proceedings to the family of deceased.

"The resolutions were unanimously agreed on, whereupon on motion, the meeting adjourned.

W. M. HARRISON,
Chairman."

C. G. NEWMAN,
Secretary.

And now, with a sad heart, in accord with the gloom that overhangs this court, the bar of this city, and the bereaved family of the honored dead, these resolutions are respectfully presented for such action as to the court shall seem meet.

Chief Justice Cockrill responded as follows:

The resolutions of the bar which have been presented to the court have set the moral and intellectual attributes which adorned the character of Judge Smith beyond the reach of

common attainment; but they are not for that reason subject to be criticised as exaggerations; and, what is perhaps more striking, the admiration which we are forced to yield to the memory of his virtues is not shadowed by any fear that the contemplation of the other side of his character may disclose more of man's infirmities than has fallen to the common lot. Candor and justice do not require that we should withhold praise because perfection has not been found, for that is beyond the feeble faculties of man; nor should it be withheld because the intellectual pitch of the world's first minds has not been reached. When a character is so moulded that each of its attributes lends strength to all the others, and under the strong mastery of a practiced will, constantly impels the man to act the whole of all he knows of the high and true—the admiration, I may almost say the adoration, of his fellows is challeged. Of such rounded completeness was the character of Judge Smith. It may not have attained to perfection at any point, but it was replete with elements of moral and intellectual strength.

His was a bold, just and impartial spirit that spurned dissimulation, evasion and wrong. Reading had made him a full man, and he was ready and exact in making practical application of his knowledge. He combined a clear view of what was theoretically desirable and just with that which was legally practicable. These qualities, joined to an aptitude for intense labor, and directed by a logical mind which was never uncertain in the conclusion it reached, and rarely wavered in reaching it—save in obedience to honest doubt, which has been called the beacon of the wise—fitted him above other men for judicial office.

He possessed the master faculty of the Judge—that of laying aside the non-essentials in a cause and seizing on the point of decision to press it through unwaveringly to the end. The

power of his analysis reduced the voluminous mass of a confused record to the simple statement of a few facts which presented the legal aspect of the cause, and the force and clearness of his intellect resolved the problems which were intricate in their origin into a judgment so lucid that the wonder to others was why doubt or hesitation had ever existed. With a plain bluntness that was indicative of his nature, his simple judicial style gave concise form to abstract principles and made them clear to the common mind. He has not encumbered the reports with superfluous matter. To his opinions in them more than those of any other Judge may we look for models of pithy brevity. Judicial reputation is the growth of time—it is never established in a day, and rarely even in the short period which was allotted to Judge Smith on the bench. His lasting impress is, however, on our jurisprudence for its good. The regret is that a career which gave promise of so much usefulness, should not have had its full development. If the light of after days shall disclose that error has somewhere crept in unawares to mar it, let the magnitude of his labor be remembered and the brief time in which it was dispatched. In rapidity of work our judicial annals furnish no parallel, and it would be more than mortal to find perfection in it.

In his lofty courage, which was never moved by any prejudice, or by public clamor which at times has swayed officials—in his honest, sturdy manhood, he stands out great as a Judge and great as a man needed by the times in which he served.

While we grieve at his loss, we may rejoice that once he lived and presided here, and has left his example to reproduce his virtues. As an aid to that end, the resolutions will be spread on the records of this court and will be published in one of the volumes of our reports, with the address-

es of the gentlemen whom the bar have deputed to present them here.

The court then adjourned out of respect to the memory of the deceased.

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

MAY TERM, 1888.

McLEOD v. GRIFFIS.

51 77 1 355

1. ADMINISTRATION: *Jurisdiction of equity over settlement of administrator.*

On a bill to impeach the settlement of an administrator, the inquiry of the chancery court is limited to such items of the account as are affected by charges of fraud, accident or mistake, and all other parts of the account should be left to stand as they are. (McLeod v. Griffis, 45 Ark., 505.)

2.—SAME: *Same.*

A matter which the probate court has passed upon in the settlement of an administrator's account, cannot, in a chancery proceeding to falsify and surcharge such account, be assigned as fraudulent or as the result of accident or mistake, except upon the statement of some fact or circumstance which the probate court did not consider.

3.—SAME: *Same: Allegations and proofs.*

A bill to impeach the settlement of an administrator, which contains only general charges of fraud, accident or mistake, without specifying in what the fraud or mistake consists, states no cause of action; and the consent of the defendant that such charges may be investigated, will give to a court of equity no jurisdiction to grant relief thereon, except upon such proofs as would sustain specific charges amounting to a cause of action.

APPEAL from *Lee* Circuit Court in Chancery.

M. T. SANDERS, Judge.

James C. Tappan and *Jno. J. Horner*, for appellants.

The law of this case was settled in *45 Ark., 505*, and the account filed by the master, Quarles, has already been adjudicated, nothing being now presented different from the cause as it appeared in the account presented by the former master, Parrott, which was overruled by this court.

The master nowhere in his report finds the administrator guilty of intentional fraud, nor does he find that any loss occurred through any accident or mistake of the administrator. And when he attempted to charge the administrator with matters arising from *errors* or *mere negligence*, he exceeded his powers, as the chancery court had no jurisdiction to go into such matters.

The master had no right to go to the books of account for evidence. He was confined to the pleadings, exhibits and proof, and an examination of the books was improper. The report is an attempt to review and restate the whole accounts, without regard to the settlements in the probate court, as done by Parrott, and this court decided this could not be done.

The report is too general and uncertain, and it is impossible to determine what the master did find from the proofs, or how or where he found it, or why the administrator should be charged with the items charged.

Stephenson and *Trieber*, for appellees.

The only question is: Whether the report of the master, as confirmed, is in conformity with the opinion in 45 Ark., 505; everything decided on the former appeal being *res judicata*. *44 Ark., 383*.

The findings of the master in the 4th paragraph are based

entirely on fraud and negligence, and he charges and credits amounts found to be the result of fraud, errors or mistakes.

2. The master merely referred to the books whenever, owing to interlineations or erasures, he was uncertain which was correct.

3. The report is made in accordance with the directions contained in the opinion of this court, in all respects, and should be approved and the decree affirmed.

CLARK, Sp. J.

This is a proceeding in chancery to surcharge and falsify the settlement accounts of the appellant as administrator of the estate of Bernard McLeod, deceased. The case was formerly before this court on appeal and the decree of the circuit court was reversed, upon a hearing upon the original pleadings and proofs, and other proceedings had thereon, referring the case to a master to take an account, and upon his report and statement of the accounts, the case was remanded to the circuit court, with instructions to again refer it to a master to state *an account upon the principles announced in our opinion*, using for that purpose the pleadings, exhibits and proofs in the record, charging the administrator with such losses to the estate as the proofs should show to be the result of intentional or legal fraud, or as occurred through accident or mistake, and crediting him with such mistakes or errors as are shown to be in his favor and charging him with legal interest on any balance from the date of his final settlement with the probate court. *45 Ark., 505.*

On the case being remanded, the circuit court again referred it to a special master, Greenfield Quarles, with instructions as follows:

1. "Charge the defendant with all such losses sustained by

the estate as are shown by the proofs to have been the result of intentional or legal fraud, or as occurred through accident or mistake of the administrator.

2. "Charge the defendant with any loss sustained by the estate by reason of the purchase by the administrator of the stock of merchandise belonging to the estate.

3. "Credit the defendant with the errors and mistakes shown to be in favor of the administrator.

4. "Charge the defendant with 6 per cent. per annum interest on any balance against him from the date of his final settlement in the probate court.

5. "If the master finds that the said administrator has been guilty of any fraud in concealing assets of the estate and failed to account for them, deduct all commissions allowed him for his services as such administrator and charge them to him in the account."

The master has divided his report into six paragraphs. In the first he states: "That owing to interlineations, erasures," etc., in the exhibits he found it necessary to make an examination of the books of account kept by B. McLeod in his life time, and by G. W. McLeod, as the administrator of the estate, stating the accounts *covering the whole administration, on the theory* adopted by the former master.

He then states an account accordingly, covering the whole proceedings of the administration, making the sum of the debits $52,155.88 and the sum of the credits $46,239.18, leaving a balance in the hands of the administrator at date of his last settlement, January 7th, 1879, the sum of $5,916.66, to which, adding legal interest to October 25th, 1886, makes $8,681.68.

2. In the second paragraph he states the account differently, leaving out of the credits the administrator's commissions,

on the theory that he had forfeited commissions on account of his frauds, and makes the amount due, including interest, October 25th, 1886, $10,663.86.

3. In the third paragraph he states no account, but alleges there was some evidence that the administrator bought timber out of which lumber was manufactured for the estate, but as the value or amounts were not given, no credit could be allowed.

4. In the fourth paragraph, after stating that "charging the defendant with the amounts which came into his hands and which he failed to account for, and with such losses to the estate as the proofs show to be the result of negligence, accident or mistake, and crediting him with such mistakes or errors as are shown to be in favor of the administrator," he proceeds to state an account accordingly. As the fourth and fifth paragraphs were affirmed by the court below, we will here state the items of this account.

To amount of notes not accounted for	$1,551 06
To lumber, etc., not accounted for	4,795 38
To error in Bush note	333 74
To shingles	50 00
To error as to voucher 58, first settlement acc't	210 00
To interest on notes	265 69
To error in claim paid Jarrot and Rodgers	50 00
To check given	100 00
To error in Allison draft	407 31
To over-charge in building gin	196 00
To error in am't paid Allison, Smith & Johnson	72 00
Total amount of debits	$8,031 18

CONTRA.

By remnant corn, timber, etc	$ 496 86
By amount paid Hewitt, $414.77 less $100.00	314 77
By amount E. L. Black	100 78
By repairs and miscellaneous expenses	647 79
By J. A. Bush	580 00
By James Torlin	35 00
By additional mill expenses	21 00
Total credits	$2,196 20

To amount January 7th, 1879	$5,834 98	
To int. for 7 years, 9 mo., 16 days	2,727 87	
Amount due Oct. 25th, 1886		$8,562 85

5. The master in the fifth paragraph states: "From the proofs before the master, he finds it impossible to state from what source some of the items with which the administrator charges himself in the first settlement come, but by charging him with the open book accounts which came to his hands, the merchandise bought and paid for with the moneys of the estate, the probable profits made in the mercantile business while carried on by the administrator for the benefit of the estate, the amounts would be about the same." The master has, therefore, balanced those items and made no charge nor allowed any credits for these items.

6. In the sixth paragraph the master finds that "The manner in which the administrator conducted the estate, his failure to keep proper books of account and to charge himself with the assets with which he is legally chargeable, deprives him of any right to commissions," and thereupon he deducts the commissions allowed in his accounts, $1,666.25, with interest, $778.82, making $2,446.06, from his accounts as

allowed him by the probate court, and adding it to the aforesaid balance of $8,562.85, charges the administrator as due the estate the sum of $11, 007.91.

To this report the defendants except, as follows:

1st. To the first paragraph, because the master therein disregards the settlement accounts of the administrator by the probate court, and restates the accounts covering the whole of the administration, on the theory of the former master, J. M. Parrott, in contravention of the former decision of this court.

2d. To the second paragraph, for the same causes contained in his exception to the first paragraph, and because by the finding of the master the administrator is deprived of commissions allowed by the probate court, unjustified by anything in the pleadings or proofs, or the former decision of the supreme court.

3d. To the fourth paragraph he excepts to the items, $1,551.06, amount of notes not accounted for, and $4,794.-38, for lumber not accounted for, amounting to $6,346.44, for the following reasons: (1) These charges are not itemized. (2) There is nothing to show that they are not embraced in the administrator's accounts as confirmed in the probate court. (3) There is nothing to show that they were collected or collectable. (4) There is nothing to show that if omitted from the probated settlements, it was through any fraud, accident or mistake of the administrator.

4th exception. To the sixth paragraph, on the same grounds set out in his exception to the second paragraph above.

5th exception. And the defendants except to the whole report, because it is stated in the alternative.

6th exception. Because it ignores the judgment of the pro-

bate court in confirming the administrator's several settlement accounts and the directions of the supreme court, and without finding or specifying that the administrator was guilty of any fraud, actual or legal, or that said judgments resulted from accident or mistake; and because the report states the account on the theory that the administrator is chargeable with neglect.

7th exception. Because the administrator is charged with various sums in addition to those in his settlement accounts, unsupported by any testimony that such omissions were the result of fraud, accident or mistake, or that the estate suffered any loss therefrom.

The court, in its decree, overruled the 3d, 5th, 6th and 7th of defendants' exceptions and sustained the 1st, 2d and 4th, especially confirming and approving the 4th and 5th paragraphs of the master's report, finding that the administrator had in his hands the sum of $5,834.93, on the 7th day of January, 1879, unaccounted for, and decreed so much money, with interest thereon to date of decree, May 5th, 1887, $2,917.50, making, in the aggregate, $8,752.48 to be paid, with accruing interest, to the widow and heirs of Bernard McLeod, deceased. The defendants excepted and appealed.

It seems as the court sustained all the exceptions of the defendants to the master's report, except what is contained in the 4th and 5th paragraphs, and the plaintiffs have not appealed, that the questions here are narrowed down to the inquiry whether the court erred in overruling the exceptions to those paragraphs, and in rendering its decree based upon the one account therein contained.

In remanding the case, in our former decision, for further reference to a master, we expressly directed that the account

should be taken in accordance with the principles announced in our opinion.

1. ADMINISTRATION: Jurisdiction of equity over settlement of administrator.

In that opinion we think it was clearly laid down that the settlement accounts of an administrator, when confirmed by the probate court, are judgments of that court, which is a court having competent jurisdiction over the subject; that ample provision has been made for a review of the proceedings of that court on appeal. That in collateral proceedings in the chancery court, to surcharge and falsify such accounts of the administrator, the court can go no further than to inquire into the charges of fraud, accident or mistake.

This inquiry will necessarily be limited to such items of the settlement as are affected by such charges or proof, and the burthen of proof is on the plaintiff. All other parts or items of the accounts should be left to stand as they are.

On further submitting the case to a master, the chancellor has, inadvertently no doubt, left the question as to this limited jurisdiction of the court to the uncontrolled discretion of the master, and the master has evidently regarded the entire settlement accounts in the probate court as subject to review and restatement, and he has in the first paragraph of his report proceeded to review and restate them, avowedly covering the whole administration, upon the theory set out in the statement by the former master, J. M. Parrott.

It was expressly upon the ground of this theory that we held that statement erroneous. The new account is based upon the same pleadings and evidence as the old one, no change in the pleadings having been made and no new evidence taken, and we must determine the question here by the same record. True, the court sustained exceptions to the general restatement in the first and second paragraphs, and ruled it out as it did the paragraph depriving the adminis-

trator of his commissions. Manifestly and expressly, however, the account set out in the fourth paragraph is based upon the same view. It consists of such items selected from the whole record, wherein the parties on either side are conceived to have suffered loss. It is manifestly an effort to correct the errors in the administrator's accounts without regard to whether such errors were fraudulent or the result of accident or mistake, or were errors of the court and parties which could be corrected only by appeal. We are aware that to draw this distinction in all cases is exceedingly difficult, and this difficulty has been the source of much litigation in the courts. In our former opinion we stated that "It may be, and often is, no doubt, a matter of great difficulty for the chancellor, upon the charges and evidence before him, to distinguish in a matter of complicated accounts, what is fraudulent or the result of accident or mistake from what is mere error remediable only by appeal. But this is a difficulty inherent in the subject, and must be met by the patient exercise of the discriminating power of the chancellor." The distinction is, however, all-important, as it constitutes the boundary of the court's jurisdiction or its judicial power, and must be maintained.

2. SAME. It is plain, however, that whatever matter the probate court has passed upon cannot be assigned in the chancery court as fraudulent or as the result of accident or mistake, unless upon the statement of some fact or circumstance not considered by that court. The identical issues decided by the probate court cannot be retried and reversed by the chancery court in this proceeding, and where this is manifest the court should refuse to take jurisdiction. The difficulty is almost peculiar to judgments confirming administrators' accounts. Those settlements are necessarily divided into numerous

items of debit and credit, and the items have no necessary connection with each other; but an examination and confirmation of the settlement is the judgment of the probate court as to each separate item as much as it is to the settlement as a whole. We are not prepared to say that the chancery court would not have jurisdiction to set aside as a whole the settlement accounts of an administrator, but it would be only upon an impeachment of the settlements as a whole. It must be upon fraud or accident going to or affecting the entire action of the probate court, and in which the court has been the victim of the fraud or the accident. "It must affect all the items of the account." This is the rule even as to stated mutual accounts between parties *in pais*. See *Branger v. Chevelier*, 9 Cal., 353; *Bruen v. Hane*, 2 Barb., 586; *Grover v. Hall*, 3 Harr. & J. (Md.), 43; *Bullock v. Boyd*, 2 Edw. Ch. (N.Y.), 293; *Farnham v. Brooks*, 9 Pick., 212; *Roberts v. Totten*, 13 Ark., 609. And see the doctrine laid down in *1st Wait, Actions and Defences*, 192, *et seq.*

It is true that in the equitable action of account, the court will in some cases reopen the whole statement for the correction of errors affecting the balance, by consent of parties, but this is because the jurisdiction of the court over the subject is plenary.

It has in that case jurisdiction of errors as well as frauds. See cases above and *Floyd v. Priester*, 8 Rich. Eq. (S. C.), 248; *Troup v. Haight*, Hopk. Chy. (N. Y.), 238.

3. SAME: Allegations and proofs.

In our former decision we held that the consent of the defendants could not enlarge the jurisdiction so as to admit a general review of the administrator's accounts or to correct any errors properly correctable on appeal, but that it would authorize an inquiry as to such frauds, accidents or mistakes as

the proof should show to be such without reference to whether specific charges to that effect had been made. It was not intended that such proof should be otherwise than such as would sustain specific charges if made.

The rule laid down by Justice Eakin in the case of *Reinhart v. Gartrell*, 33 Ark., 727, is the true one: "That the chancellor should confine the reference to the correction of the settlement as to those points where the errors originally occurred, and where they entered into subsequent statements; and this finding should be itself always upon the allegations of the bill pointing out the fraud and not upon vague and general charges. General assertions of fraudulent intent add nothing to the strength of the bill, unless made applicable to specific acts or declarations."

We cannot agree that general charges of fraud, accident or mistake in an administrator's settlement accounts, without such specifications as show in what the fraud or mistake consists, can constitute a cause of action in this collateral proceeding. The court will not compel a discovery from the administrator to find out whether it has jurisdiction. Jurisdictional facts must be charged. In the language of ancient jurisprudence, "the court of chancery will not entertain a fishing bill."

In the original complaint, the plaintiffs, after numerous charges of frauds connected with the separate items of the settlements, proceed to state, in effect, that other frauds and mistakes existed in the accounts unknown to the plaintiffs, but which would appear upon an inspection of the books and a discovery from the administrator, and prayed such discovery, and that the settlements might be opened and the administrator's accounts restated. The defendants in their answer and cross-bill admitting errors and mistakes, denying any

intentional frauds, claim that such errors and mistakes were principally against the administrator, and consent to setting aside the settlements and restating the accounts over the whole administration. The court proceeded accordingly to set aside the settlements and to restate the accounts. We are of opinion that these proceedings were erroneous and *coram non judice*, except so far as they contain evidence of the specific charges in the pleadings, or such proofs of fraud, accident or mistake in the several items of the settlements as when properly charged would give a right of action. We are not able to see how we can affirm the decree without sanctioning these proceedings—without setting a precedent inconsistent with many former decisions of this court and with our former opinion in this case, for there is nothing in the report of the master or the decree to show that the jurisdictional distinction referred to has been considered in reference to the items of this account, upon which the decree is based. Whether they are charged or proved to be fraudulent, or the result of accident or mistake. The master has acted upon the principle that fraud or mistake in any one particular authorized him to review the whole proceeding and to correct any errors he might find prejudicial to the party. The defendants' exceptions are founded upon this error and we think they are well taken.

The decree will be reversed and the case will again be submitted to a special master here; and as the account last taken, upon which the decree was based, contains whatever is complained of in the settlements of the administrator, we will confine the reference to an inquiry as to the charges and proofs in the record to affect the several items of the account with fraud or show that they were the result of accident or mistake. Hon. W. P. Campbell, the clerk of this court,

is hereby appointed an especial master for that purpose, and he will charge against the administrator such of the items or parts of items in the said accounts as the proofs in the record shall show to be connected with fraud or the result of accident or mistake on the part of the administrator or the probate court, and report the evidence upon which such charge is made. And he will allow such items of credit in the account as through error or mistake the administrator is entitled to, but only to the extent of the debits against him; and charge legal interest upon any balance against the administrator from the date of his last settlement.

The master will report his proceedings to this court on the 2d Saturday in October next, and the parties or their solicitors are permitted to appear before the master at any time to be set by him, to assist him in determining the questions involved.

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

McLEOD v. GRIFFIS.

1. ADMINISTRATION: *Jurisdiction of equity; Surcharging accounts.*

On a bill to surcharge and falsify an administrator's accounts, he will not be charged with the value of notes and lumber belonging to the estate, alleged to have been unaccounted for, when it is not shown that the notes were collected, or that the lumber was sold and the money appropriated by the administrator to his own use, and where, so far as the proof shows, such notes and lumber still belong to the estate.

2. SAME: *Same.*

In a proceeding to falsify and surcharge the settlement accounts of an administrator, the chancellor referred the case to a special master to state an account. The defendant excepted to the master's report and his exceptions were sustained to all the paragraphs of the report except the fourth and fifth. A decree based on those paragraphs was reversed, on the de-

fendant's appeal, and the case was referred to a special master appointed by the supreme court. As there was no appeal by the plaintiff, the inquiries of the master were confined, by the order of this court, to the statement contained in the fourth and fifth paragraphs of the report made by the master in the court below. The master appointed here allowed credits amounting to a large sum, which the administrator had neglected to take in his probate settlements, and charged him with a smaller sum, with which his answer admits he was erroneously credited in such settlements. *Held:* That although the item thus charged is not contained in the statement submitted to the master, yet, as the credits he allows the administrator can only stand upon the principle that whoever demands equity must do equity, their allowance should, by the same rule, be upon terms of charging him with the item which he admits to be due from him to the estate.

APPEAL from *Lee* Circuit Court in Chancery.

Tappan and *Horner*, for appellant.

Stephenson and *Trieber*, for appellee.

SUPPLEMENTAL OPINION ON MASTER'S REPORT.

CLARK, Sp. J.

We have had under consideration the exceptions to Master Campbell's report in this case. In submitting the case to him for an account, we especially confined him, as to the charges against the administrator, to the statement contained in the fourth and fifth paragraphs of Master Quarles' report in the court below, because the decree in that court overruling exceptions to this statement and giving judgment thereupon, was alone appealed from. The exceptions of the defendant to all other matters of account in the report were sustained and the plaintiff failed to appeal. Appellees' exceptions to Master Campbell's report, therefore, complaining that the master has failed to charge the administrator with sums not contained in the statement submitted, cannot be entertained, as they are not before us.

As to the other branch of his exceptions, in which he 1. ADMINISTRATION:

Jurisdiction of equity; Surcharging accounts.

complains that the master has stricken out of the statement items of debit with which he was justly chargeable, the master reports that he finds no evidence to sustain such charges on the ground of fraud, accident or mistake, and we have held that such must appear in order to surcharge the administrator. On comparing the settlement accounts of the administrator, it does not fully appear, at least as to some of the items, that he is not already charged with them in such settlements, nor is it clear that the sums so disallowed involve a waste of the assets, or that the estate has suffered the loss of these sums. As to the two largest items, that of $1,555.06 and $4,795.38, the former being for notes and the latter for lumber charged to be unaccounted for, the master says, "there is nothing to show that they were not embraced in the settlement accounts confirmed by the probate court, nor to show that the notes had been collected or were collectable, nor if omitted from the probate settlements, that it was through fraud, accident or mistake of the administrator." We think this appears true upon the face of the charges. Doubtless it was the duty of the administrator to include these assets in his accounts, and it was an error which might have been corrected upon appeal, but it is not charged, or at least not proved, that the notes were collected, or that the lumber was sold and the money appropriated to his own use by the administrator. So far, therefore, as charged or proved, these notes and this lumber remained the property of the estate. We do not think this is sufficient to charge the administrator in this collateral proceeding. Without referring more particularly to the grounds of the appellees' exceptions, we have looked into them and are of the opinion they should be overruled, and they are overruled accordingly.

2. SAME.

But the master has charged the administrator with one

item, $1,069.17, voucher No. 61, of his probate settlements. This item is not contained in the statement submitted to the master, and the question is, can it be allowed? On looking into Master Quarles' report, it does not appear as any part of the accounts to which exceptions were sustained. But the plaintiff's bill charges, and the defendant in his answer and cross-bill admits, that he was erroneously and by mistake credited with this sum in his probate settlements, and that he ought to be charged with it in this proceeding. We think, however, it can and should be allowed to stand upon another familiar principle of equity.

The master has allowed the administrator some large items of credit, the whole amounting to more than $1,800. On what principle in equity are credits allowed the administrator in cases of this kind? Of course, fraud, or waste of assets, can have no application to credits, nor are they allowed upon any original or independent equitable right. As intimated in our former opinion in this case, we are not prepared to hold that an administrator can, after his accounts have been finally settled in the probate court and the assets distributed, come into a court of chancery, either upon a cross-bill, as in this case, or by original bill, and have his accounts opened and restated on the ground that by his own errors or mistakes he has over-charged himself, or failed to take credits to which he was entitled. But if such jurisdiction were unquestionable, the court would grant no relief where such errors and mistakes were the result of his own negligence. See Pomeroy Equity, secs. 828, 839, 854, and cases cited.

No one can look into these probate settlements and not see that the confused, inartificial and negligent manner of accounting has been the cause of the whole mischief. Granting, therefore, such original equity in his behalf, the court

could grant him no relief for the reason that such relief would be founded upon his own negligence. Whatever credits are to be allowed him are, in a manner, *ex gratia* on the part of of the court, *i. e.*, upon the principle that whoever demands equity through the court, and especially in cases of mutual and stated accounts, must do equity. See Pomeroy Equity, secs. 385, 386. But in accounts involving debits and credits, where relief may be afforded either party, the rule, we think, applies as well to one party as to the other. See *Tongue v. Nutwell*, 31 Md., 302.

Coming within this well-recognized principle of equity, we think that in allowing the administrator the benefit of these credits, it should be upon terms of charging him with the item of $1,069.17, which he admits is just and due from him to the estate.

As to the other grounds of exception on the part of the appellant, we think they are not well taken, and they are overruled accordingly. We are satisfied that the master's report, as it stands, comes as near doing justice to both parties as it is possible to arrive at in this complicated and greatly troublesome proceeding, and the report is accordingly confirmed.

The case will be remanded to the circuit court with directions to enter a decree in behalf of the plaintiffs for the sum of eight hundred and ten and 76-100 dollars ($810.76), the balance found due by the master against the defendant, McLeod, and the sureties on his administration bond, to which the court will add interest at 6 per cent. per annum from the administrator's last settlement in the probate court to date of the decree, and the decree to draw legal interest from its date until paid.

And the court will make such further orders or decree as it shall deem necessary, awarding process and for the distribu-

tion of the money to the proper parties; and the court will charge the costs of the appeals to the supreme court and proceedings therein to the plaintiffs in the court below, and all other costs in the case to the defendants.

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

JONES V. HORN.

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1. DAMAGES: *Measure of: Conversion of chattel.*

Where a mortgagee of personal property takes and sells it in the exercise of a right existing under the mortgage, and becomes a wrong-doer only by reason of the improper method of exercising his right, he is liable to the mortgagor, in the absence of special damages, only for the value of the property at the time of its conversion, less the amount of the mortgage debt.

2. SAME: *Conversion of tenant's crop: Recoupment.*

In an action by a tenant against his landlord, for the conversion of a crop, the defendant's lien on the crop for rent may be made the subject of recoupment in his favor.

APPEAL from *Independence* Circuit Court.

J. W. BUTLER, Judge.

The appellant, Jones, who was the plaintiff in the court below, to secure an existing indebtedness of $235.66 to V. Y. Cook, and also the amount of future advances to be made by Cook, executed to B. M. Cook a deed of trust, conveying to the latter certain mules, hogs and farming implements, and also all the corn and cotton which he might raise during the year 1886, on a farm belonging to the appellee, Horn. The deed was executed on the 9th day of January, 1886, and provided that the whole indebtedness should become due and payable on the first day of October following. On the 15th of June, 1886, V. Y. Cook, after having advanced to Jones

$50.90 in supplies, for which, under contract with Horn, he held a first lien on Jones' crop, sold to Horn his debt on Jones and delivered to him the deed of trust.

It was stipulated in the deed of trust that, if default should be made in the payment of the debts, the trustee was authorized to take possession of the property without legal process, and to sell the same at public auction, for cash, after giving ten days' notice of the time, place and terms of sale. The deed also contained the following stipulation: "And it is distinctly understood that any neglect, ill treatment or abandonment of any of the aforementioned property, is, at the discretion of the said party of the third part, to work a forfeiture of all rights of said party of the first part therein, and this trust may be foreclosed just as if said indebtedness had matured and default in payment thereof had been made."

After his purchase from Cook, Horn furnished Jones, during the months of June and July, $50.70 in supplies and labor to assist him in cultivating his crop.

On the 9th day of August, 1886, Horn went into the field where Jones was ploughing, and without the consent of the latter, unhitched the mules from the plows and took possession of the mules, plows, gears, etc., mentioned in the deed of trust. He at the same time notified Jones that he took possession of the crop, and that Jones was thereafter to have nothing to do with it. At the time of the seizure of such property, Jones was indebted to Horn in the sum of about $351.00 on the mortgage and owed him the rent for the land on which the crop was growing. Horn advertised the property for sale under his own signature as "assignee," and had it appraised by three persons who were not previously selected and sworn as the statute requires, but who afterward made oath to their appraisement, which amounted to $424.00. By

Horn's request, B. M. Cook, the trustee, attended at the time and place fixed by Horn's notice and offered the property for sale. Horn became the purchaser for the sum of $309.00, and Jones then sued him for the unlawful taking and conversion of the property and also for the use of the mules. Horn answered, setting up the execution of the deed of trust, his purchase of the debts secured, his advance to Jones, in addition to the advance made by Cook; that he took possession of the property under authority of the trustee, because of Jones' neglect to give the crop the necessary cultivation; that the gross value of all the property purchased by him, without deducting anything therefrom for rent due him, was less than the mortgage debt, and denying that the plaintiff had sustained any damage.

On the trial the court gave the jury, among other instructions, the following, which were objected to by the plaintiff:

1. The jury are instructed that if you find, from the evidence in this case, that the plaintiff was the owner of the property described in his complaint, and that he was in the peaceable possession thereof, and that the defendant unlawfully took said property out of his possession and afterwards wrongfully converted it to his own use, then you should find for the plaintiff, and assess his damages at the full value of the property so unlawfully taken and wrongfully converted, unless you further find from the evidence in the case, that by act of the plaintiff, under the deed of trust, the defendant had a right to foreclose the lien created by said deed, and in that event the damages would be the difference between the actual value of the property at the time of the taking and the mortgage debt; and if the value of the property does not exceed the mortgage debt, then you should only find for the plaintiff nominal damages.

2. The jury are instructed that if you find for the plaintiff, then, in arriving at the value of the property taken from him by the defendant, you should take as a basis the estimated probable yield of the crops of corn and cotton at the maturity of said crops, as shown by the evidence, and without making any deduction for what may have been wasted or destroyed, if any waste or destruction occurred, while in the defendant's possession. But if no waste or destruction occurred, then you should estimate the actual yield of the crop, and you should give plaintiff the highest market value of said corn and cotton, as shown by the evidence, at any time after the maturity of said crop and the commencement of this action, and this value you will estimate without regard to any outlay or expense which defendant may have incurred after he took possession of said crop. And in estimating the value of the other property, you should give the highest market value as shown by the evidence at any time after the taking and before the commencement of this suit, and to which you should add the value of the use of the mules from the taking to the commencement of this suit; unless they find from the evidence that the defendant had the right to foreclose his lien at the time of the taking, and in that event the measure of damages would be the value of the property at the time of the taking, and they would be authorized to find for the plaintiff nominal damages and whatever they may find from the evidence the property was worth in excess of the defendant's mortgage, if any.

3. The jury are instructed that if you find from the evidence that the plaintiff rented land from the defendant for the year 1886, and that V. Y. Cook held a deed of trust upon all the crop of plaintiff growing upon said land for that year, and also upon the mules and farming utensils owned by

plaintiff at the time, to secure a debt owing by plaintiff to said Cook, and which debt would not become due until the 1st day of October, 1886, and that said Cook was threatening to have said deed of trust foreclosed before the maturity of said debt; and that, in order to prevent the foreclosure of said deed of trust and the sacrifice of his property by a premature sale of it, the plaintiff and the defendant entered into an agreement that the defendant would buy said debt and deed of trust from said Cook and forbear the foreclosure of said trust until the maturity of said debt, for the consideration of thirty dollars, or other valuable consideration, to be paid defendant by plaintiff in addition to the debt secured by said deed of trust; then the defendant cannot justify the taking of the property under said deed of trust, and you should find for the plaintiff the full value of the property taken from him by defendant. But if you further find that the defendant had a right under his said contract and deed of trust to foreclose the lien in said deed at the time of the taking, then the damages would be nominal and also the excess, if any, of the value of the property over the mortgage debt.

4. The jury are instructed that if they find from the evidence that the plaintiff was indebted to the defendant in an amount greater than the value of the property alleged to have been taken by him, and you further find at the time of the taking of the property the defendant had a lien, by deed of trust, thereon, subject then to be foreclosed; then, and in that event, the damage for the taking of the property would be only nominal.

The trial resulted in a verdict and judgment in favor of the plaintiff for $64.20 and he appealed.

Coleman & Yancey, for appellant.

The plaintiff being the owner and in peaceable possession

of the property, the unlawful taking by defendant and the wrongful conversion to his own use, constituted him a trespasser, and plaintiff was entitled to have his damages assessed at the full value of the property so unlawfully converted, at its highest market value before the commencement of suit, without any deduction for waste or destruction while in defendant's possession, or any expenses or outlay incurred. 16 Otto, 432; 36 Ark., 268,

It devolved on defendant to show that the terms of the deed of trust and the law had been strictly complied with. Mansf. Dig., secs. 4759, 4760–1. No one except the trustee had power to take possession and sell.

If the defendant was a trespasser, he could not offset any expenses against the damages. 44 Ark., 210.

The measure of the damages was not the value of the property *at the time* of the conversion; the damages should be *compensatory*. 1 Car. & P., 625; 2 Gaines Cases in Error, 200; Moaks Underhill Torts, pp. 76–7; 3 Cowen, 82; Sedgwick on Damages, 2d Ed., pp. 478–9.

Defendant being a trespasser was not entitled to even offset his mortgage debt. Cases supra. The verdict was inadequate, and plaintiff's instructions laid down the correct rule.

Robert Neill, for appellee.

Instructions 2, 3 and 8 asked by appellant are in contravention of the principles laid down in 36 Ark., 268, and Sedgwick on Dam., 6th Ed., p. 482.

It is conceded that appellee is a trespasser in taking the property *without Jones' consent*, but appellee had the right to foreclose his lien, on a violation of the stipulations contained in the trust deed, and was entitled to offset his mortgage

debt against the value of the property at the time of the conversion. Boone on Mortg., sec. 176 and notes 8, 9 and 10. The recovery is limited to the actual net amount of plaintiff's claim. 25 Md., 269; note b, p. 482 Sedgwick Dam., 6th Ed., and p. 392, vol. 2, 7th Ed. This is the rule even where the wrongful conversion occurs before default, where the mortgagee has a present right to possession. Ib. supra: 15 C. B. (N. S.), 330; Mansfield's Dig., sec. 4764; 16th Otto, U. S., 432.

COCKRILL, C. J.

It appears to have been conceded on the trial that the defendant was a wrongdoer and liable to the plaintiff for the conversion of the property in question. The controversy turned on the rule of damages. The rule is that wherever the defendant has a legal or equitable interest in or claim upon the specific property for the conversion of which he is sued, the recovery against him is limited to the actual net amount of the plaintiff's interest, although the possession is wrongly assumed or retained. This fully indemnifies the plaintiff, and leaves the balance of value in the hands of him who is entitled to it, thus settling the whole controversy in one suit.

1. DAMAGES: Measure of: Conversion of chattel.

Where the defendant is a mortgagee who was entitled to the possession, with power to sell at the time of the seizure or conversion, and who has become a wrongdoer by reason of the manner of acquiring possession, or in the irregularity of the sale, he is liable to the mortgagor (in the absence of proof of special damages), only for the value of the property at the time of the conversion, less the amount of the mortgage debt. *McClure v. Hill*, 36 Ark., 268; *Street v. Sinclair*, 71 Ala., 110; *Chamberlin v. Shaw*, 18 Pick., 278; *Brinck v. Freoff*, 44 Mich., 69; *Brown v. Phillips*, 3 Bush.,

656; Sedgwick on Measure of Damages,* 482, note 2 and cases cited; Jones on Chat. Mortg., sec. 437.

The jury in this cause found, in effect, that the mortgagor's neglect of his crop had worked a forfeiture by the terms of the mortgage, and that the right to take and sell the property for the defendant's benefit existed at the time it was exercised. It was only for the improper method of exercising his rights that the defendant was mulcted in damages. It is obvious, therefore, that the value of the property at the time of the conversion, and not at some subsequent period, should govern.

2. SAME: Conversion of tenant's crop: Recoupment.

The defendant was also the landlord of the plaintiff and had a lien on the crop, which he converted for rent. This specific lien was also the subject of recoupment in his favor, and it was not error to admit proof in regard to it. If the jury, in estimating the damages to be assessed against the defendant, gave him the benefit of the amount due him for rent, they did no more than they should have been instructed to do. If they allowed him nothing upon that account because they understood the court to instruct them not to do so, the error was favorable to appellant. The evidence of the value of the property was conflicting. In any view the verdict is within the evidence; the charge was favorable to the appellant and the judgment will not be disturbed. Affirm.

NICHOLS V. COUNCIL.

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1. PUBLIC LANDS: *Alienation of homestead.*

The provision of the original homestead act of congress, which inhibits the sale of lands entered thereunder, before such entry is completed, applies equally to a soldier's additional homestead, entered under the act of June 8, 1872; and under either act, the conveyance of a homestead under a

power of attorney executed before the application for the entry was made, is void and constitutes no defense to an action against the grantee to recover the land, although such action is brought by the homesteader.

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

Where land, entered under the homestead law, is alienated before the right thereto is perfected, the statute of limitations will not run in favor of the enterer's grantee while the title remains in the government.

[QUERE: Will the statute begin to run on the complete performance of every act necessary to perfect the right to the land, although no patent for it has been issued? See 4 Wall, 44; 22 Ib., 444; 117 U. S., 151.]

APPEAL from *Franklin* Circuit Court, Charleston District.

G. S. CUNNINGHAM, Judge.

Cos. Altenberg, for appellant.

The title of the land in controversy remained in the United States government until the issuing of final proof certificate, January 12th, 1885, and the statute of limitations did not begin to run prior to the vesting of the equitable title in the appellant. See *Railway v. Prescott*, 16 Wall, 603, and *Diver et al. v. McSwine* 22 Wall., 444; *Friedheim*, 43 Ark., 204.

As to the statute of limitations: It was error on the part of the lower court to permit the appellees to introduce evidence to show peaceable and adverse possession of said land prior to vesting of equitable title from the United States government to appellant, January 12th, 1885. See *Diver et al. v. Friedheim, supra;* also *Simmons v. Ogle*, 105 U. S., 271. As long as the title remained in the United States government, the statute of limitations did not run against appellant. See *Simmons v. Ogle, supra;* also *Ross v. Evans*, 65 Cal., 439.

As to public lands: The power of congress over the disposition of the public lands within the state is expressly recognized to exist by the organic law of the state. See Mansfield's Digest, p. 152; Acceptance of Compact, approved October 18th, 1836.

See *United States v. Gratiot*, 14th Peters, 526. *Congress has the sole power* to declare the effect and precedence of title to public lands emanating from the United States. See *Bagnell v. Broderick*, 13 Peters, 436. A patent carries the fee and is the best title known to a court of law. See *Bagnell v. Broderick, supra;* also *Hooper v. Schiemer*, 23d Howard, 235. The appellant presented a patent from the United States government for the lands in controversy, dated Nov. 30th, 1885, issued under an act of congress approved May 20th, 1862, which could not be successfully questioned by appellee. See *Drew v. Valentine*, 18th Federal Reporter, 712.

Alienation of homestead is against public policy and void. The appellee's deed, presented and read as evidence to the the jury, was illegal and void for the reason that it was dated prior to issuing of final proof certificate for said lands, and for the further reason that it was predicated on a power of attorney executed prior to date of homestead entry, and is illegal and void as against public policy. See acts of congress, approved May 20th, 1862. A power of attorney, deed of conveyance or contract, executed by a homestead entryman prior to five years' residence or final proof certificate, is illegal and void. See *Seymour v. Sanders*, 3d Dillon, 440, and *Cox v. Donnelly*, 34 Ark., 762, and *Sorrels v. Self*, 43d Ark., 451; *Shorman v.Eakin*, 47th Ark., 351, and *Marshall v. Cowles*, in manuscript. It was error to admit power of attorney and pretended deed as evidence to the jury on the question of estoppel. No one can estop himself from taking advantage of that which is contrary to public policy. See *Shorman v. Eakin, supra*, and *Thompson v. Dauksum*, 68 Cal., 593, and *Thrift v. Delany*, 69 Cal., reported in 10th Pacific, 475; *Hutton v. Frazier*, 37 Cal., 475; *Law v. Hutchings*, 41 Cal., 637.

Ed. H. Mathes, for appellees.

The theory of appellant on the trial below seemed to be, that inasmuch as he had executed the power of attorney to Wittich, authorizing him to sell the land in controversy before he made his final proof of residence and cultivation as required by law, the power of attorney was therefore void and appellees acquired no title under the deed from Wittich. There is no evidence whatever in the transcript to support this theory.

The acts of congress upon the subject of homesteads, etc., provide that persons who served in the federal army or navy, and who had, prior to the act of June 8th, 1872, entered as a homestead a quantity of the public lands less than 160 acres, might, after that date, take up an additional amount, sufficient to make a full quarter section or 160 acres. This was called a "soldier's additional homestead," and proof of residence upon and cultivation of his original homestead was all the proof that was or could be required. Revised Statutes of the United States, section 2306. The patent from the United States, relied on by the appellant in this case, shows on its face that no final proof of any kind was required, as it conveys two separate tracts of land lying several miles apart, and it is impossible he could have lived upon and used both as a homestead. As to proof required on original homestead, see section 2291, Revised Statutes.

The natural and legitimate presumption, then, is that he had made his original entry of 40 acres only, and had made the proof of residence and cultivation as required by section 2291 before he applied for the 120 acres named in the patent. The power of attorney to Wittich refers to any lands he may be entitled to under the act of June 8th, 1872.

The plaintiff in ejectment must recover on the strength of

his own title and not on the weakness of that of the defendant. *Rice v. Harrell*, 24th Ark., 402. And if the appellant did, in fact, enter into a contract to sell his land before he made final proof as required by law, then he forfeited all his interest in the land, and obtained his patent from the government through fraud. In making final proof on original homesteads the entryman must swear and prove by two witnesses that he has not mortgaged, sold or contracted to sell any part of the land. See "Circular from general land office, showing the manner of proceedings to obtain title to public lands," issued March 1st, 1884, pages 24, 25, and form 4—369, pages 86, 87. Also, forms 4—008 and 4—197, page 91. The last is the form of the certificate of the receiver of the United States land office, and shows that no final proof, except that already made on the original entry, is required on these additional entries.

The truth is, appellant made the entry according to law, sold the land through his attorney for a hundred dollars, and when the government, in ignorance of the sale, issued the patent to him, tried to take advantage of an apparent wrong of his own, and demanded possession of the land. His after-acquired or perfected title only inured to the benefit of his vendee. Mansfield's Digest, sec. 642.

The authorities are numerous on the proposition that any sale or disposition of the homestead before final proof is contrary to public policy and void; but they will be found upon examination to refer always to original entries and not to the additional privilege allowed to soldiers and sailors.

The register and receiver are instructed to receive the application for a soldier's additional homestead and to issue his final certificate at the same time, thus showing that no proof

of any kind is required. See top of page 25 of the circular from the general land office, issued March 1st, 1884.

COCKRILL, C. J.

Nichols brought his action of ejectment in 1886 against Council for the posession of 80 acres of land, relying upon a patent from the United States, issued, as it recites, "pursuant to the act of congress approved 20th May, 1862, to secure homesteads to actual settlers on the public domain, and the acts supplemental thereto." The homestead entry upon which the patent is based, was made November 13th, 1875, the final proof certificate issued January 12th, 1885, and the patent followed in November of the latter year.

The defence was a conveyance from the plaintiff to the defendant's ancestor, and seven years adverse possession under that claim of title.

The conveyance under which defendant claims, was executed by one Wittich on the 18th day of November, 1875, pursuant to a power of attorney from the plaintiff, dated August 24th of the same year. It empowered the attorney to convey any lands of which the plaintiff was then, or might thereafter become seized, including any which might be located under the soldier's additional homestead act of June 8th, 1872, under which, the instrument recited, the plaintiff was then entitled to enter 120 acres in additon to what was called his "[my] forty acre homestead."

1. PUBLIC LANDS: Alienation of homestead

From this statement it will be seen that the power of attorney, which is the basis of the defendant's claim of title, was executed by the plaintiff before he had made application to enter the land for a homestead. But it is against the policy of the United States homestead laws to permit a conveyance of any part of the homestead before the entry is completed. An

agreement to convey or a conveyance by the homesteader is therefore void, and it is the recognized doctrine that the public interest requires that the courts shall lend their aid to carry out the policy of the statute, notwithstanding the homesteader is the plaintiff and party to an agreement looking to the violation of the law. *Cox v. Donnelly*, 34 Ark., 762; *Sorrels v. Self*, 43 Id., 451; *Shorman v. Eakin*, 47 Id., 351; *Marshall v. Cowles*, 48 Id., 362.

It is argued that the land in suit was entered by the plaintiff as a soldier's additional homestead under the act of June 8th, 1872, and that the inhibition of sale contained in the original homestead act does not apply to this class of homesteads. The record does not make apparent the fact contended for, but the conclusion as to the law would not follow if we should view the facts as the appellee does.

What is known as the soldier's additional homestead right is the privilege granted by the second section of the act of June 8th, 1872, to honorably discharged soldiers and sailors who had previously made homestead entries of less than 160 acres, to make an additional entry of a sufficient number of acres to make the aggregate 160. The act is supplemental to the original homestead law. The first section, which favors the veteran by deducting his time of actual service from the period of residence on the land required by the general homestead law, expressly requires of those who attempt to take advantage of its terms, a compliance with the provisions of that law, except as modified by the new act. One of those provisions is an affidavit by the enterer on making final proof, that he has not alienated any part of the land. The soldier who makes an original homestead entry under this act is then, by the express terms of the law, subject to this provision, and there is no general policy manifested by

the act to remove his incapacity to alienate before final entry. The section which confers the additional homestead right contains nothing that indicates a change of this policy. No procedure to govern in making the additional entry is provided. The old law, therefore, so far as applicable, must govern, for no rule of construction warrants the conclusion that a repeal of the law in force at the passage of the act was intended, except as it is expressly changed or irreconcilably conflicts with the last act. Whatever other proof required by that law is dispensed with in an effort to acquire the additional homestead, that of non-alienation has not been. The practice adopted by the land department requires it. See French's Case, 2 Land Decisions of Interior Department, 235.

It follows that the additional homestead which the soldier may acquire is inalienable before the right is perfected. This leaves the defendant to stand upon his plea of adverse possession. But the statute of limitations could not be put in motion while the title was yet in the United States. *Gibson v. Choteau*, 13 Wallace, U. S., 92; *Simmons v. Ogle*, 105 U. S., 271.

2. SAME: Same: Statute of limitations.

If the statute can run at all before the patent issues, it would be only in a case where the right to the patent has been completed by the performance of every act going to the foundation of the right. In such cases it has been held by the supreme court of the United States that the land is segregated from the public domain; that it becomes private property and consequently the subject of sale for taxes. *Witherspoon v. Duncan*, 4 Wall., 210; *Railway v. McShane*, 22 Ib., 444; *Van Brocklin v. Tennessee*, 117 U. S., 151. The same reasoning, it would seem, would give operation to the statute of limitations. But in this case the right to the

patent did not accrue until the patent certificate issued in 1885, which was only one year before suit was brought. The verdict and judgment, then, cannot be sustained on that theory.

Reverse the judgment and remand the cause.

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GIBNEY V. CRAWFORD.

1. COUNTY WARRANTS: *Order calling in: Notice, etc.*

In proceedings for calling in county warrants, the statutory authority under which the county court acts must be strictly pursued; and unless notice of the order making the call is given and proved in the manner prescribed by the statute, the order is a nullity as to all warrants not presented in obedience to the call.

2. SAME: *Same: Proof of publication.*

An affidavit as to the publication of an order calling in county warrants, in which the affiant fails to state he is the editor, proprietor, publisher or principal accountant of the newspaper in which such order was published, or that the paper was a daily or weekly and had a *bona fide* circulation in the county and had been published therein for one month before the first publication of the order, or how long it was published, the number of insertions, or the length of time between the last insertion and the time fixed for the presentation of the warrants, is a nullity and cannot be received as evidence of the publication which the statute requires. [Mansf. Dig., secs. 1148, 4359.]

3. SAME: *Same: Posting notice.*

Under the statute (Mansf. Dig., sec. 1148) requiring the sheriff to give notice of an order calling in county warrants, by posting copies of the order at the court-house door and the election precincts, it is the duty of the sheriff to make a written return, setting out the manner in which he has given such notice; and the testimony of a witness that he was the sheriff's deputy when the order was made, and put up copies of the same at some of the places prescribed by law and that the sheriff, who was not then living, had presented to the county court an account charging for his services in giving notice that county warrants had been called in, is not sufficient to show that such notice was posted as the law requires.

APPEAL from *Clark* Circuit Court.

H. C. BUNN, Sp. Judge.

J. L. Witherspoon, for appellant.

1. The burden of proof to show that the judgment of the county court was void, was on the appellee. Mansf. Dig., secs., 2870–1; 38 Ark., 157. In the absence of proof to the contrary, the county court, a court of superior jurisdiction, will be presumed to have acted upon sufficient facts to maintain its action. 38 Ark., 157; 11 Id., 519. See also Freeman on Judgments, sec. 124, 3d Ed.; Ib., sec. 132; 28 Fed. Rep., 409; 8 N. W. Rep., 266; 8 N. E. Rep., 269; 2 S. W. Rep., 102; 31 Ark., 74.

2. But if the burden was on appellant, the court erred in excluding the evidence offered by him. The presumption is that the sheriff made a proper return. 18 Ark., 469; 11 Id., 349. The proof of publication shows that it was *duly* published as required by law. Newman Pl. and Pr., p. 261; Myers' Code, p. 436, note A; 43 Ark., 232.

The proof by the Gazette was a substantial compliance with the statute. 37 Ark., 660; and the affidavits of the sheriff and his deputy were the best evidence procurable. 11 Ark., 525; Hempst. C. C., 6.

3. It must affirmatively appear on the record that the court *had not* jurisdiction. 1 Sawy., 319; 16 Wall., 352. As to conclusiveness of such judgments, see 10 Pet., 449; 2 Wall., 328, 349. See also, 3 Otto, 274.

Crawford & Crawford, for appellees.

The burden was on appellant. The answer admits all the material averments of the complaint, but sets up an affirmative defence in confession and avoidance. This shifts the

burden. 7 Ark., 42; 31 Id., 104; 19 N. W., 970; 16 Neb., 21. See also, 48 Ark., 426.

2. If a proceeding, even in a superior court, is contrary to the usual course of the common law in the exercise of a special statutory and extraordinary power, there is, in the absence of any recital in the record to that effect, no presumption that the court had jurisdiction of the defendant, and every requirement of the statute to give the court jurisdiction must be strictly complied with. And it should appear from the record that the court had jurisdiction. If it is silent upon the jurisdictional facts, it will not be permissible to introduce evidence *dehors the record* to prove that the court had jurisdiction. 5 Wend., 148; Freeman on Judgments, secs. 123, 124, 127; Hawes on Jurisdiction, sec. 8; Ib., sec. 234; Newman Pl. and Pr., p. 55–6; Bigelow on Estop., p. 198–9; Ib., 199, 200; Wells on Jurisdiction, p. 28; 2 Am. Lead. Cases, 633; 1 Smith's L. C., Pt. 1, p. 1127, 8th Ed.; 13 Wis., 575; 27 Id., 563; 33 N. W., 560; 18 Wall., 350; 53 Cal., 639; 25 N. H., 302; 5 Haywood (Tenn.), 294; 4 McLean, 221; 3 Humph. (Tenn.), 313; 26 Ill., 286; 27 Ala., 663; 25 N. J. Law, 554; 83 Ill., 188; 60 Mo., 585; 11 Wend., 648; 6 Wheat, 119; 9 How., U. S. 350; 17 Fed. Rep., 876; 122 U. S., 556; Cowp. Rep., 26; 3 Perry & Davidson, 208; 10 Fed. Rep., 892.

3. Parol evidence is not allowable to prove facts which should appear of record. 10 Fed. Rep., 892; 2 N. W., 472; 9 Neb., 191; 4 N. W. Rep., 933; 10 Neb. 109; 4 Sawy., 644; 65 Me., 559; 18 Ill., 551; 58 Ind., 316; 10 Nev., 370; 41 Mo., 400; 46 Iowa, 68; 97 Mass., 538; 13 How. Pr., 43; 60 Ill., 329; 26 Ala., 39; 28 Gratt., 879; 32 Barb., 605; 34 Id., 95; 14 Mich., 533; 17 Abb., 66; 73 Ala., 86; 4 Col., 416. Our own court sustains this view:

11 Ark., 130; 25 Id., 60; 2 S. W., 707; 48 Ark., 151; 2 S. W., 847; S. C., 48 Ark., 238.

4. The court had no authority to direct where the notice should be published. That is provided by law. Mansfield's Dig. secs. 4357, 1148; Act July 14, 1868, p. 42.

The affidavit of Clark does not comply with secs. 4356–7, Mansf. Dig., nor does the affidavit of Adams of the Gazette.

Cohn & Cohn, also for appellees.

In addition to the authorities cited by Messrs. Crawford & Crawford, we cite the following:

Where an affidavit is required to prove jurisdictional steps, it cannot be substituted by parol evidence. *Murphy v. Lyons*, 19 Neb., 689, 692.

Where no such affidavit was forthcoming, in a court of general jurisdiction, the want of jurisdiction was held to be *affirmatively* shown. Ibid., 693.

The record must show that the provisions of the law regarding service have been complied with. *Brownfield v. Dyer*, 7 Bush, 505, 507; Wells Res Adjudicata, sec. 477.

The record must speak for itself; evidence *aliunde* inadmissible. *Allen v. Carpenter*, 15 Mich., 33; *Montgomery v. Merrill*, *Metcalf v. Gillett*, 5 Conn., 400; 36 Mich., 97, 104; *Sullivan v. Blackwell*, 28 Miss., 737; *Bryan v. McDowell*, 15 Lea (Tenn.), 581, 585; *Wilcox v. Emerson*, 10 R. I., 270; *Hennig v. Planter's Ins. Co.*, 28 Fed. Rep., p. 443; 21 Wharton Evi., sec. 986.

BATTLE, J.

The county court of Clark county made an order calling in certain outstanding county warrants for cancelling or re-issue, and fixing the time for the presentation of the same. After the time fixed had passed, appellees tendered warrants which had

been called in, but had not been presented, to the collector, in payment of the tax assessed against their property for county purposes for the year 1885, and he refused to receive them. They then applied to the Clark circuit court for a mandamus to compel him to do so, which was granted and the collector appealed.

The record of the orders made by the Clark county court fails to show that any notice of the calling in of the warrants was given. No return in writing of the sheriff, showing that he had given notice to the holders of the warrants called in, to present the same to the county court, could be found or produced. Two affidavits were on file. One of them, with a copy of the order calling in the warrants attached, was in the words and figures following, to-wit:

"State of Arkansas, County of Clark.

"Personally appeared before me, Adam Clark, one of the publishers of the Southern Standard, a newspaper published at Arkadelphia, Clark county, Arkansas, who being duly sworn, deposes and says, that the advertisement hereto attached was published in said newspaper for two (2) consecutive weeks prior to the January term, 1881, county court of said county, according to law, and that the fee therefor,..... ..... dollars, had been paid, the receipt of which is hereby acknowledged. ADAM CLARK,

Proprietor of Southern Standard.

Sworn to and subscribed before me, this 3d day of January, 1881. A. M. CROW,

[SEAL.] Notary Public."

The other was made by Dean Adams, and is like the one made by Clark, except it stated that the order was published in the Arkansas Gazette, and the dates of publication, the last being thirty days before the day fixed for the pre-

senting of warrants. Thomas Sloan testified that he was deputy sheriff when the order was made; that he put up copies of the same at some of the election precincts in Clark county; and that the sheriff, who is dead, presented an account to the county court, in which he charged Clark county with $24.00 for giving notice that county warrants had been called in. This was all the evidence of notice adduced at the hearing of the application for mandamus.

The only question presented for our consideration is, were the holders of the county warrants tendered to the collector debarred from receiving any benefit from them, by their failure or neglect to present them as required by the order of the county court? There is no question as to their genuineness or validity, or the duty of the collector to receive them in payment of taxes, if they were not barred by such order.

As a general rule the proceedings of a superior court, with respect to jurisdictional facts about which the record is silent, are presumed to be within the scope of its jurisdiction until the contrary is shown. But this rule does not apply to proceedings had under special statutory authority. As said by the supreme court of New Hampshire, "A court of general jurisdiction may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited special jurisdiction. The jurisdiction in such cases, both as to the subject matter and as to the persons to be affected by it, must appear * * * ; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it." In other words, the jurisdiction of the court in such cases must be shown affirmatively to confer validity on its acts,

and unless it is shown its whole proceedings will be invalid, and may be treated as a nullity when called in question in a collateral controversy. *Galpin v. Page*, 18 Wall., 350; *Morse v. Presby*, 5 Foster, 302; *Lusk v. Perkins*, 48 Ark , 238; 1 Smith's Leading Cases, pt. 2, 8th Ed., 1127, 1105; Freeman on Judgments, secs. 123, 127; *Thatcher v. Powell*, 6 Wheat, 119; *Christie v. Unwin*, 3 Perry & Davidson, 208.

In this case the Clark county court undertook to act under a special statutory authority. The power it undertook to exercise was wholly derived from the statute. It was special and summary and is not exercised according to the course of the common law. The statutes under which the order calling in the warrants was made, required the clerk to furnish the sheriff with a copy of the order, and made it the duty of the sheriff to notify the holders of the warrants to present the same to the court at the time and place fixed for presentation, "for cancellation or re-issuance," by putting up at the court-house door and at the election precincts in each township of the county, at least thirty days before the time appointed for the presentation, a true copy of the order, and by publishing the same in newspapers printed and published in this state for two weeks in succession, the last insertion to be at least thirty days before the time fixed for the presentation of the warrants; and required at least one of the publications to be made in a daily or weekly newspaper published in the county of Clark, provided there was one which had a *bona fide* circulation therein and had been regularly published in the county for the period of one month next before the date of the first publication of the order; and provided that the affidavit of the editor, publisher, proprietor or principal accountant of the paper in which it is published, stating the

length of time it was published in his paper and the number of the insertions, with a printed copy of such advertisement attached, should be the evidence of its publication; and after the notice was given in the manner prescribed, authorized the county court, at the appointed time, to examine the warrants presented in obedience to the call, and cancel or cause the same to be re-issued. Mansfield's Digest, secs. 1147, 1148, 1152, 4356, 4359.

It was the duty of the sheriff to have made a written return and set out in it the manner in which he gave the notice required, and filed the same and the affidavits as to the publication, with the clerk of the county court. Mansf. Digest, secs. 5316, 6361.

1. COUNTY WARRANTS: Order calling in.

It is evident that the statutes authorizing the calling in of county warrants never intended that the holder of a county warrant, without lawful notice, should lose the benefit of his claim by a failure or neglect to present the same to the county court. Before he can be deprived of the benefit of his warrant, they provide that a certain order shall be made; that a certain notice shall be given; that it shall be given by posting and by publication; and that the posting and publication shall be in a certain manner and for a certain period, and the mode in which the notice was given shall be proven. As these statutes are in derogation of the common law they must be strictly pursued.

Notice, etc.

Unless notice of the calling in of the warrants was given in the manner prescribed by the statutes, the order making the call was a nullity as to the warrants which were not presented to the court in obedience to the call. The burden of proving that it was given was upon the appellant. The evidence adduced was not sufficient to prove it. In the affidavits, which are made the evidence of the publication and intend-

2. Proof of publication.

ed to be made a part of the record as to the calling in of the warrants, affiants fail to swear that either of them was the editor, publisher, proprietor or the principal accountant of the newspapers in which the order of the court was published, and neither of them swears that his paper was a daily or weekly newspaper and had a *bona fide* circulation in Clark county, and had been published in that county for the period of one month before the date of the first publication of the order therein; and Adam Clark does not state in his affidavit how long it was published in his paper, the length of time the last insertion was made before the time appointed for the presenting of the warrants, or the number of insertions which appeared in his paper. The statutes regulating the publication of legal advertisements, obviously intended that these facts should be sworn to in the affidavit required to be made. Proof of them is a necessary part of the proof of publication. Without it any affidavit made would be a nullity, and fail to be the evidence the statutes declare it shall be. *Cissel v. Pulaski County*, 10 Fed. Reporter, 891; *Gray v. Larrimore*, 4 Sawyer, 638; *Haywood v. Collins*, 60 Ill., 328; *Fontaine v. Houston*, 58 Ind., 316.

3. Posting notice.

There was no evi dence that the notice was given by posting as required by law.

The statute having prescribed the manner in which the notice should be given, it could not be given legally in any other manner; and having prescribed what shall be the evidence of the publication it can be proven in no other manner. Facts which should be of record cannot be proven by parol. *Iverslie v. Spaulding*, 32 Wis., 394; *Cissel v. Pulaski County*, 10 Fed. Rep., 891; *Gray v. Larrimore*, 4 Saw., 638; *Haywood v. Collins*, 60 Ill., 328; *Wilcox v. Emerson*, 10 R. I., 270; 2 Wharton's Law of Evidence, sec. 986.

Judgment affirmed.

WOLFF V. PERKINS.

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CHATTEL MORTGAGE: *Unrecorded; Lien as against mortgagor's widow.*

The lien of an unrecorded chattel mortgage remains valid after the mortgagor's death, and may be enforced against the mortgaged property after the legal title thereto has vested in the widow, under the statute which gives her the right to her deceased husband's estate when it does not exceed the value of $300.

APPEAL from *Pike* Circuit Court in Chancery.

H. B. STUART, Judge.

The complaint in this action alleges, that on the second day of April, 1884, Joseph M. Perkins, being indebted to the plaintiff in a certain sum of money, in consideration thereof, and of any other indebtedness he might contract during that year, and to the time of the satisfaction of the mortgage mentioned below, executed to the plaintiff a mortgage, exhibited with the complaint, by which he conveyed to the plaintiff, in the usual form and by proper description, his crops, two mules and a wagon, with the usual power of seizure and sale in case of default, etc. That the mortgage was indorsed, "to be filed but not recorded," and was filed in the recorder's office, where it still remains, but that no affidavit had been subsequently filed therewith by the plaintiff, to show his interest therein. That plaintiff afterwards, during said year, furnished Perkins merchandise, money, etc., to a certain amount, and received from him a certain amount in cotton and money, leaving due the plaintiff a balance, the amount of which is stated. That during the following year the plaintiff furnished other supplies amounting to a sum named, upon the faith of the mortgage, and received cotton, etc., in part payment, leaving due the plaintiff upon the whole account, which is exhibited, a balance $187.81, which remains wholly unpaid. That of the

mortgaged property only the two mules and the wagon remain in existence; that Perkins died about January, 1886, having the wagon and mules in his possession; that in the same month the defendant, as his administratrix, filed in the probate court an inventory of his estate, which is exhibited, including therein the mules and wagon. That afterwards the probate court, without notice to the plaintiff, made an order vesting absolutely in the defendant as widow of the mortgagor, Perkins, the entire estate of the latter, including said mules and wagon. (The order is exhibited and recites that the value of the estate is shown to be less that $300.) That the defendant holds the mules and wagon, claiming to own them under said order, and refuses to deliver them to the plaintiff, or to pay his debt, and that unless restrained by the court, she will sell or otherwise dispose of them, leaving the plaintiff without remedy for his debt. The prayer is for a restraining order, for judgment for the debt and a sale of the mortgaged property. The defendant demurred to the complaint on the grounds, (1) That the complaint discloses facts which preclude the plaintiff from equitable relief, and (2) "That the complaint on its face shows that the lien sought to be enforced therein is void."

The demurrer was sustained and the complaint dismissed. The plaintiff appealed.

Jones & Martin, for appellant.

The order vesting the property in appellee was strictly in accordance with the law. *Mansfield's Digest*, sec. 3.

Even without the order of the probate court, the estate of J. M. Perkins, being found not to exceed $300, vested absolutely in his widow, the appellee. *Hampton et al. v. Physick*, Adm'r, 24 Ark., 561. *Harrison v. Lamar*, 33 Ib., 824. *Word, Adm'r, v. West*, 38 Ib., 243.

But it cannot be contended that she acquired any greater estate than her husband held. The property was subject to the lien of the mortgage at the time of the husband's death, and the widow acquired it subject to the same lien. The fact of its being unrecorded does not alter the case, so far as she is concerned. *Haskill v. Sevier*, 25 Ark., 152. *McClure et al. v. Owens*, 32 Ark., 443. *Martin et al. v. Ogden*, 41 Ib., 186.

The endorsement upon the mortgage, "to be filed but not recorded," is a compliance with the statute, even as against third parties. *State v. Smith*, 40 Ark., 431.

Appellee had no inchoate right of dower in her husband's personalty, and he could mortgage and dispose of it free from dower, which he did. *McClure et al. vs. Owens*, 32 Ark., 443, supra.

The order of the probate court, vesting her deceased husband's estate absolutely in her, did not vest in her a title better than the widow's by dower in the personalty of her deceased husband, or one which she could set up against the mortgage. Ib.

Nor was it necessary for appellant to probate his claim, even if there had been anything remaining to the estate of the mortgagor, Perkins. Ib., and authorities there cited.

R. G. Shaver, for appellee.

COCKRILL, C. J.

The title to an intestate's estate when less than three hundred dollars vests in the widow by virtue of the statute. *Hampton v. Physick*, 24 Ark., 561; *Wood v. West*, 38 Ib., 243. She succeeds to such interest as her deceased husband had at his death—no more. Her condition is no better than that of the administrator or the heir when there is no widow,

and her title is not superior to that which vests in the widow by the assignment of dower. An unrecorded mortgage, executed by the intestate, remains a valid lien after his death as against the administrator or the heir, (*Martin v. Ogden*, 41 Ark., 186) and as to personal property takes precedence of the widow's dower. *McClure v. Owens*, 32 Ark., 443. It follows that an unrecorded mortgage of chattels may be enforced against property, the legal title of which has vested in the widow by virtue of the statute which confers upon her the right to her deceased husband's estate when less than $300 in value.

It was error, therefore, to sustain the demurrer to the complaint.

It is not necessary to determine whether the mortgage was intended to cover all of the indebtedness claimed to be due, or whether the payments made by the mortgagor operated to extinguish the mortgage debt. It is sufficient for the purpose of this appeal that the complaint alleges that the debt secured by the mortgage is due and unpaid and that the demurrer admits that to be true.

Reverse the judgment and remand the cause with instructions to overrule the demurrer.

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GOCIO v. DAY.

1. LANDLORD AND TENANT: *Liability of landlord for improvements.*

It is only by virtue of the agreement of a landlord to pay for improvements that his tenant can recover of him their value.

2.—SAME: *Same: Counter-claim.*

When a landlord leads his tenant to believe that the value of improvements he may thereafter put upon the demised premises, will be deducted from the rent or paid to him, a special promise to that effect may be

implied; and such promise is the subject of a counter-claim in an action for the rent. But the mere fact that a landlord permits permanent improvements to be made without objection, or warning that he will not pay for them, raises no presumption that he intends to do so.

APPEAL from *Arkansas* Circuit Court.

JNO. A. WILLIAMS, Judge.

This was an action by a landlord against his tenant to enforce his lien for rent. The only defence was an account for improvements made upon the premises and pleaded as a set-off against the demand of the plaintiff. The evidence was conflicting as to whether there was any agreement to pay for improvements, or to deduct their value from the rent, and the court among other instructions given to the jury, charged them, in substance, that if it was shown that the plaintiff knew that improvements were being made and did not forbid the work, then the law requires him to pay for their value. The jury were also instructed, "that the defendants are entitled to pay for permanent improvements, if made with the knowledge of the plaintiff, whether made under contract or not." To these instructions the plaintiff excepted. The verdict and judgment were against him and he appealed.

Gibson & Holt, for appellant.

A landlord is not responsible or liable to his tenant for improvements put upon the demised premises, unless he expressly agrees to pay for them, or acts in such manner as to lead the tenant to believe he intends to pay for them or deduct their value from the rent. The fact merely that the landlord knew the tenant was making improvements, and did not object, or forbid him, or warn him he would not pay for them, does not render him liable.

COCKRILL, C. J.

The law imposes no obligation upon a landlord to pay his tenant for improvements made by him upon the demised premises. The tenant is presumed to repair and improve for his own benefit; and his only right to the fruits of his labor expended for that purpose, is to enjoy the enhanced value of the premises during the term, and within certain limitations to remove the improvements before its expiration. It is only by virtue of an agreement by the landlord to pay for improvements that the tenant can recover their value of him. *Kuttar v. Smith*, 2 Wall., 491. But a special promise may be implied from conduct, and if the landlord leads the tenant to believe that the value of the improvements he may thereafter put upon the premises will be deducted from the rent or paid to him, a contract to do so may be implied; and a promise to pay thus imputed to the landlord is the subject of counter-claim in an action by him for the rent. But the mere fact that the landlord permits the tenant to make permanent improvements without protest or warning that he will not pay, raises no presumption that he intends to do so. *Dunn v. Bagby*, 88 N. C., 91.

Reverse the judgment and remand the cause for a new trial in accordance with these principles.

DAVIS V. SEMMES.

WILLS: *Attesting witness may subscribe by mark.*

One may become an attesting witness to a will by making his mark, although the person who writes the name of the witness fails to attest that fact by signing his own name in accordance with section 6344, Mansfield's Digest, which defines "signature" to include a "mark when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness."

APPEAL from *Monroe* Circuit Court.

M. T. SANDERS, Judge.

The will of Thomas H. Semmes was presented to the probate court for admission to record and was rejected. An appeal was taken to the circuit court, where a judgment rejecting the instrument was also rendered, and from that judgment this appeal is prosecuted. The rejection of the will was upon the ground that, as the attesting witnesses subscribed it by mark and the person who wrote their names failed to sign his own name as a witness of that fact, the marks of the witnesses could not be taken as their signatures.

Grant Green, Jr., for appellant.

There is a compliance with the requirements of the statute. No form is prescribed. Mansfield's Digest, section 6492. An attesting clause is not necessary. The signatures of the witnesses by making their mark is a compliance with the law. *Redfield on Wills*, chap. 6, sec. 4, pp. 228 to 245.

Appellant should have been permitted to prove the signatures of witnesses by the person who wrote their names. *Miller, ex parte*, 49 Ark.

John C. Palmer, for appellee.

The only question presented by the record is, "were there two attesting witnesses, each of whom signed his name at the end of the will?" That neither of the attesting witnesses signed their names at the end of the will, there can be no question. But sec. 6344 of Mansfield's Digest provides that, "signature or subscription includes mark, when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness." Was this provision of the will complied with? It was not. In the first place, it is in proof that one of the witnesses

could write. This witness, therefore, is no witness. Secondly, the statute requires that the execution of the will shall be perfect, before the death of the testator. See Mansfield's Digest, sec. 6490. In this case it was not perfect, and it is sought to prove, orally, in court, by the beneficiary, that which was required to be done at the time; and which was not done at all.

But Paul S. Davis was an incompetent witness. Sec. 2857 of Gantt's Digest making interested parties competent in civil actions, does not apply to proving a will by a subscribing witness. See secs. 6539, 6540 and 6541.

Well might the judge of the circuit court have said: "If a will could be established upon such testimony as this, a will might be made for any man."

The case of Miller, *ex parte*, 49 Ark., 18, is no authority in this case. Redfield on Wills is not applicable, because we have a statute regulating the subject.

COCKRILL, C. J.

The question in this case is, can one become an attesting witness to a will by making his mark when the person who writes the name of the witness fails to sign his name as witness of that fact?

A subscribing witness, like the testator himself, signs most appropriately by subscribing his name in his own handwriting; and there is much reason why a witness intelligent and able-bodied enough to do this, should be chosen to perform the office. Nevertheless, a will may lawfully be subscribed by mark either by a testator or witness. It was so held as to the testator, by this court under the statute now in force in Cornelius' case in the 14th Ark., 675. See too *Gatline v. Price*, 23 Ib., 396. The reasons which control in sustaining

the testator's subscription by mark apply also to the subscribing witness, when the governing provisions of the statute are similar. This is the rule recognized by the authorities. *Schouler on Wills*, sec. 313, and cases cited.

It is argued that the statute has been changed since the decision in Cornelius' case, *supra*, by the code of civil practice, in which it is declared that in construing its provisions a signature or subscription shall be held to "include mark, when the person cannot write, his name being written near it and witnessed by the person who writes his [own] name as a witness." Mansfield's Digest, sec. 6344. It is argued from this that the mark of a witness cannot be taken as his signature unless it is accompanied by the signature of the person who wrote the witness' name.

In Miller, *ex parte*, 49 Ark., 18, this provision of the statute was under consideration, and it was ruled that it did not mean that the signature of the person who wrote the name of the witness should be the exclusive evidence of the witness's signature. It was intended, as there explained, merely to put a signature by mark on the footing of a signature by writing, when made in accordance with the statute, and not to exclude other proof of the signature by mark. Now if we concede that this provision of the statute has any application to the execution of a will, the construction placed upon it in Miller, *ex parte*, which we think is its true meaning, left the attesting witnesses free to prove their signatures as they did in this case. The statute governing the probate of wills requires every subscribing witness, if he can be produced, to prove his own signature. Mansfield's Digest, sec. 6514, *et seq.*; and if the person who wrote the witnesses' names in this case had attested that fact by his signature in accordance with the provisions above quoted, it would not

have dispensed with the subscribing witnesses' testimony or added anything to the force of their evidence.

As was explained in Cornelius' case, *supra*, when a signature by mark is permitted, it is not solely upon the ground of the illiteracy of the subscriber; and his signature is not rejected merely because it is shown that he could write. See too *Schouler on Wills*, secs. 313 and 314 and notes.

The record shows that the court acted upon the presumption that the signature of the person who wrote the witnesses' names was essential to the attestation, and the judgment rejecting the will will be reversed and the cause remanded for a new trial.

GARRETT V. BEAN.

1. DESCENTS AND DISTRIBUTION: *Statute of: Inheritance per capita and per stirpes.*

When the persons composing the nearest class of kin to an intestate, as fixed by sec. 2522 Mansfield's Digest, die before his death, the next class in order will thus be advanced nearer to him, and the persons composing it will inherit his estate in their own right as next of kin, equally if equal in degree, and *per stirpes* if in unequal degree—those equal in degree and nearest in degree to the intestate, taking equal shares in their own right, while those of unequal degree and one step further removed from the intestate, take only the shares their ancestors would have taken if alive.

2.—SAME: *Same.*

An intestate died without issue and without ancestors, brothers or sisters, surviving him, and leaving thirty-five nephews and nieces—the children of eight deceased brothers and sisters—and four grand-nephews and nieces—the children of his deceased niece—his nearest of kin. At the time of his death he was seized in *fee simple* of certain lands. *Held:* That the nephews and nieces, standing in equal degree and nearest to the intestate, take *per capita* equal shares of his lands, each taking one-thirty-sixth thereof, and the grand-nephews and nieces take *per stirpes*, the share their mother would take if alive—each taking one-fourth of one-thirty-sixth.

APPEAL from *Jefferson* Circuit Court in Chancery.

JNO. A. WILLIAMS, Judge.

Hemingway & Austin and *J. W. Crawford*, for appellant.

1. The nearest of kin living at the death of the intestate were his nephews and nieces, twenty-one in number, and besides these there were fifteen dead, leaving issue in all, thirty-six nieces and nephews. Hence, the estate should have been divided into thirty-six equal parts, each nephew or niece living at the time of the death of intestate being entitled to one-thirty-sixth part, and the issue of deceased nephews and nieces to one-thirty-sixth part. The rule is the same as the rule for distributing among grand-children and the issue of those dead. Mansfield's Digest, sec. 2522, 2nd sub-division; 4 Kent Com., * p. 400, Canon IV; Walker's American Law, sec 161; *Kelly's Heirs v. McGuire*, 15 Ark., 592, rule 7.

2. The living nephews and nieces take equal shares *per capita*, and the descendants of dead nephews and nieces *per stirpes*, the part their ancestors would have taken if living. Mansfield's Digest, sec. 2530; 4 Kent Com., * pp. 375, 376, 391; Walker's American Law, secs. 159, 160, 161; 3 N. Y., 408; 3 Wash. R. Prop., 4th ed., p. 12, sub. 22.

See also Lead. Cases American Law, Real Property, Sharswood & Budd, p. 414 et seq.

BATTLE, J.

Lewis G. Garrett died without issue, ancestors, brothers or sisters, and left thirty-five nieces and nephews, the children of eight deceased brothers and sisters, and four grand-nephews and nieces, the children of a deceased niece, his nearest kindred him surviving. He died intestate, seized in fee simple and possessed of certain lands in Jefferson county.

The question is, who inherited these lands and in what proportions?

1. DESCENTS AND DISTRIBUTION.

The correct disposition of the lands in question depends on the construction which should be given to the second subdivision of section 2522 of Mansfield's Digest. This section, so far as it has any bearing on the questions in this case, reads as follows: "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and to the widow's dower, in the following manner:

"First: To children, or their descendents, in equal parts.

"Second: If there be no children, then to the father, then to the mother, then to the brothers and sisters, or their descendants, in equal parts."

Inheritance *per capita* and *per stirpes.*

According to this section the descendants of the deceased brothers and sisters of Garrett became entitled, at his death, by inheritance, to the lands in controversy, subject to the payment of his debts and the widow's dower. Do they inherit *per capita* or *per stirpes?* According to the doctrine generally laid down by English and American authorities, in the construction of statutes of descents and distributions, the nearest class of kin, as fixed by the statute, remaining in being at the death of the intestate is always made the basis of partition or distribution of his estate among his heirs. If the persons composing the nearest class of kin die before the intestate, the next class in order inherits in its own right and as next of kin. Death, in that event, operates to advance the next class nearer to the intestate and substitutes the persons in it in the place thus vacated. In that case, those

in the next class so advanced inherit in their own right as next of kin; and, in the absence of statutory regulations, if equal in degree, inherit equally, and, if unequal in degree, take *per stirpes*, "those equal in degree and nearest in degree to the intestate taking equal shares in their own right, while those of unequal degree and one step further removed from the intestate take only the shares their ancestors would have taken if alive." 4 Kent Com., * p. 391; *Houston v. Davidson*, 45 Ga., 574; *Cox v. Cox*, 44 Ind., 368; *Knapp v. Windsor*, 6 Cushing, 156; *Snow v. Snow*, 111 Mass., 389; *McGregor v. Comstock*, 3 Comstock, 408; *Miller's Appeal*, 40 Penn. St., 387.

In *Kelly's Heirs v. McGuire*, 15 Ark., 555, this court carefully considered and examined the statutes of descents and distribution in this state, and, after saying in what lines of succession real estate of intestates descends or ascends, that is to say, when it pursues the paternal and when the maternal line, said: "In all cases where the inheritance is in any one line, it there goes in succession *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, precisely as if the other line was extinct." This, as we understand it, is an announcement of the rule as we have stated.

2. SAME.

The lands in controversy, then, descended to the nephews and nieces of Garrett and the four grand-nephews and nieces, who were the children of his deceased niece, they being the descendants of his deceased brothers and sisters. The nephews and nieces, standing in equal degree and nearest to the intestate, take *per capita*, equal shares, each taking one-thirty-sixth, and the grand-nephews and nieces take *per stirpes*, the share their mother would take if alive, which is a one-thirty-sixth, that being to each of them a one-one hundred and forty-fourth part of the lands. The interests of the heirs

who have died without a will, since the intestate, descended, severally, to their respective children in the manner prescribed by sec. 2529 of Mansfield's Digest.

The decree of the court below is reversed and a decree will be entered here in accordance with this opinion.

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HILL V. SHRYGLEY.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS: *When set aside for fraud of assignor; Act of 1887.*

A deed of assignment for the benefit of creditors, made prior to the act of March 31st, 1887, is not affected by that act and will not be set aside on proof of a fraudulent intent on the part of the grantor alone. To invalidate such deed it must be shown that the assignee or creditors to be benefited, knew of the assignor's fraudulent design, or had knowledge of facts sufficient to lead to its discovery. *Hempstead v. Johnson*, 18 Ark., 123; *Cornish v. Dews*, Ib. 172, and *Mandel v. Peay*, 20 Ark., 325. (The act referred to provides that proof of fraud on the part of the assignor, whether known to the assignee or not, shall be sufficient.—REP.)

2. SAME: *Preference of assumed debts; Recitals of deed.*

L. sold a stock of merchandise to W. & F., in consideration of which they assumed the payment of his indebtedness for the goods. They afterwards executed a deed of assignment for the benefit of their creditors, which recites that they are indebted to the parties who sold the goods to L., giving the amount due to each, and making them, with others, preferred creditors. *Held:* That the preference given to the debts assumed for L., not being for his benefit, will not avoid the assignment on the ground that he was a party to the assignor's fraud; and that until proof of fraud, *prima facie* sufficient to set aside the deed, its recitals are sufficient to show that the assumed debts are genuine, and the assignee is not called upon to produce other evidence of that fact.

APPEAL from *Johnson* Circuit Court.

G. S. CUNNINGHAM, Judge.

Hill, Standish & Co. brought an action against Weems & Flippin, in which an order of attachment was issued and

levied on certain goods in the hands of Shrygley. The latter, by interplea, claimed the attached property under a deed of assignment made by Weems & Flippin, conveying it to him for the benefit of their creditors. By answer to the interplea, the assignment was attacked as fraudulent, and a trial of the issue thus formed resulted in a finding and judgment for Shrygley. Hill, Standish & Co., appealed.

J. E. Cravens and *S. R. Allen*, for appellants.

The court below was misled by the case of *Emerson v. Senter*, 118 U. S., to the effect that the assignee must have knowledge of and participation in the fraud of the assignor to make void a statutory deed of assignment. But there is another general principle which he seems to have lost sight of. "Where a purchaser from a fraudulent vendor has knowledge of such facts as would excite the suspicions of a man of ordinary prudence and capacity, and shuts his eyes and refuses to inquire, he does not purchase in good faith, and is affected with notice of any fraud upon prior creditors affected by the sale." 6 Cent. Law Journal, p. 396; Bump., 3d Ed., pp. 201, 362; 32 Ark., 251. Review the evidence and contend that the facts bring this case within this rule.

This court has never held that in a general assignment executed under the statute, and the trust to be executed under the supervision of a court, the trustee or assignee must have notice and participate in the fraudulent intent, to avoid the deed. 39 Ark., 70; 46 Id., 405; 47 Id., 247. In one of these cases a contrary view is indicated. See also, Burrill on Assignments, p. 190; 46 Ark., 412.

Our legislature has condemned such a monstrous doctrine by the act 31st March, 1887, but does not establish a new rule. This was the law before.

Cohn & Cohn, also for appellants.

1. Does the fraud of the assignors control? We think so. 21 Am. Law Rev., 901 *et seq.;* 18 Iowa, 493; 43 Mich., 454; 46 Ark., 405, 412.

2. The act 31 March, 1887, providing that fraud of the assignor is sufficient (p. 194), is retroactive, and applies to this case. 43 Ark., 421; 39 Id., 278; Cooley Const. Lim,, marg. p. 381 and notes; 44 Ark., 365; 47 Id., 413, 420; *Beard v. Dansby*, 48 Ark.; 74 Ala., 213.

3. The rule with regard to notice, even if the assignee does stand in the shoes of a purchaser for value (which we deny) was not stated correctly by the court below. 11 Fed. Rep., 559; 20 Id., 258; 6 Wall., 299, 311; 32 Ark., 251.

A. S. McKennon and *L. H. McGill*, for appellee.

Does the fraud of the assignors alone control? A fraudulent intent on the part of the debtor alone is not sufficient to avoid the assignment, when neither the assignee nor creditors participate in the fraud. Bump. Fraud. Convey., 360–1; 18 Ark., 123; Ib., 172; 20 Id., 325; 118 U. S., 3; 13 Ohio, 30; 16 Ohio St., 439; 26 Ill., 36; 19 Mo., 17; 23 Ib., 237; 49 Ib., 548; 26 Gratt., 563; 7 Cold., 32; 2 Mich., 309; 16 Ala., 560; 17 Id., 566.

The question is not open in this state. It was not involved in 39 Ark., 70; 46 Id., 405; 47 Id., 247.

An assignment is founded upon a valuable consideration. Bump. Fr. Conv., 360; Burrill Ass., sec. 236; 45 Ark., 136. Though an assignee is not a "*bona fide* purchaser for value," in the usual sense, but takes subject to all prior liens, set offs, etc. Burrill, sec. 391; 45 Ark., 136.

2. The act of 1887 is not retroactive. Wade on Retroac-

tive Laws, secs. 34, 35, 47, 118 to 130; Cooley Const. Lim., 76, 456.

COCKRILL, C. J.

The first question presented is, whether a deed of assignment for the benefit of creditors shall be set aside on proof of a fraudulent intent on the part of the grantor alone. On the trial the court declared the law to be that the deed should not be invalidated unless the assignee, or creditors to be benefited by the deed, knew of the assignor's fraudulent design, or had knowledge of such facts as would lead to its discovery.

1. ASSIGNMENT: When set aside for fraud of assignor.

There are conflicting decisions in the courts of this country on the question. See 21 Am. Law Review, 901. The charge was, however, in accordance with the views announced by this court in *Hempstead v. Johnson*, 18 Ark., 123; *Cornish v. Dews*, Ib. 172, and *Mandel v. Peay*, 20 Ark., 325. These cases were followed by the supreme court of the U. S., and the rule they establish approved, in *Emerson v. Senter*, 118 U. S., 3. We are not at liberty to consider it an open question. The relation of the assignee to the contract of assignment is what gives rise to the difference of opinion on this question. If he is to be regarded as the agent of the assignor, or simply a volunteer, as some of the courts hold, why may not a creditor successfully pursue the property on showing that his debt was outstanding when the assignment was made and that the assignor was then insolvent, without regard to any special intent to defraud? But as all agree that this cannot be done, why should the assignor's unaided and unknown design to defraud affect the validity of the instrument? The existing demands of the creditors are said by the courts in line with our own, to be a valuable consideration for the transfer; but the assignee is not treated as a purchaser in

good faith in the sense of protecting his purchase against the prior equities of third persons, unless some further consideration enters into the contract. *Bridgford v. Adams*, 45 Ark., 136; *Farguson v. Edrington*, 49 Ark., 214; *People's Savings Bank v. Bates*, 120 U. S., 556.

Practically the assignee is regarded as a purchaser by all the courts, else he would be treated as a volunteer subject to have his title defeated at the suit of any creditor; but as the creditors are in no worse condition than they were before the the deed and nothing of value has been parted with as a consideration, he is said not to be an *innocent* purchaser. It may be that the rule adopted by neither line of conflicting decisions is throughout a logical deduction from principle, but is rather in accordance with the courts' varying ideas of policy. We adhere to the line previously marked out by this court. Nothing is decided in *Hunt v. Werner*, 39 Ark., 70, contrary to that rule.

Act of 1887.

The legislature has changed the rule announced by the court, for future cases, by enacting that "proof of fraud on the part of the assignor shall be sufficient to invalidate the assignment, whether the assignee knew of it or not." Act March 31st, 1887. The act was passed after the appeal in this case was prosecuted. To permit it to affect this litigation, would be to hold that a contract which was legal when entered into can be invalidated by subsequent legislation. But that would be an interference with vested rights which are beyond legislative control.

The act does not affect the determination of this cause, and the court did not err in its declarations of law.

2. SAME: Preference of assumed debts: Recitals of deed.

It appears that some time before the assignment, a merchant named Little, who was in business under the style of Little & Co., sold his stock in trade to the assignors in con-

sideration that they would assume the debts due by Little & Co. The deed of assignment seeks to give preference to these assumed debts along with certain others. It is argued that this is a preference for Little's benefit, and that, as the proof is that he was a party to whatever fraud the assignor sought to perpetrate, this attempted preference should avoid the deed. But Little is not a preferred creditor under the deed, nor is he mentioned as a creditor at all. The deed recites that the assignors are indebted to the parties who sold the goods to Little & Co., and the amount due each is given as in the case of the other creditors. Until a showing of fraud was made sufficient *prima facie* to overturn the deed, these recitals were evidence of their truth, and the assignee was not called upon to produce other evidence of the genuineness of the debts. *Valley Distilling Co. v. Atkins*, 50 Ark., 289; *Hempstead v. Johnson, supra; Mandel v. Peay*, Ib.

There is nothing in the record to impeach the validity of these debts. The findings of the court are sustained by the evidence, and the judgment must be affirmed. It is so ordered.

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PATTY V. GOOLSBY.

1. WILLS: *May include after-acquired lands.*

When a will manifestly designs to dispose of the whole estate of the testator, as it exists at the time of his death, it will include after-acquired lands of which he dies seized and possessed.

2. SAME: *Construction; Estate conveyed; Power of sale.*

By the first item of his will a testator gave "his entire estate," real and personal, to his wife, "during her natural life," or until she might "think proper to marry, with full power to sell and dispose of such property as she might think proper." The second and third items are as follows: 2. "It is my desire that, at the death of my said wife, all my worldly

effects be equally divided between my children." 3. "If my wife should marry, it is my will and desire that my estate of all kinds whatsoever be equally divided between my wife and children, thereby each one to share each and each alike." By other provisions the wife was made executrix and charged with the payment of the testator's debts and the education of his children out of the estate. *Held:* (1) That the testator gave to his wife a life estate in the real property with remainder in fee to his children. (2) That while, under the power contained in the will, the wife could dispose absolutely of the personal property of the testator, she could sell only her life interest in his real estate.

3. ESTOPPEL: *Acquiescence in sale.*

Where a widow, having only a life estate in the lands of her deceased husband, without power to sell any greater interest, conveyed them in *fee simple*, and her children, who are the devisees of the remainder, were present and assented to, or acquiesced in the sale, they are not thereby estopped from claiming the lands, as against the purchaser, on the termination of the life estate, where it does not appear that he was misled by their conduct, or was ignorant of their reversionary interest, nor that they were then of age, or knew of their interest.

APPEAL from *Little River* Circuit Court.

R. D. HEARN, Judge.

Compton & Compton, for appellants.

1. Under the laws of Arkansas the land, though after-acquired, passed by the will. Review the common law rule, 11 Mod., 148; 1 Salk., 238; 4 Burrow, 1960; 3 Atk., 798; 7 Term Rep., 419, which was followed in many of the American courts, (5 Johns. Chy., 441; 5 Peck, 112; 6 N. H., 47; 4 Kent Com., 11 Ed. marg. p. 510 note; 1 Redfield on Wills, 3 Ed., pp. 387, 332 and notes), but contend that in most of the states it has been changed by statute, and in others the reason of the rule having ceased the rule has also ceased. See also the Stat. Henry viii, c. 1 and 34 Ib., c. 5; Stat. at Large (Eng.)vol. 5, pp. 1, 136; 2 Chitty, Blackstone, marg. p. 314; Co. Litt., 392.

This rule was unsatisfactory, but was too well established to be overturned by judicial decisions. 3 Dougl., 366; 4 Burr., 1960, but was changed by 1 Vic., ch. 26; 4 Kent. Com. (11 Ed.) marg. p. 500 and note; Theobald Wills(3d Ed.) pp. 603, 609; Hawkins on Wills, (2 Am. Ed.) marg. p. 18. The rule also abolished in America. See note to Hawkins on Wills, 2 Am. Ed., marg. p. 18.

This common law rule *never* prevailed in this state, the reasons upon which it was founded being taken away by the earliest legislation of the state. Act 30 Nov., 1837; *Bunch v. Nicks*, 50 Ark., 367; Mansfield's Digest, secs. 639, 644, 642 and 6490.

The several items of the will taken together, manifestly show the intention of the testator to give his entire estate to his wife during life or widowhood, *with full power to sell and dispose* of same if deemed best. No intention to limit the power of disposal to the life interest of the wife is expressed and none can be implied. Such a limitation would have been, in the highest degree, impracticable and unwise; and could not have been intended by the testator.

2. And even if it could be held that the lands did not pass by the will, they, nevertheless, belonged to the estate of the testator, and it is insisted that his wife, in the exercise of the general power conferred on her to dispose of any part of the *estate*, had the right to sell and make a valid title to the lands, whether they passed by the will or descended to the heirs.

3. The heirs, as alleged in the answer, stood by when the sale was made, one of them assisting in making it, and made no objection to, but acquiesced in the sale, are now estopped to set up title to the lands. Bigelow on Estoppel, 3 Ed., pp. 515, 517, and authorities cited in note 7. 1 Story's Eq. Jur., 5 Ed., sec. 385.

Dan. W. Jones, for appellees.

The will conferred only a life estate upon Elizabeth, the widow, with remainder in fee to the children of the testator.

The will is to be construed as a whole, so as to carry into effect the intent of the testator. 18 Wall., 493; 49 Ark., 128.

The power of disposal was limited to the personal property, and if applicable to the realty at all, was limited to her life interest. *Giles v. Little*, 104 United States, 291; also 6 Pet., 68; 93 United States, 326; 13 Vesey, Jr., 445; 36 Ill., 355.

2. The widow could sell no greater interest than she acquired under the will. Authorities *supra*.

3. The facts alleged do not create an estoppel. Herrmann on Estoppel, secs. 410, 414; 36 Ark., 96, 114; 15 Id., 55, 62.

CLARK, Sp. J.

This is an action of ejectment brought by the appellees, heirs at law of Peter R. Goolsby, against Owen W. Patty and Robert L. Moore, to recover the following lands, to-wit: The east ½ of s. e. ¼ and w. ½ of s. w. ¼ of section 16, in t. 12 s., in r. 29 w., in Little River county, Arkansas.

There was a complaint and answer, an amended and substituted complaint and answer. The court sustained a demurrer to the answer to the amended and substituted complaint and the defendants rested and appealed. There was a jury trial as to the value of the improvements and the rents and profits, and exceptions to the verdict, but this is made no question here.

The undisputed facts upon which the sufficiency of the answer must be determined are as follows:

Peter R. Goolsby, father of the appellees, on the 14th day

of May, 1862, he then residing in Columbia county and being seized and possessed of both personal and real estate, made and published his last will and testament. Afterwards, he moved to Little River county, where on the 23d day of December, 1869, he purchased the lands in controversy, and where, near ten years after, having executed his will, to-wit: on the——day of March, 1872, he died, never having revoked or changed his said will.

The provisions of the will were as follows: "First: I give and bequeath unto my beloved wife, Elizabeth Goolsby, my entire estate of whatsoever kind it may consist, viz: All my negroes, lands, stock of all kinds, with all my debts due me in any way; also my household and kitchen furniture, to have and to hold during her natural life, or until she may think proper to marry, with full power to sell and dispose of such property as she may think proper; also to trade and buy such property as she in her judgment may think best."

Second: "It is my desire that at the death of my said wife, all my worldly effects be equally divided between my children."

Third: "If my wife should marry, it is my will and desire that my estate of all kinds whatsoever be equally divided between my wife and children, thereby each one to share each and each alike."

Fourth: "It is my will in the event that I die while my children are small or in their minority, that they be educated according to their ability and that my wife pay strict attention to their instruction and that the means be provided from my effects for that purpose."

Fifth: "It is my will and desire that my debts be paid out of the first moneys raised by my wife from the estate, and that she have full power to manage and control my

whole estate until her death or until she may think proper to marry, without any further administration than to have this will properly recorded and proven according to law and the circumstances of the times."

Sixth: "It is my will that my beloved wife, Elizabeth Goolsby, be and she is hereby appointed executrix upon this my last will and testament."

After his death his wife caused the will to be proved up and probated and took possession of the estate, real and personal, including these lands, and proceeded to manage and control the same for the support of herself and the maintenance and education of the children, two of whom, Annie and Myrtie, were born after the execution of the will, until her death, which was before the commencement of this suit. In the meantime in order to pay for goods, wares and merchandise purchased for her own use and that of the children, and to carry on and cultivate the plantation, on which they resided as a family, she sold and conveyed the lands in controversy, on the 28th day of June, 1877, to defendant, Robert L. Moore, for the consideration of $800, which was paid. This deed conveys the property as her own in fee simple with full covenants.

There was no order of the court for the sale and the conveyance does not refer to the power of disposal in the will. Possession was given and subsequently Moore conveyed it to his co-defendant, Owen W. Patty.

It is obvious that the rights of the parties depend upon the construction and effect of the will. It is contended by the appellees:

1st. That these lands being after-acquired lands, did not pass by the will, and the testator, Peter R. Goolsby, dying intestate as to the same, they descended to the defendants as his heirs at law.

2nd. If they did pass, still the power of disposal contained in the will to Elizabeth Goolsby was limited by the estate granted to her, which was only an estate for life, subject to be divested upon her marriage, and dependent upon this estate the plaintiffs, the children, by the terms of the will took a vested remainder at the date of the will which came into being and they became fully seized upon the death of Elizabeth.

In the one case, therefore, they claim title by descent. In the other as devisees under the will.

It will be noticed here that the will purports to convey property *in presenti* and not such in terms as the testator should die seized of. But it is said that this is immaterial since it is the nature of a will to take effect only upon the death of the testator, and the testator is supposed always to refer to the condition of his affairs at the time of his death and to intend to convey such lands as he should die seized of.

While by the common law a will was generally construed to speak from the death of the testator as to personalty, it was not so as to real estate. For real estate to pass by will it was requisite that the testator should be seized at the time of making the will, and continue so seized to the time of his death, and it seems this rule was independent of any intention to convey such after-acquired property expressed in the will. The reason assigned was that a will was nothing more than a mode of conveying a particular estate and the testator could not convey property of which he was not seized.

This rule, though many times adversely criticized by eminent English judges, was never changed in England until the statute 1 Vict., c. 26, sec. 3, which took effect upon wills made subsequent to the year 1837. Schouler on Wills, secs.

29, 486, and the English law in this respect has been recognized in most parts of the United States. But in later times it has been changed in most of the states, if not all of them, generally by statutes declaring that wills shall take effect upon lands capable of being devised at the time of the death, although acquired after the date of the will, if such was the intention of the testator, or unless a contrary intention was manifest from the will, or by statutes abolishing the grounds upon which the English rule was based. See 4 Kent. Com., 13th Ed., 512; 1 Williams Ex'rs, 6 Am. Ed., 6, Perkins' notes; 1 Jarman Wills, 5 Am. Ed., 326, Bigelow's notes; *Kimball v. Ellison*, 128 Mass., 41; *Whittemore v. Bean*, 6 N. H., 47; *Roony v. Stiltz*, 5 Wheat., 381.

We are not aware that the question has ever been directly before this court, nor has there been any legislation in this state in terms changing or abolishing the English law on the subject. But a course of legislation was adopted at an early day wholly inconsistent with it and which has certainly swept away the principles or grounds upon which the rule has ever been understood to be predicated. Thus by act of 30th November, 1837, it was enacted "that all lands, tenements, hereditaments may be aliened and possession thereof transferred by deed without *livery of seizin;*" and by the same act it was further provided, "that any person claiming title to any real estate, may, notwithstanding there may be an adverse possession thereof, sell and convey *his interest* in the same manner and with like effect as if he was in the actual possession thereof." And furthermore, "that if any person shall convey any real estate by deed purporting to convey the same in fee simple, absolute or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or

equitable estate afterwards acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance."

It is true these statutes refer in terms only to conveyances by deed; but devises were always regarded as a mode of conveyance—always classed among the several species of alienation of real property and limited generally by the same rules. For instance, by the common law, or rather by the statute of 32 Henry viii, ch. 9, which was a part of the English statute of wills, the power of alienation was forbidden in all cases where the party was not seized in fact. Full seizin included possession. The grantor must be able to deliver possession, which was done by a peculiar formality called *livery of seizin*, and involved a formal entry and investiture upon the land which could not be made where another person held possession claiming adversely. Where such was the case, every species of grant was made void except releases. See 2 Bouvier's Inst., 1997; Coke Lit., 214, a.

This rule and the reasons for it were made applicable to grants and devises alike, although livery of seizin could have no application to wills except by a kind of analogy—a bare technicality—for no feoffment or any kind of delivery was requisite to the validity of a will. As said by Lord Mansfield in criticizing the rule in 3rd Douglas, 361: It was founded upon a bare technicality and might just as well have been decided the other way; but he held that it had then become too thoroughly established to be shaken.

The object of the rule as stated in English works was to prevent dealing in pretended titles.

Every such sale was void as an act of maintenance where-

by rich and powerful men were enabled to oppress the weak. 2 Bouvier, 381; Coke Lit., 214, a; Bigelow on Estoppel, 322; 1 Devlin on Deeds, 112.

But under our statutes above referred to, every species of vested interest and every possibility coupled with an interest in lands may be conveyed by deed as well as after-acquired property. And our statutes of wills, see Mansfield's Digest, sec. 6470, seems to have been enacted with the purpose of putting conveyances by will upon a corresponding basis of enlargement. And see Descents and Distributions, Mansfield's Digest, sec. 2522.

1. WILLS: May include after-acquired lands.

Where a will manifestly designs to dispose of all a testator's estate, real and personal, as in this case, knowing that it is to take effect only at his death—that until that event the will is ambulatory—that he may sell or buy or dispose of his property conveyed by the will, and notwithstanding such changes by him, does not revoke or change his will, but leaves it to remain as first made, the presumption, we think, is strong that his intention and belief was that the will would take effect upon the whole estate as it existed at the time of his death and that he did not intend to die intestate as to any part of it. 5th Otto, 591.

Considering the great changes in the policy, as well as the formalities in alienating and assuring title to real estate from what they were when the English rule on this subject originated and prevailed, we cannot see, notwithstanding the common law has never been changed by any positive statute, any reason why a will should not speak from the death of the testator as to real as well as to personal estate, and we are therefore of the opinion and so hold that the said intestate being seized and possessed of the said lands at the time of his death they were included in his will and were conveyed thereby.

2. SAME: Construction: Estate conveyed: Power of sale

As to the constructfon of the will we see no difficulty whatever. The testator has given, and no doubt intended to give to his wife Elizabeth, a life estate in both his personal and real property—in his whole estate. It is equally as clear that he gave and intended to give a remainder in fee to his children. The language is clear and admits of no dispute. It will be seen that the bequest of the remainder is to his own children, some of whom were then living, and not to the children or heirs of his wife to whom he gave the life estate. The word heirs is not used and nothing indicates even that she was the mother of the children. Had the bequest been to his wife Elizabeth for life, with the remainder over to *her heirs*, she would have taken a fee in the lands and might have disposed of them as she pleased under the law called the Rule in Shelly's case, which has never been abolished in this state. So if the will had been a bequest of his whole estate to his own heirs absolutely, it would, by common law have been void or inoperative, and the heirs after his death, would have taken the lands by inheritance and not under the will. 4 Kent. Com., 216, 506; Boone Law of Real Property, 329, 341. But here the bequest of the remainder is a specific bequest to parties in being, as specific and definite as the life estate of the widow. It was therefore not a contingent but vested remainder—vested at the same time the life estate vested.

It is true that out of the proceeds the widow was to pay the debts and support and educate the children. This provision would be material as evidence that she took a fee simple in the lands under the will instead of a life estate, if the language would admit of such a question. Boone's Law of Real Property, sec. 381. And so the power of disposal and sale of any and all of the real estate given to her may be

regarded as inconsistent with the life estate therein, and consistent only with a devise of the fee, and such provisions have always been treated as evidence to that effect, but never to the extent of annulling the plain and unequivocal language of the will. See *Smith v. Bell*, 6th Peters, 68. But it is contended and the question is, whether admitting only a life estate in Elizabeth Goolsby, she had power to dispose of the lands absolutely. The language of the power is: "To have and to hold during her natural life, or until she may think proper to marry, with full power to sell and dispose of such property as she may think proper."

Obviously considered by itself, the language of the power is broad enough to accomplish that object. But the power must be so construed as to give effect to other provisions of the will. If she could sell absolutely the lands, she could manifestly sell the whole estate and disinherit the children. Moreover such construction of the power is inconsistent with the limitation to a life estate in her; for it would be useless to limit her title to a life estate, if at any time she might by sale convert the whole estate to her own use. The power, we think, should be so construed as to be consistent with the life estate, and not so as to enable her to cut off the remainder in fee to his children. It would be unreasonable, we think, to attribute such an intention to the testator, and would not be consistent with the language in which the remainder is given to them, which is as follows: "It is my desire that at the death of my said wife *all my worldly effects* be equally divided between my children."

This language is very broad and purports to convey the whole estate without reference to a sale of any part by the widow.

It has been very ably and plausibly argued that the widow be-

ing charged with paying the debts and raising and educating the children out of the proceeds of the estate, is a strong argument of the intention to give the power of absolute disposal of the lands for that purpose. But to us it is not clear that such power would be any advantage for such a purpose. A power of disposal limited to her life interest might be thought to be equally adequate to every purpose of the will and would not interfere with the children's rights. However, whatever reasons we may advance on this subject, the authorities seem to be a unit, that where a remainder over is limited upon a devise of lands to take effect upon the death or marriage of the devisee, the first taker has but a life estate, though the language of the will does not in terms create a life estate; and that the power of disposal of the property in the tenant for life will be limited by his own interest in the lands.

Both of these positions were so decided in the case of *Giles v. Little*, 104 United States, 291, and the court there says: "It is contended that even conceding that the will gives the widow of the testator an estate for life, yet it conferred on her during her widowhood the power to convey the entire estate in fee, and she having so conveyed, the defendants in error who claim under her have a good title." But the court says "the authorities are averse and show that when a power of disposal accompanies a bequest or devise of a life estate *the power is limited to such disposition as a tenant for life* can make unless there are other words clearly indicating that a larger power was intended." And the court cites various authorities fully sustaining their position.

Brant v. Va. Coal and Iron Co., 93 United States Rep., 326, is clearly to the same effect. There the last testator made a bequest "to his wife of all his estate, real and per-

sonal; to have and to hold during her life *and to do with as she sees proper before her death,*" and the court held that under this power she could convey only such interest as she held in the estate.

We might cite numerous other cases to the same effect, but deem it unnecessary. It is asked: "If this is the proper construction of the power what effect can be given to it?" The answer is that the law as to the personalty is very different. A bequest of a life estate in personal property with remainder over gives the first taker without any express power for that purpose, the absolute right to all perishable articles, or those like corn, wine and other articles of food or drink, whose use consists in their consumption, and he may dispose of them at pleasure unless restrained by other provisions in the will. See Schouler on Wills, 558. But a power of disposal as in this case is not limited to perishable articles or such as are consumed in the using, but gives to the life-tenant the absolute interest in all personalty and leaves the subsequent limitation void. Under this will the widow, by virtue of the powers which it contains, had unlimited control over the whole personal estate and might dispose of any part of it as she pleased. To be sure she was under a trust obligation to use the proceeds for the declared purposes of the will, but this could not affect the right and power to dispose absolutely of the property. Doubtless she could lease or rent the real estate and appropriate to her own use the rents and profits. See upon these points *Jones v. Bacon*, 68 Me.,24; *Howard v. Carusi*, 109 United States, 725; 4 Del. Chy., 311; *Stevens v. Winship*, 1 Pick., 318.

But as the construction of the will as to the personal estate is not in issue, we will pursue the investigation no further. We are of the opinion that the deed of Elizabeth Goolsby to

Robert L. Moore conveyed only an estate during her life and terminated at her death, when the plaintiffs became entitled as devisees of the remainder.

3. ESTOPPEL: Acquiescence in sale.

It is alleged in the answer demurred to "that plaintiff, William P. Goolsby, stood by and witnessed said deed (from Elizabeth to Moore) and that the remainder of said plaintiffs and those under whom they claim stood by and assented to said sale and conveyance," and it is contended that by reason of this they are estopped from claiming the lands. The demurrer of course admits the truth of the answer and the question is, did this conduct bring them within the law of estoppel? We think not. At that time the plaintiffs had no immediate interest in, and no control of the lands. It is not alleged that the purchaser was induced by this conduct to make the purchase or that he was in any way misled by it, nor that Moore was ignorant of their interest in the property; nor that their omission at the time to object or to claim title was done with the intention of inducing the purchase. In fact, it does not appear that the children were at that time of age or that they knew of their own reversionary interest in the lands. Bigelow on Estoppel, 480. Affirmed.

BATTLE, J., did not sit in this case.

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BRICE v. TAYLOR.

1. ADMINISTRATION: *Action for waste of assets; Rights of distributees and creditors.*

The distributee of an estate is not entitled to maintain an action against the administrator for waste or conversion of assets, without showing that the claims of creditors have been satisfied; but if such suit is sustained a judgment obtained therein by the plaintiff is not binding on absent parties in interest, and he is only a trustee for the benefit of those entitled to the fund recovered.

2. SAME: *Same: Right of administrator de bonis non.*

When it becomes necessary to remit to the probate court for administration, a balance recovered from the administrator in chief in an action on his bond, brought under the statute, [Mansfield's Digest, sec. 199,] by a creditor or "other person interested," it should be paid to the administrator *de bonis non* as assets of the estate—although he could not, under the statute, nor at common law, have maintained the action in which it was recovered.

3. SAME: *Same.*

An administrator *de bonis non* may maintain a bill in equity to prevent, by injunction and other appropriate orders, the loss or misapplication of a fund recovered by an insolvent distributee from the administrator in chief, and which is required for the satisfaction of creditors.

4. JUDGMENT: *Assignment by trustee.*

When a plaintiff in a judgment is only a trustee thereof, and, as shown by the record, has no beneficial interest therein, his assignment of it will pass no title.

APPEAL from *Cleburne* Circuit Court in Chancery.

J. W. MARTIN, Judge.

W. R Coody, for appellant.

A court of chancery has no power to lift the administration out of the probate court for the purpose of proceeding with it. It can only lend its aid to correct frauds, etc., uncover assets, etc., and if there are still further proceedings necessary, they must be had in the probate court. 33 Ark., 729; 33 Id., 575; 34 Id., 71; *Turner v. Rogers*, 49 Ark.; 4 S. W. Rep., 196; 39 Ark., 117-19; 32 Id., 297. While an heir, legatee or creditor may show fraud and uncover assets in an administrator's hands, yet, when the fund is recovered, all the chancery court can do is to direct them turned over to the existing administrator to be administered under the orders of the probate court.

J. W. House, for appellees.

An administrator *de bonis non* cannot sue a former ad-

ministrator for waste or conversion. 24 Ark., 117; 34 Id., 144; 36 Id., 307. But an heir or legatee can. 24 Ark., 117. Now will a court of equity allow an administrator *de bonis non* to come in and reap the benefit of a fund he could not sue for or recover? We think not. Equity will not enjoin a judgment on the ground of hardship. 20 Ill., 310. Nor was the transfer of the decree ground for injunction. 26 La., 42.

Third parties are not bound by latent equities. 12 Cal., 257; 24 Penn. St., 363; 2 John. Chy., 442; 26 N. J. Eq., 414; Freeman on Judgment, secs. 428, 217.

COCKRILL, C. J.

The appellee, Amelia Taylor, as next of kin of H. J. Gatton, deceased, filed her complaint in equity against Greer, who had been executor of Gatton's estate, to surcharge his accounts and recover the value of assets which he had technically administered, but for the proceeds of which he had failed to account. She recovered judgment for two hundred and odd dollars and interest. Thereupon Brice, the appellant here, filed his complaint in the same court against the appellee, Greer, and another, alleging the facts above set forth, and also that he had been appointed administrator *de bonis non* of the estate of Gatton, that there were debts outstanding to the amount of about $5,000, allowed by the probate court where the adminstration was pending, that there were no personal assets with which to discharge the debts and that the lands were insufficient for the purpose; and that if the plaintiff in the judgment was permitted to collect the money, it would be lost to the estate. The prayer was, that the plaintiff be restrained from collecting the amount due on the judgment and that it be paid to the plaintiff in this suit, the

administrator *de bonis non*, to be accounted for in the probate court as assets of the estate of Gatton. A temporary restraining order was issued when the complaint was filed, enjoining the collection of the judgment, but the bill was eventually dismissed on a demurrer. When the appeal was prayed, the injunction was reinstated by the court for the purpose of holding the matter in *statu quo* until the rights of the parties could be determined here.

Ought the complaint to have been dismissed?

That an administrator *de bonis non* could not call the administrator in chief to account for waste or conversion of the assets of the estate was well settled at common law, and the American courts enforce the rule unless relieved by statute. *U. S. v. Walker*, 109 U. S., 258. This court is committed to the doctrine that the common law still prevails in that respect in this state. *State for use of Oliver v. Rottaken*, 34 Ark., 144, and previous cases.

1. ADMINISTRATION: Action for waste of assets: Rights of distributees and creditors.

The statute authorizes suit against an executor or administrator and his bondsmen by "any legatee, distributee, creditor or other person interested." Mansfield's Digest, sec. 199. This provision is declaratory of the common law according to the judgment in *State v. Rottaken, Sup.* But no person, even of one of the classes mentioned, can maintain his action unless his interest is made apparent. A distributee, or one who in the absence of creditors would be entitled to the fund, is not a party in interest until the creditors are satisfied, and he should not be allowed to maintain an action against the administrator and his bondsmen without showing that fact. *State for use of McCreary v. Roth*, 47 Ark., 222. But if the suit is sustained, the judgment, in so far at least as it favors the plaintiff, is not binding on the absent parties in interest who have had no opportunity of asserting their rights,

and the most the judgment plaintiff can claim is that he is a trustee for the benefit of those entitled to the fund. 3 Williams' Ex'rs, (2007); Schouler on Ex'rs, sec. 407. This was the law before the statute and it is evident that it was not the intention of the legislature to make a change for the plaintiff's benefit, for the provision which authorizes the suit declares that the amount recovered "shall be distributed by the court in the same manner as if the same had been accounted for by the executor or administrator." Sec. 199, supra.

Under the English system, until changed by Parliament in the reign of Victoria, the administrator *de bonis non* had no concern whatever with a balance due from the administrator in chief, and could not interfere with a judgment of recovery obtained by any of the parties entitled to sue.

The remedy was for the creditor himself to take action against the defaulting administrator by bill in chancery on behalf of himself and others similarly interested, when an accounting was had, the creditors' claims proved up, and the estate administered as far as was necessary—the court of equity exercising concurrent jurisdiction under certain restrictions with the ecclesiastical courts in the administration of estates of decedents. The difficulty with us in undertaking to follow the English rule arises at that point. The statute authorizing suits by the legatee, distributee or creditor, confers an equitable as well as a legal remedy; but the jurisdiction of our courts of equity is more restricted than that of the English courts.

They are prohibited by the constitution, as construed by this court, from exercising jurisdiction concurrent with the probate courts or otherwise, in the administration of decedents' estates. The latter tribunals have exclusive jurisdiction in

such matters, and there is no power in equity to draw to itself the administration of an estate and wind it up as the English court did, when once it had obtained jurisdiction. *Turner v. Rogers*, 49 Ark., 51, and cases cited. With this limited jurisdiction, equity can do no more than remove obstacles in the way of the probate court in order that the latter may successfully proceed with the administration, and having opened the way, it relinquishes its grasp on the estate and leaves the administration to proceed in the other tribunal. It is only when the probate court has fully performed its functions, leaving nothing in the way of a distribution of the amount recovered, that equity can direct the distribution. *Reinhardt v. Gartrell*, 33 Ark., 727. If the rule were otherwise, the court of chancery would interfere with, or would itself direct the administration. If continued proceedings in the course of administration are necessary, after the ancillary tribunal has lent its aid, it follows that a fund raised through that medium must be remitted to the probate court, as such additional steps can be taken in that court alone. The administrator *de bonis non* would, in that event, assume the duty under the statute of administering the fund under the direction of the court of probate. Schouler on Ex'rs, sec. 408. He would, in that contingency at least, be a party in interest, as trustee for the creditors and others concerned.

If the balance due from the administrator in chief is voluntarily rendered by him to the probate court on his final settlement, it becomes assets of the estate when paid into the hands of his successor, for which he and his sureties are liable Schouler on Ex'rs, sec 408; *Whitworth v. Oliver*, 39 Ala., 286. It is difficult to appreciate the reasoning which leads to a different conclusion when the amount is raised by suit on his bond for the benefit of the estate. If in this, as in the

contingency mentioned above, the administrator *de bonis non* becomes a party in interest, consistency would, it seems, require that he should be permitted to sue for and recover the fund. But I am not at liberty to regard that as an open question. In order to prevent a failure of justice and a perversion of the obvious intent of our administration laws, we hold, however, that when it becomes necessary to remit to the probate court for administration a balance recovered in another tribunal from an executor or administrator in chief, it shall be paid to the administrator *de bonis non* as assets of the estate. If it can be ascertained from the records of the probate court that the fund is ripe for distribution, nothing is in the way of an order to that effect in the tribunal where it is recovered, and it is then unnecessary to encumber it with costs and delay by remitting it to the probate court. *Gray v. Harris*, 43 Miss., 429. No good end is attained by the circuity of action contemplated by the statute. It is often doubtful who is entitled to sue, and the natural tendency of the law, as it stands, is to make waste of what are practically, if not theoretically, assets of the estate; and the sooner the legislature remedies the evil by conferring the necessary authority on the administrator *de bonis non*, the better.

3. SAME: Right of administrator *de bonis non*.

The demurrer to the complaint admits that its allegations are true. The plaintiff in the judgment is therefore a naked, voluntary and insolvent trustee, who is about to waste or convert to her use the trust fund. When these facts were brought to the knowledge of the court, the issue of the restraining order was proper. It is not certain from the complaint whether the estate is ready for the distribution of the fund or not, but the complaint should not be dismissed for that reason, and the trustee allowed to misapply the fund. If it appears that it will not interfere with the course of admin-

4. SAME.

istration, and the proper parties are before it, the chancery court where the judgment is recovered may cause it to be executed and make a distribution of the fund; otherwise it should be paid to the administrator *de bonis non*, to be administered under the orders of the probate court.

5. JUDGMENT: Assignment by trustee.

We have not overlooked the allegation of the complaint to the effect that the plaintiff in the judgment has endorsed upon it an assignment of her right, title and interest in it to a stranger to the record. The assignee, who is made a party defendant, took nothing by the assignment, because the assignor had no beneficial interest to assign. The judgment record itself apprised him of the fact.

The judgment is reversed; the cause will be remanded for further proceedings, and the injunction will be continued in force until the further order of the Cleburne circuit court.

DRIVER V. HAYS.

1. SPECIAL ADMINISTRATOR: *Revival of suit in name of; Construction of statute.*

The only object of sec. 5231, Mansfield's Digest, providing for the revival of suits on the death of either party, in the name of a special administrator to be appointed by the court where the action is pending, was to prevent the dismissal of actions for the want of a party to prosecute or defend. It was not intended to empower the court in every case to set up a special administrator to represent all the parties in interest.

2. SAME: *Same: In action to restrain sale for taxes.*

On the death of the plaintiff in an action to restrain the sale of lands for the non-payment of taxes, the suit should be revived in the name of his heir, and not in the name of a special administrator; and the latter cannot maintain it unless he acts as a substitute for a general administrator where the lands would be required as assets for the payment of debts.

3. SAME: *Liability for costs.*

The statute, (Mansfield's Digest, sec. 5233), exempts from liability for costs

a special administrator in whose name a suit is revived, and it is error to render against him a judgment for costs.

APPEAL from *Mississippi* Circuit Court.

J. E. RIDDICK, Judge.

O. P. Lyles, for appellant.

Argues on the merits and the validity of the tax.

COCKRILL, C. J.

John L. Driver filed his complaint against the collector of taxes of Mississippi county to restrain the sale of his, the plaintiff's, lands, which had been returned delinquent for the non-payment of taxes. The plaintiff died before the cause was heard and when his death was suggested, the court where the cause was pending, appointed J. L. Driver, Jr., special administrator and ordered that the suit be revived in his name. The collector answered, a demurrer to his answer was overruled; the plaintiff stood upon the demurrer; the complaint was dismissed, a judgment for costs was rendered against the administrator and he appealed.

1. SPECIAL ADMINISTRATOR: Revival of suit in name of.

When a party to a suit dies, the court where the action is pending is authorized by sec. 5231, of Mansfield's Digest, to cause it to be revived in the name of a special administrator, to be appointed by the court for the purpose of conducting the suit. It was not the intention of the statute, however, to empower the court in every case to set up a special administrator to represent all the parties in interest. Its object was only to prevent the dismissal of actions where there was no party known who could prosecute or defend. The act is its own interpreter. Its title limits it "to certain cases;" it is provided that a special administrator cannot be appointed if there is a general administrator, and the third section extended its provisions to suits pending at the time of its passage,

in which either party had died, and the suit "abated for the want of a party to prosecute or defend." Acts 1851, p. 102.

2. SAME: In action to restrain sale for taxes.

There is no suggestion in the record that the contingency contemplated by the statute has arisen. In no event can the special administrator's powers to represent others be greater than that of the general administrator, for the act intends only that he shall act in an emergency as a substitute for the latter. Mansfield's Digest, sec. 5233. But the general administrator has no concern with the lands of a decedent, except when they are needed as assets for the payment of debts. When they are not needed for that purpose, the heir is the party in interest, and he alone can sue. *Stewart v. Smiley*, 46 Ark., 373; *Chowning v. Stanfield*, 49 Ib., 87. One who has no interest in real estate, which the constituted authorities seek to subject to a tax, and who is in no way responsible for the failure to pay the tax or to redeem from the tax sale, will not be allowed the aid of an injunction to prevent its enforcement. 1 High on Inj., 573.

The special administrator could not, for this reason, maintain the suit for injunction, and the judgment of dismissal was right. The heirs were not parties and are not bound by the judgment. But the statute specially exempts the special administrator from liability for costs, and the court erred in rendering a judgment for costs against him. Mansfield's Digest, sec. 5233. The judgment for costs is therefore vacated; the judgment of dismissal is affirmed.

3. SAME: Liability for costs.

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REYNOLDS V. TENANT.

1. HOMESTEAD: *Exemption from sale under attachment.*

Where land is not occupied as a residence at the time an order of attachment is levied upon it, the defendant's occupation of it on a subsequent

day, will not enable him to hold it as a homestead exempt from sale under a judgment sustaining the attachment.

2. EXECUTIONS: *Sale of land in a body.*

The statutory requirement, (Mansfield's Digest, sec. 3052), that lands shall be sold under execution, in tracts containing not more than forty acres, is directory; and where the owner of the lands is present at the sale, he waives a compliance with the statute by his failure to demand it.

APPEAL from *Izard* Circuit Court.

R. H. POWELL, Judge.

Z. M. and *D. L. Horton*, for appellant.

The sale was subject to confirmation and should have been rejected for any irregularity affecting the substantial rights of the parties. Mansfield's Digest, sec. 350; 29 Ark., 307; Rorer on Jud. Sales, pp. 28, 110, 121, 590-1-7, and note 1.

The pleadings admit the land to be defendant's homestead. It was exempt, Art. 9, sec. 3, Const. even after the issue of the order of sale. 48 Ark., 224. His schedule complied with sec. 3006, Mansfield's Digest. It states that *it is exempt*, and even if it does fail to show when his occupancy began, it clearly implies that it was his homestead at the time of the levy. Homestead laws are liberally construed. Thompson, H. and Ex., secs. 4, 7, 731; 38 Ark., 113; 48 Id., 493.

The clerk is a ministerial officer, and has no discretion when the debtor complies with the law.

2. The sale was irregular. Mansfield's Digest, secs., 3049, 3052-3. The sheriff *neglected his duty* in selling in a body.

John H. and *S. W. Woods* and *Robert Neill*, for appellees.

A party claiming exemption must, by affirmative statement, bring himself within the law. 34 Ark., 112; 43 Id., 20.

The necessary qualifications of the homestead claimant must exist at the date of the levy upon the land. The home-

stead character cannot be impressed afterwards, so as to displace the lien of the judgment which relates back to the levy. 42 Ark., 178; 46 Id., 49; 48 Id., 226.

The affidavit does not disclose the fact that appellant occupied the land at the date of the levy. He simply states that he *now* owns, etc. This does not bring him within the law. 33 Ark., 454; 46 Id., 43-47.

2. The statute directing lands to be sold in forty acre tracts or less, etc., is merely directory, and may be waived. 34 Ark., 409; 38 Id., 579. The land sold for its full value and no injury was done appellant; he was present at the sale and did not object to the manner of sale, thereby waiving his right under the statute.

BATTLE, J.

Appellee instituted an action against appellant, and sued out an attachment, which was levied on his personal property and land. They recovered judgment; the attachment was sustained; and the property levied on was ordered to be sold. A writ of Ven. Ex. was issued, commanding the sheriff to sell. Upon its issuance, appellant, after giving the requisite notice, filed his schedule with the clerk of the court, and claimed the land as his homestead. The schedule was verified by an affidavit to the effect that the schedule was a correct list of all his property, except the wearing apparel of himself and family; that he is a resident of the state, a married man and the head of a family; that the land claimed as his homestead did not exceed one hundred and sixty acres, and was not worth exceeding $2,500; that he occupied it on the 10th of April, 1886, the date of his affidavit, as his homestead; and that he claimed it as his homestead and to be exempt from seizure or sale under attachment, and de-

manded a supersedeas. The clerk refused to issue the supersedeas, and the sheriff sold the land, a tract consisting of one hundred and fifty-five acres, in a body. Appellant was present at the sale and made no objection to the manner in which it was sold. The sheriff made a report of his proceedings to the court; and appellant moved the court to set aside the sale of the land, because it was his homestead and he had filed a schedule before the sale, as before stated. The court overruled the motion and confirmed the sale.

The attachment was levied on the 16th of February, 1886; the judgment of the court sustaining the attachment and directing the sale to be made was rendered on the 13th of March, 1886; and the schedule was filed on the 10th of April, following. Appellant failed to show, in the affidavit annexed to his schedule, or otherwise, that he occupied the land as a residence at the date of the levy of the attachment. The language used in the affidavit is, "he owns and *now* occupies the same as a homestead," which means he occupied it at the date of the affidavit, the 10th of April, 1886, nearly two months after the levy. His right to hold it as a homestead, exempt from seizure under an order of attachment, depended upon his having occupied it as a residence on the day it was attached. His occupancy of it after the levy did not relieve it of the attachment lien, or from sale under the judgment of condemnation. The judgment sustaining the attachment and condemning the property seized to be sold perfected the inchoate lien created by the levy; and appellant did not remove it by a subsequent occupation. *Patrick v. Baxter*, 42 Ark., 175; *Richardson v. Adler, Goldman & Co.*, 46 Ark., 43.

1. HOMESTEAD: Exemption from sale under attachment.

The sale of the land was made in a body. This, it is contended, is in violation of the statute, which provides that in

2. EXECUTIONS: Sale of land in a body.

all sales of land under execution, when the tract to be sold contains more than forty acres, it shall be divided, as the owner may direct, into lots containing not more than forty nor less than twenty acres, and be sold accordingly. This requirement has been held by this court to be directory, and at the option of the owner, and may be waived, In this case the owner was present at the sale, and did not ask that the land be divided up according to the statute, or object to the sale. The requirement of the statute was for his benefit; he did not ask the sheriff to comply with it. He had a right to waive it and did so by his failure to demand it. It does not appear that the land failed to bring a fair price. *Field v. Dortch*, 34 Ark., 399; *Youngblood v. Cunningham*, 38 Ark., 571. Judgment affirmed.

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CLAIBORNE V. STATE.

1. FORGERY: *Of school warrant.*

It is forgery to make a false school warrant in the name of a majority of the school directors. *Crain v. State*, 45 Ark., 450.

2. SAME: *By creditor on his debtor.*

It is no defence for a creditor to show that when he executed a forgery on his debtor, he intended to apply the money thus obtained to the payment of his debt.

3. SAME: *Fraudulent intent.*

One who is authorized to sign the name of another to an instrument for the payment of money in a stated amount, or for a legal purpose, will commit forgery if he signs it for a larger amount, or for an illegal purpose, with intent to defraud.

4. INSTRUCTIONS: *Excluding points raised by evidence.*

It is not error to refuse a prayer for an instruction which, though correct as far as it goes, is so framed as to exclude from the consideration of the jury points raised by the evidence of the adverse party.

5. SAME: *Same.*

A charge that a conviction should be had if the jury find the existence of a given state of facts, which do not legally import guilt without a specific intent, is erroneous, and the error of the specific charge upon the facts singled out by the court to the exclusion of others which the jury had the right to consider, is not cured by a correct general charge in regard to the guilty intent necessary to constitute the offence.

APPEAL from *White* Circuit Court.

M. T. SANDERS, Judge.

The appeal in this case is from a conviction for forging a school warrant. The defendant was one of the directors of the district out of the funds of which the warrant was payable, and it purported to be drawn by the other two directors in favor of the defendant for the sum of $25.00, in payment, as expressed, "for stoves for school houses." On the trial, defendant admitted that he signed the names of the other directors to the warrant, but testified that he did so in good faith, believing that he had a legal demand against the district and that he had authority from the other directors to sign their names to all warrants for such demands. He was secretary of the board, and there was other testimony to show that he had a general authority to sign warrants for the other directors. Other facts were in evidence, which are stated in the opinion.

J. W. House, for appellant.

The forging the names of the directors was not sufficient. It must have been done with a fraudulent intent to deprive the school district of its money. If the school district owed Claiborne $25.00 at the time the warrant was drawn, while it was wrong to sign the names of the other directors, it was not forgery, it was not a criminal wrong. 15 Ohio, 717; 51 Ga., 535; 7 Cox Cr. C., 122. A person is never criminally

responsible for doing what he believes he has a right to do, when acting on a fair ground of reason and without fault or carelessness. 7 Car. & Payne, 224; Id., 94; 8 Hun. (N. Y.), 623; 1 Foster & Fuil., 529; 22 Am. Dec. 313; 15 Mass., 526: 15 Ohio, 717. There can be no forgery without an intent to defraud. 1 Whart. Cr. L., sec. 717; 5 Ohio, 5; 22 Am. Dec., 302; 15 Mass., 526; 15 Oh., 717.

Under the instructions of the court, and particularly No. 1 *a*, the jury were compelled to bring in a verdict of guilty, although they may have believed Claiborne intended no wrong. The right to determine the intention of Claiborne from all the facts and circumstances was taken from the jury. If he drew the warrant in good faith, not intending to defraud, believing he had a just demand, he was not guilty, even if he did sign the names of the directors without authority. 31 Ark., 554; 135 Mass., 367; 1 Whart. Cr. Law, secs. 717–18; 49 Ark., 156; 37 Id., 580. Even if Claiborne's testimony was false, he had the right to have an instruction based on his version. Authorities supra. 32 Ark., 470; 37 Id., 164; 43 Mass., 99; 94 Id., 591.

Dan. W. Jones, Attorney-General, for appellee.

A creditor has no right to forge his debtor's name to a check or note, though he intend to apply the proceeds to the extinguishment of the debt.

It is a forgery to sign two of the names, or one of the two names of the three school directors to a warrant, as a warrant signed by two of the directors is valid. Mansf. Dig., sec. 6366; 36 Ark., 449.

An instruction which *assumes* certain facts to be true, or which emphasizes certain parts of the testimony, should be refused. 36 Ark., 117; 37 Id., 333; 30 Id., 383.

Nor should one be given where there is no evidence upon which to base it. 29 Ark., 151; Thompson Charging the Jury, p. 62; 42 Ark., 61.

We come now to instruction No. 1 *a*, given by the court on its own motion, and which is so seriously objected to by appellant. It seems to have been intended by the court, and the effect of it was, to direct the attention of the jury to the proposition of law, that authority to sign the names of the other directors to legal demands against the district was not an authority to sign their names to warrants for demands which he knew were not legal, or demands that he knew had been paid, or were included in another warrant which he knew had been paid. And in this instruction the further proposition is involved, that every sane man is presumed to intend the natural consequences of his act. *Howard v. The State*, 34 Ark., 433. And it also involves the further proposition that the act of signing the names of the other two directors to a warrant for a demand which he knew had been paid, or was included in another warrant which he knew had been paid, was an act in itself unlawful, and the law implies a criminal intent. *Harris v. The State*, 34 Ark., p. 469; *The State v. Kimball*, 50 Maine, 409.

The intent to defraud mentioned in the statute, and indeed in the works of text writers, does not mean, necessarily, an intent to actually defraud, but it must be an intent that the forged instrument shall be used as good. See Bish. Cr. Law and authorities cited, vol. 2, p. 305.

COCKRILL, C. J.

1. In the case of *Crain v. State*, 45 Ark., 450, it was held to be forgery to make a false school warrant in the name of only two school directors, and the court did not err in refusing to instruct otherwise. 1. FORGERY: Of school warrant.

2. SAME: By creditor on his debtor.

2. It is well settled that when the intention to give effect to a forged document is established, the intent to defraud is conclusively presumed. It is, therefore, no defence for a creditor who executes a forgery upon his debtor to show that he intended to devote the money thus raised, to the payment of the debt due him. 2 Bish. Cr. Law, sec. 598; 1 Whart. Cr. Law, 718; *Regina v. Wilson*, 1 Den. Crown Cas.,* 284; S. C. 2 Car. & Kir., (61 Eng. Com. Law) *531; *Bush v. State*, 77 Ala., 83; *State v. Kimball*, 50 Me., 409; *Com. v. Squires*, 97 Mass., 59. Several of the prisoner's requests to charge the jury were not consistent with this principle, and the court did not err in rejecting them.

3. One of his requests which was denied by the court was as follows: "The jury are instructed that if they believe from the testimony that the defendant was not authorized to sign the names of the other directors to the order alleged to have been forged; yet, if they believe from the evidence that he was acting on a fair ground of reason, without fault or carelessness, believing himself authorized to sign their names, then he is not guilty and they must acquit."

This is an enunciation in the abstract of a principle of the common law. It is not necessary that one who signs the name of another should have express authority to do so to relieve him of the penalties of forgery. If it appears from the proof that he had reasonable ground for considering that he had authority and acted upon that belief, the intent to commit the offence would be wanting and he would not be guilty. *Regina v. Parish*, 8 Car. & P., 94; *Parmelee v. People*, 8 Hun., 623.

3 SAME: Fraudulent intent.

But the request makes the application of the principle too narrow for the facts of this case; for one may have authority to sign the name of another to an instrument for the payment

of money in a stated amount, or for a legal purpose, and yet commit forgery by signing for a larger amount, or for an illegal purpose, with intent to defraud. *Rex v. Hart*, 1 Moody Cr. Cas., 486; *Regina v. Wilson*, and cases cited, *supra*. The request should have been so framed as to leave the jury at liberty to convict the prisoner, notwithstanding they might find that he had reasonable ground upon which to base a belief in his authority to act for the other directors, if it was also found that he signed their names to the warrant with the fraudulent purpose of paying an amount the school district did not owe. The legal question, whether the instrument was forged or not, would be the same whether the claim, for the payment of which the warrant was drawn, was held by the prisoner or another.

4. INSTRUCTIONS.

4. Upon the phase of the case relating to the payment of a demand not due from the district, the court charged the jury as follows:

5. SAME.

"If a school director draws a warrant on the school fund of the district, payable to himself or order, for an expense of the district which he knew had been previously paid, or which he knew had been included in another warrant that had been previously drawn on the school fund of the district and paid, and signs the names of the other directors thereto, he is guilty of forgery, although he may have had a general authority to sign their names to orders for legal demands against the district."

The charge, like the defendant's rejected request, tended to restrict the jury's field of inquiry to isolated facts, to the exclusion of other considerations which enter into the determination of the question of the prisoner's guilt.

The district was indebted to one Roberts in the sum of $40.00 for a month's salary, and owed $25.00 for a stove,

etc., purchased by the prisoner for the use of the school. He drew a warrant in Roberts' favor for $65.00, intending thereby to pay the teacher's salary and his own demand. The warrant was delivered to Roberts and was paid to him by the county treasurer out of the school fund; but, according to the prisoner's version, the arrangement by which he was to be paid was not permitted to stand. His explanation is that after the $65.00 warrant was issued the conclusion was reached that the whole amount would have to be charged to the teacher in whose favor the warrant was drawn, because it professed to be drawn for teachers' salary; that he having practical control of the affairs of the district and believing that he had authority to act, thereupon agreed with the teacher that the $25.00 in excess of the amount then due him on account of his salary, should be charged to him as money paid in advance on that account; and that the whole amount was retained by the teacher with that understanding and for the reason stated. There was evidence to show that his explanation was false and that he actually received the $25.00 from the teacher in pursuance of the understanding between them, but it was for the jury to settle the conflict in the testimony. The prisoner's version may be false, but cannot be ignored by the instructions to the jury. If true, it is consistent with good faith, whether he had the actual legal authority to draw the warrants and deal with the school fund as he did or not; and if he drew the $25.00 warrant under a general authority from the other directors to sign their names to warrants for legal demands against the district, believing that it was for a subsisting legal demand and without the intent to defraud, he was not guilty of forgery. But the charge above copied leaves these considerations out of view and informs the jury that the prisoner

is guilty if he drew the warrant for an amount which he knew was included in the first warrant.

The specific charge upon the facts would likely make a deeper impression on the jury than the more general charge in regard to the criminal intent, which the court told them in another connection they must find the prisoner entertained before they could convict. They would naturally infer that the facts selected and pointed out by the court raised a conclusive presumption of fraud, and in themselves authorized a conviction if found to exist. The charge was too certainly calculated to mislead to justify an affirmance. The judgment is, therefore, reversed, and the cause will be remanded for a new trial.

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

NOVEMBER TERM, 1888.

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BATTLE (and five other cases) v. STATE.

1. LIQUORS: *Construction of license law.*

The construction placed upon the license law in *Chew v. State*, 43 Ark., 361 and cases there cited, that it forbids a sale of liquor for any purpose whatever, by an unlicensed dealer, is approved.

2. SAME: *Sale for medicinal purposes: "Three mile law."*

The act of 1881, known as the "the three mile law," did not change the general license law, so as to permit the sale of liquors for medicinal purposes without a license.

3. SAME: *Who may furnish to the sick.*

Under "the three mile law" a physician who files the oath required by that act is the only person who can furnish alcoholic stimulants to the sick in a prohibited district; and a sale made therein by a druggist is unlawful, although he sells for medicinal purposes and upon the prescription of such physician.

APPEAL from *Garland* Circuit Court.

J. B. WOOD, Judge.

G. W. Murphy, for appellant.

The whole law considered in the light of the circumstances and the motive to its enactment, it is as clear as language can make it, that the intent was to permit the druggist to fill the prescription of the physician, who had made and filed the affidavit, even though it called for alcohol or whiskey; and this intent must prevail. *State v. Smith*, 40 Ark., 431; *Woodruff v. State*, 3 Ark., 285; *State v. Jennings*, 27 Ark., 419; *Holbrook v. Holbrook*, 1 Pick.; *Jackson v. Collins*, 3 Cow., 89; *Reddick v. Governor*, 1 Miss., 147; *Beall v. Harwood*, 2 Har. & J., 167; *Wilkinson v. Leland*, 2 Pet., 662; *People v. Utica Ins. Co.*, 15 Johns., 358; *Minor v. Mechanic's Bank of Alexandria*, 1 Pet., 64. The conjunctions "and" and "or" are treated as convertible, where the context requires it. *State v. Brandt*, 41 Iowa, 593; *People v. Sweeter*, 1 Dak. Ter., 309; *State v. Pool*, 74 N. C., 402.

The circuit court held that the physician, *only*, could furnish the stimulant, and that his prescription was no protection to the druggist.

This was extremely technical; it denied the influence of intelligent motive in the law making power.

No license to fill the prescription, or sell intoxicating liquors in the district embraced by the prohibitory order could have been granted, nor was any required.

But in any event the first instruction asked by appellant should have been given; the fact that a druggist kept alcohol or whiskey to make tinctures or compounds raised no authority, by implication, in the clerk to sell it without his knowledge.

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

There are but two questions raised in these cases:

First: That the party indicted had no criminal agency, part in or knowledge of the sale. This is settled against appellants in the case of *Robinson & Warren v. State*, 38 Ark., 642; *Waller v. State*, 38 Ark., 656.

Second: That appellants are protected by section 4526 of Mansfield's Digest.

It must be borne in mind that they are not indicted for a violation of the "three mile law," but for a violation of section 4511 of Mansfield's Digest. But even if they were indicted for a violation of the "three mile law," they were properly convicted, for the language of that act is "to prevent the prescribing *and furnishing*."

Being indicted for a violation of section 4511 of the Digest we think that the following cases may be considered conclusive of this point: *Woods v. State*, 36 Ark., 36; *Flower v. State*, 39 Ark., 210.

COCKRILL, C. J.

These six appeals from convictions for violation of the liquor laws have been submitted together as involving similar questions. Some of the convictions were had under the general license law and some under the three mile local option law.

All the defendants are druggists and each sold whiskey to his customers on the prescription or requisition of a practicing physician that it was for a sick person under his charge. The physician in each case had made and filed the oath hereinafter mentioned as the law prescribes.

The question presented is the correctness of the defendant's contention that it was the intention of the legislature, as ex-

pressed in the third section of the Act of March 21st, 1881, known as "the three mile law," to authorize druggists to sell any kind of ardent spirits on the prescription of a physician who had qualified himself to prescribe alcoholic and vinous liquors for the sick, by compliance with the requirements of the act.

1. LIQUORS: Construction of license law.

It is the settled construction of our license law that no one without a license can lawfully sell any of the prohibited liquors or concoctions mentioned in the act—not even a druggist when selling as medicine in good faith upon the prescription of a practicing physician. *Woods v. State*, 36 Ark., 36; *Flower v. State*, 39 Ib., 209; *State v. Butcher*, 40 Ib., 362; *Chew v. State*, 43 Ib., 361.

The presumption is that in licensed districts ardent spirits needed for medical purposes can be procured from a licensed dealer. *Wood v. State*, 36 Ark., sup., and the intention of the license act is to confine the traffic to such persons.

2. SAME: Sale for medicinal purposes.

The terms of the act prohibit a sale by an unlicensed person "for any purpose whatever," no exceptive provision being made in favor of the druggist or for medical purposes. The legislative intent, like that expressed in the similar statutes of Illinois and other states, has therefore been considered too manifest for the courts to engraft any exception upon the statute. *Wright v. People*, 101 Ill., 126; Bish. St. Cr., sec. 1026 N. 6. This was the construction placed upon it prior to the enactment of the three mile law, and that that act did not alter it was decided in *Chew v. State*, *sup*.

The question remains, does the three mile law intend to exempt druggists selling ardent spirits as medicine upon the prescription of a physician within the prohibited district, where no license can be obtained, from the penalties imposed by the law? The first section of the act is to the effect that

when the county court upon a prescribed petition has prohibited sales within a radius of three miles of a designated point, 'it shall be unlawful for any person to vend or give away any spiritous, vinous or intoxicating liquors of any kind,'' etc., within the district described in the order.

Now the value of spiritous liquors in the treatment of diseases is, perhaps, universally recognized. But as no license can be had in the prohibited district, if no one can lawfully sell or give them away their use as a medicine would practically be lost. But the intention of the legislature not to bring about that state of things is manifested by the third section of the three mile law, which is as follows: ''This act shall not be construed as prohibiting the use of wine for sacramental purposes, or to prevent the prescribing and furnishing of alcoholic stimulants by a regular practicing physician to the sick under his charge when he may deem the same necessary; but before such physician shall be authorized to prescribe and furnish such alcoholic stimulants, in order to protect himself from the penalty of this act, he shall file in the office of the county clerk in the county in which he resides an affidavit, which shall be in the following form, to-wit: I,——, do solemnly swear or affirm that I am a regularly practicing physician and that I will not prescribe or furnish any vinous or alcoholic stimulants to any one except it be in my judgment, a necessity in the treatment of the disease with which he shall be at the time afflicted.'' Here provision is made for furnishing alcoholic stimulants to the sick. But by whom may such a stimulant be furnished? The act limits its protection to the physician who prescribes it. Its language is to the effect that he may ''prescribe and furnish'' alcoholic stimulants, but that in order to protect (not another, but) himself from the penalty of the act ''he

3. SAME: Who may furnish to the sick.

shall make and file an oath that he will not prescribe or furnish it unless he believes it to be a necessity." Where these statutory provisions and limitations prevail, says Mr. Bishop, "they must in reason and it is believed on authority be accepted as the measure of the right to make such sales, so that no further right can be superinduced by interpretation." Bish. St. Cr., sec. 1019. The legislature has selected the physician as the only person to be entrusted in a prohibition district with what they deem a dangerous agency liable to abuse, and the courts are not authorized to extend the privileges by construction to the druggist or any one else. This was the construction given the act in *Chew v. State, sup.*

In the earlier case of *State v. Bailey*, in the same volume (p. 150), which is relied upon by appellants, the question was not directly ruled. It was objected to the indictment in that case that it did not negative the fact that the defendant was a druggist selling for medical purposes only, and it was held that the exceptions in the statute not being in the enacting clause, needed not to be noticed in the indictment. The meaning of the exception was not declared.

Chew's case, sup., was a conviction of a druggist for selling whiskey without a license, although the sale was on the prescription of a physician as in these cases, and in a prohibited district. As the Act of March 26th, 1883, makes a guilty sale in a prohibited district punishable under either the license or the three mile law, it is not probable that it was the legislative intent to make a given case violative of one act and not of the other. Chew's case is conclusive of this.

Some of the defendants were indicted under the statute making it an offence to be interested in the sale of liquor. There was no proof to distinguish their cases from those of *Robinson v. State*, 38 Ark.; 641, and others following it. See

Bish. St. Cr., sec. 1024; *Com. v. Nichols*, 10 Met. (Mass,) 259. Affirm.

FORD V. STATE.

CRIMINAL LAW: *Failure to attend road working; Indictment; Instruction.* The defendant was indicted under the first clause of sec. 5907, Mansfield's Digest, for a failure to attend the working of a public road in obedience to the overseer's warning. On the trial, the court charged the jury that the defendant was entitled to three days' notice of the time and place he was required to attend, but that if he attended in obedience to a shorter notice, this might be taken as a waiver of sufficient notice. *Held:* That the instruction was not applicable to the allegations of the indictment, since, if the notice given the defendant was not sufficient, or if he in fact attended in obedience to it, in either event he was not guilty as charged.

APPEAL from *St. Francis* Circuit Court.

M. T. SANDERS, Judge.

N. W. Norton, for appellant.

1. It was neither alleged or proved that appellant had three days' actual notice. The indictment merely charges that he "was duly warned." This is not the language of the statute, (Mansfield's Digest, sec. 5907, etc.), or of similar import. A substantial compliance with the language of the statute is necessary. 18 Ark., 363; 39 Id., 216; 33 Id., 140; 41 Id., 226; 43 Id., 71; 47 Id., 488, especially.

2. The being at the place where the hands were to meet could not operate as a waiver of legal notice; nor can one waive himself into the commission of a statutory crime. Until legally notified, no duty devolved upon appellant, and none could be required of him.

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

The demurrer and motion in arrest of judgment were

properly overruled. The indictment substantially follows the language of the statute. Mansfield's Digest, sec. 5907; Arkansas Reports, *passim*.

The words, "duly warned," sufficiently charge the three days' warning required by the statute.

A statement in the indictment of the facts necessary to constitute the offence in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, is all that is required. Mansfield's Digest, secs. 2106, 2107; *Dixon v. State*, 29 Ark., p. 165.

The trial court, after telling the jury what it would take to constitute a legal warning, very properly instructed them that, "if they found from the evidence that the defendant did *attend* in obedience to a warning, at the time and place he was notified to appear for work, this, in the absence of evidence to the contrary, would amount to a waiver of sufficient notice."

The indictment is not for "a failure to attend," but for a failure to work the road.

He was indicted under the second clause of sec. 5907, which provides that, "or having attended, shall refuse to obey the orders of the overseer," etc. The language of the trial court in its instruction is "that if defendant did attend in obedience to a warning."

The instruction was properly given.

COCKRILL, C. J.

The charge against the defendant was that being subject to road duty, he neglected to attend at the time and place designated by the road overseer to work on a public road in obedience to the overseer's warning to do so; that he failed

to furnish a substitute, and neglected to pay a money consideration for his failure. See Mansfield's Digest, sec. 5907.

The court charged the jury that the defendant was entitled to three days notice of the time and place he was required to attend, but that if he attended in obedience to a notice of less duration, this might be taken as a waiver of sufficient notice. This appears to have been the whole charge to the jury. It was inapplicable to the allegations of the indictment. The offence alleged was a failure to attend at the time and place designated by the road overseer to work the road. If three days had not intervened between the giving of the notice and the time designated for attendance, or if the defendant appeared in obedience to the overseer's warning, the offence was not committed. If he appeared upon an insufficient warning and submitted himself to the domination of the overseer, and thereafter neglected his duty as a road hand, the insufficiency of the warning would be no defence to a prosecution for such neglect. That offence is punishable under the second clause of the section, but the defendant was indicted under the first clause for a *failure to attend* the road working in obedience to the overseer's warning; and if in fact he did attend in obedience thereto, he was not guilty as charged.

Reverse the judgment and remand the cause for further proceedings.

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PENZEL V. BROOKMIRE.

MORTGAGE: *To secure several notes: Precedence of payment.*

The maker of several promissory notes executed a mortgage to secure their payment. The notes matured at different times and the mortgage contained no stipulation as to the order in which they should be paid. The

mortgagee assigned them to different parties, and at different dates, without any agreement with either of his assignees as to the precedence of payment. On a sale of the mortgaged property, the proceeds were not sufficient to pay all the notes. *Held:* That in the absence of any special equities arising out of the assignments, the proceeds of the sale should be applied *pro rata* in part payment of the several notes, irrespective of the dates of their maturity or assignment.

APPEAL from *Yell* Circuit Court.

G. S. CUNNINGHAM, Judge.

Hall & Carter, for appellants.

We submit that when West Brothers assigned to Hall & Carter, attorneys for Charles F. Penzel, the note first due, they assigned the mortgage *pro tanto* and not *pro rata*. This is the equitable rule as between assignor and assignee, and if at a later date, West Brothers transferred the remaining two notes to appellees, such transfer could not affect the right of appellants. *Parkhurst et al. v. Watertown Steam Co.*, supreme court of Indiana, October 14th, 1886.

The notes have preference according to the date of their maturity. *State Bank v. Tweedy*, 8 Blackf., 447; *Doss v. Ditmars*, 70 Ind., 451; *Richardson v. McKim*, 20 Kan., 346; *Walker v. Schreiber*, 47 Iowa, 529; *Winters v. Franklin Bank*, 33 Ohio St., 250; *Grapengether v. Feyinverry*, 9 Iowa, 163; *Hafford v. Gottberg*, 54 Mo., 271; *Rankin v. Majir*, 9 Iowa, 297; *People's Saving Bank v. Finney*, 63 Ind., 460; *Bank of the N. S. v. Covert et al.*, 13 Ohio, 240.

The assignment of the note first due, to appellant, was sufficient to give it priority. *Noyers v. White*, 9 Kan., 640; *Foley v. Ross*, 123 Mass., 557; *Bryant et al. v. Damon*, 6 Gray, 564.

Jacoway & Jacoway and *W. A. Nolen*, for appellees.

Upon default the entire debt became due and the respec-

tive holders were entitled to share *pro rata* without preference. Jones on Mortg., 3d Ed., vol. 2, par. 1701 *a* and note 1; Ib., par. 1703, note 5, par. 1179, note 5, and par. 1701, notes 3 and 4; 2 Hill. Mortg., 4th Ed., p. 249 and notes.

The assignee of the note which first matures is not entitled to priority, but to equality only of payment from procceds of security. Boone on Mortg., par. 91 and notes 1, 2, 9 and 10; 2 Hill. Mortg., 4th Ed., 249.

BATTLE, J.

On the 16th of March, 1885, James Quigel executed to West Brothers three promissory notes, one for $150 due on the 16th of June, 1885, one for $125 due on the 16th of August, 1885, and the other for $116 due on the 16th of November, 1885, and at the same time executed a mortgage to secure their payment. On the 17th of March, 1885, West Brothers transferred the note for $150 to Charles F. Penzel, and thereafter transferred the one for $125 to H. Friedlander & Son, as collateral to secure a debt, and the one for $116 to Brookmire, Rankin & Scudder. After the maturity of the first two notes, Penzel took possession of a part of the mortgaged property, and sold the same, with the consent of all parties concerned, at private sale, for $216 on a credit, of which $50 have been collected.

The mortgage contained no stipulation as to the order in which the notes should be paid. It is not alleged in the pleadings, and was not claimed in the court below and is not insisted on here, that there was any agreement between the mortgagees and any one of their assignees as to the order of precedence each note should take, or that there was any special equities arising out of the assignments. There is no

issue of that kind in the case. Appellants insist that Penzel should be first paid out of the property mortgaged, because he is the holder of the note first falling due and first assigned; and appellees insist that the proceeds should be paid ratably upon the notes, without regard to the order in which they fell due or were assigned. The only question here is, which of these contentions is correct?

MORTGAGE: To secure several notes

In the absence of such a stipulation or agreement, or special equities, the authorities are not agreed as to how the proceeds of the sale of property, mortgaged to secure the payment of several notes and sold under the mortgage, shall be appropriated, when the notes secured mature at different times, have been assigned to different persons, and the proceeds are not sufficient to pay all of them. One class holds that the notes shall be paid in the order of their assignment. *McClintic v. Wise*, 25 Grat., 448; *Cullum v. Erwin*, 4 Ala., 452; *Griggsby v. Hair*, 25 Ala., 327; *Waterman v. Hunt*, 2 R. I., 298. Another, that the notes should take precedence in the order of their maturity. *Mitchell v. Ladley*, 36 Mo. 526, 530; *Sargent v. Howe*, 21 Ill., 148; *Vansant v. Allman*, 23 Ill., 30; *Koester v. Burke*, 81 Ill., 436; *State Bank v. Tweedy*, 8 Blackf., 447; *Doss v. Ditmars*, 70 Ind., 451; *Marine Bank v. International Bank*, 9 Wis., 57, 64; *McVay v. Bloodgood*, 9 Porter (Ala.), 547; *Richardson v. McKim*, 20 Kans., 346, 350; *Hinds v. Mooers*, 11 Iowa, 211; *Walker v. Schrieber*, 47 Iowa, 529; *Wilson v. Haywood*, 6 Fla., 171, 190; *Kyle v. Thompson*, 11 Ohio St., 616; *Winters v. Franklin Bank*, 33 Ohio St., 250. And a third class, that the proceeds should be applied *pro rata* in part payment of the several notes, irrespective of their dates of maturity or assignment. *Donlay v. Hays*. 17 S. & R., 400, 404; Cowden's Estate Appeal, 1 Penn. St., 278;

Mohler's Appeal, 5 Penn. St., 418, 420; Perry's Appeal, 22 Penn. St., 43, 45; *Grattan v. Wiggin*, 23 Cal., 16; *Dixon v. Clayville*, 44 Md., 573, 578; *English v. Carney*, 25 Mich., 178, 181; *McCurdy v. Clark*, 27 Mich., 445, 448; *Parker v. Mercer*, 6 How. (Miss.), 320, 324; *Cage v. Iler*, 5 Smede & M., 410; *Pugh v. Holt*, 27 Miss., 461; *Andrews v. Hobgood*, 1 Lea (Tenn.), 693; *Exchange Bank v. Beard*, 49 Texas, 363; *Delespine v. Campbell*, 52 Texas, 4; *Wilson v. Eigenbrodt*, 30 Minn., 4.

The authorities which hold that the notes should be paid in the order in which they were assigned, do so upon the ground that the debt secured was the principal and the mortgage an accessory, and that the transfer of a part of the debt carried with it the assignment of so much of the lien created by the mortgage as is necessary to pay the part assigned, as effectually as it existed in the mortgage; and that no second assignment can divest the first assignee of his lien and preference.

The courts adhering to the doctrine that the notes should be paid in the order of their maturity, say that the debt is the principal thing and the mortgage to secure it is only an incident; that the assignment of the debt passes the mortgage without being referred to in the assignment; that "the assignee of the debt takes the security by the assignment, in the same condition and to the same extent it was held by the payee at the time of the assignment, as security for the debt assigned, and succeeds under it to all the rights of the assignor;" that the assignor, the payee, in the absence of a stipulation to the contrary, had the right to foreclose the mortgage when default should be made in the payment of the notes first falling due, and as each one should fall due, and satisfy them out of the proceeds in the order of their

maturity, so far as the proceeds would extend, although there should not be enough to pay all; and that, therefore, inasmuch as the assignee, by the assignment of any one of the notes, succeeded to the rights which his assignor had, he has the right, in the event there is not enough to pay all, to be paid out of the mortgaged property so far as it will extend, according to the order in which his note stands in the line of maturity with the others secured by the mortgage; and that "the different installments in a mortgage, when secured by corresponding notes, may be regarded as so many successive mortgages, each having priority according to its time of becoming payable."

The reasons assigned for the two doctrines first mentioned are not convincing. While the notes were in the hands of the mortgagee there could be no priority of liens. He was not bound to foreclose when default was made in the payment of the note first falling due. He could have waited until all became due, and then, if the mortgage empowered him to sell when default should be made in the payment of any one of the notes, have sold the property and appropriated the proceeds of the sale, if the mortgage did not forbid, to the payment of any of the notes, if there were not more than enough for that purpose. *Saunders v. McCarthy*, 8 Allen, 42; *Allen v. Kimball*, 23 Pick., 473; *Matthews v. Switzler*, 46 Mo., 301. If he appropriated the proceeds to the payment of the note first falling due, it thereby attained a preference, through the act of the mortgagee, and so might have the second or last in the same manner. The mortgagee being the owner of all the notes, unrestricted by the mortgage, can give the preference in the appropriation of the proceeds to either of them by virtue of his ownership and control over the entire mortgage debt; and the question of

preference or right to priority in payment out of the proceeds can only arise when there is a diversity in the ownership of the debt secured. Hence, the assignment of one of the notes could not, *ipso facto*, carry with it the right to be paid in preference to the other notes, because the mortgagee had the right to appropriate the proceeds of the sale of the property mortgaged to its payment; for the condition on which the mortgagee could have exercised the power, does not exist in the case of the assignee of one of the notes; and for the same reason it follows that the assignee of the note first falling due is not entitled to preference, because the mortgagee could have given preference in the appropriation of payments when he owned all the notes.

The comparison of a mortgage given to secure several notes to successive mortgages given to secure each one of them does not support the doctrine it is made to prove. To make the cases analogous, the mortgages to secure each note must bear the same date, and be executed, delivered and filed for record, and recorded, at the same time, and the property mortgaged must be the same. In the latter case the mortgages would be concurrent; neither one would have preference over the others, and all would have equal claims to be paid ratably out of the property mortgaged. If one should be transferred to a third party it would not thereby become paramount to the others, but all would stand on an equality. Hence the comparison does not sustain the doctrine that the notes, while in the hands of different persons, are entitled to priority of payment according to the order in which they mature.

Precedence of payment.

We do not think that either of the doctrines laid down by the two classes of decisions first mentioned is sustained by reason or equity. The notes are secured by one mortgage,

executed for the equal benefit of all. It does not provide that one note shall be preferred to the others, but secures all equally or *pro rata*. The legal title to the property mortgaged is conveyed and held for the benefit of all. The rights and interests acquired in the property begin with the date of the mortgage, and not from the maturity or assignment of the notes, or the time when the cause of action arises. There can be no priority of rights in favor of one against the others, as the mortgage is one. The simple assignment of the notes does not change the mortgage and make it any less security for any of the notes than it was before the assignment. The mortgage security, in following the transfer of the notes as an incident, does not pass by the assignment any farther than it was an incident at the time the transfer was made. The holders of the notes, therefore, stand *æquile jure*, and consequently are entitled to participate ratably in the fund derived from the security, if there be not enough to pay all.

The decree is affirmed.

STATE V. OAKLEY.

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INDICTMENT: *For larceny; Description of property.*

An indictment for larceny which describes the property charged to have been stolen, as "two ten dollar bills of United States currency," is bad for the vagueness and uncertainty of the description.

APPEAL from *Dallas* Circuit Court.

C. D. WOOD, Judge.

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

This court in the case of *State v. Parker*, 34 Ark., 158,

held that "twenty-five cords of wood" was a sufficient description of the subject of the larceny.

For the same reasons given in that case the description of the money in this indictment must be held sufficient.

No substantial right of the appellee on the merits was, or could be, prejudiced by the failure of the pleader to describe the money as greenbacks, national currency, or gold or silver certificates, all of them being of United States currency, equal in value and passing indiscriminately as money.

The usual acceptation, in common parlance of the words, "two ten dollar bills of United States currency" is well understood to be current paper money of the United States, and not gold or silver. Hence, we conclude the indictment is sufficiently certain, when measured by Mansfield's Digest, secs. 2107, 2120.

The supreme court of North Carolina held the following description to be sufficient, to-wit: "One twenty dollar bank note on the Bank of North Carolina, of the value of twenty dollars." *State v. Rout*, 3 Hawk's, 618. And the supreme court of Tennessee held that "ten five dollar bank bills of the value of five dollars each," was a sufficient description. *Ryland v. The State*, 4 Sneed, 357.

In Mass. "divers promissory notes of the amount and value in all of $6.00," and "divers coins of the United States current as money in said commonwealth, of the amount and of the value in all of $3.00," were held to be sufficient descriptions of the money stolen. *Com. v. Collins*, 138 Mass., 483; also see *State v. Logan*, 1 Mo., 532; *State v. King*, 31 La., Ann. 179; *State v. Carter*, 33 La., Ann. 1214; *Com. v. Gallagher*, 16 Gray, 240; *McKane v. State*, 11 Ind., 195.

R. C. Fuller, for appellee.

The money alleged to have been stolen was not sufficiently described in kind.

The code requires every material fact necessary to constitute a public offence to be alleged in an indictment. "It dispenses with form and requires substance only. What is now substance at common law is substance under the code," etc. *Barton v. State*, 29 Ark., 70.

The indictment must set forth the kind of United States currency stolen, otherwise it would be no bar to a subsequent indictment for the same offence. *State v. Thompson*, 42 Ark., 518; Russell on Crime, 2 vol., p. 185; Bishop's Criminal Procedure, vol. 2, sec. 320.

The failure to describe the United States currency stolen was fatal, and the court below committed no error in sustaining the demurrer. *State v. Ward*, 48 Ark., 36, and authorities there cited.

BATTLE, J.

Appellee was indicted in the Dallas circuit court for larceny. The property charged to be stolen is described in the indictment as "two ten dollar bills of United States currency." Is this description sufficient?

In an indictment for larceny, as a general rule, the property taken should be described specifically by the name usually appropriated to it, to distinguish it from other property, or by a description sufficient to show the particular kind or species of property alleged to be stolen. It has been adjudged that the description of property stolen, as "one pound of meat," was insufficient, because the term meat "applies not only to the flesh of all animals used for food, but in a general sense, to all kinds of provisions." For a like reason the de-

scription, "two ten dollar bills in United States currency," in this case is too indefinite. For United States currency includes the gold and silver coin of the United States, the notes issued by the banks organized under the laws of the United States, the treasury notes, commonly known as greenbacks, and the certificates of deposit, generally called gold and silver certificates, issued by the United States. While it is certain that the property charged to be stolen is not gold or silver, it cannot be ascertained from the indictment what is meant, further than it was paper currency of the United States. The indictment is not aided by the statute. For no where is the stealing of United States currency *eo nomine*, declared by the statutes of this state to be a public offence. The description is too general, too broad, and too vague and uncertain, and is fatally defective. *Leftwich v. Com.*, 20 Grat., 716, 720; *Boyle v. State*, 37 Texas, 360; *Martinez v. State*, 41 Texas, 164; *Merrill v. State*, 45 Miss., 651; *Barton v. State*, 29 Ark., 68; *State v. Ward*, 48 Ark.. 36; *State v. Longbottom*, 11 Humph., 39; *State v. Morey*, 2 Wis., 494; 2 Bishop on Criminal Proceedure, (3rd ed.), secs. 700, 705, 731, 732.

Judgment affirmed.

EDMONSON V. STATE.

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1. CRIMINAL LAW: *Finding of jury as to accomplice.*

Whether a witness for the state in a criminal prosecution was an accomplice of the accused or not, is a mixed question of law and fact; and where the jury determine the fact against the prisoner, their verdict is final, unless the testimony shows conclusively that the witness was an accomplice.

2. SAME: *Accessory after the fact: Wife of accomplice.*

The statute defining an accessory after the fact, (Mansf. Dig., secs.

1507, 1510), does not compel a wife to become an informer against her husband; and the mere fact that she has concealed a crime does not make her the accomplice of one who participated with her husband in its commission, if the the facts within her knowledge were such that she could not inform against one without implicating the other.

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

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

COCKRILL, C. J.

The appellant was convicted of burglary. There was no exception or objection of any kind to any ruling of the trial court, except in refusing to grant the accused a new trial. The several grounds set up in the motion for a new trial all go to the same question, viz: Is the proof sufficient to sustain the verdict? It is not pretended that the offence was not committed. The county treasurer's safe had been blown open, and several thousand dollars of the county funds stolen. The defendant's complicity in the crime was directly testified to by Mike Landers, an avowed accomplice, and also by Landers' wife, who, it is contended, was also an accomplice; but as the statute prohibits the conviction on the testimony of an accompliae, unless corroborated by other evidence tending to connect the accused with the offence charged, (Mansfield's Digest, sec. 2259), and as the corroboration required by the statute cannot be supplied by a second accomplice, the question is whether there was any evidence outside of that of an accomplice leading to the inference that the appellant was implicated in the burglary. If Mrs. Landers was not an accomplice we need not look beyond her testimony to corroborate that of her husband. To ascertain her relation to the crime it is not necessary to state the particulars further than they tend to connect her with a

knowledge of it. The prisoner was her husband's step-brother, and was an inmate of their house for several weeks before and after the burglary was committed. He opened the project to Landers to rob the safe. The plan proposed was that they should ascertain when the funds raised by taxation would be deposited in the county's safe, get an expert to aid them, open the safe and divide the spoils. Landers hesitated, and the prisoner broached the subject to his wife, hoping to persuade her to urge him to become a party to the intended offence. She protested against it, wept and portrayed the disgrace the act would bring upon her and her children; but a promise that she would not tell unless forced to do so if the burglary was committed was finally extorted from her. The expert came, the safe was robbed, and her husband received a share of the stolen money. Mrs. Landers made no disclosure of what she knew until her husband was arrested for the offence and turned state's witness. Whether she knew who was concerned in the commission of the offence, or whether it had been committed at all prior to that time, is not disclosed positively by the bill of exceptions. It is certain that Landers was concerned in the commission of the offence. The prisoner was at his house with him on the evening of the burglary, and took breakfast there the next morning. These facts taken in connection with Mrs. Landers' statement that he had informed her a short time before of his intention to commit the deed, had a tendency to show that he was connected with the commission of the offence, and the jury was authorized to take it as sufficient corroboration of Landers' testimony, unless she was also an accomplice. Whether she was an accomplice or not was a mixed question of law and fact, and the jury's determination of the fact against the prisoner is final, unless the testimony shows con-

1. CRIMINAL LAW: Finding of jury as to accomplice.

clusively that she was an accomplice. *Melton v. State*, 43 Ark., 367; *Com. v. Ford*, 111 Mass., 394, 395.

It is not pretended that Mrs. Landers advised or encouraged the perpetration of the offence, and the bare fact of concealing information that a felony is likely to be committed has never been considered sufficient to make one an accessory before the fact. 2 Hawk., c. 29, sec. 231. Rosc. Cr. Ev., * 183. She did not therefore participate in the commission of the crime, and for that reason she would not, perhaps, have been regarded as an accomplice at common law within the rule requiring corroboration. *Rex v. Hargraves*, 5 Car. and P., 170; *Allen v. State*, 74 Ga. 769; *Miller v. Com.*, 78 Ky., 22. An accessory after the fact was not regarded as a partaker in the guilt of the original wrong doer. His offence was considered as separate and independent of the main crime. 1 Bish., Cr. Law., sec. 692. But the word accomplice as used in the statute requiring corroboration has been construed by this court to include an accessory after the fact. *Polk v. State*, 36 Ark., 126; *Carroll v. State*, 45 Ib., 539; *Hudspeth v. State*, 50 Ib., 534. The jury have found in effect, however, that Mrs. Landers was not an accessory after the fact, and the question is, does the evidence warrant the finding?

2. SAME: Accessory after the fact: Wife of accomplice.

An accessory after the fact, as defined by the statue, "is a person who, after full knowledge that a crime has been committed, conceals it from the magistrate or harbors and protects the person charged with or found guilty of the crime. * * * Provided that persons standing to the accused in the relation of parent, child, brother, sister, husband or wife shall not be deemed accessories after the fact, unless they resist the lawful arrest of such offenders." Mansfield's Digest, secs. 1507, 1510. It is only for a failure

to discover the crime that there is room to contend that Mrs. Landers became accessory to it. This would have been no more than a misprision of felony, and a misdemeanor at common law. Whatever else may be the intent of the statute, it is certain it does not compel the wife to become informer against her husband. He was *particeps criminis* with Edmonson in this case. If the evidence of his guilt was so interwoven with that of Edmonson's criminality that she could not inform against one without implicating the other, the statute would not visit her with the criminality of the offence for failing to do so. Her concealment of the crime would not, in that event, be attributable to the intent to shield Edmonson, which was necessary to make her his accomplice. *Melton v. State*, 43 Ark., 371.

She furnished the required corroborative evidence and the judgment is affirmed.

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DOTSON V. STATE.

1. EMBEZZLEMENT: *Conversion of money by bailee.*

B. delivered to the defendant a horse to be sold for him. The defendant sold the animal for $125 and received the money, but failed to deliver it to B. *Held:* That if it was expressly or impliedly understood that defendant should deliver to B. the identical money received for the horse, then he was a bailee of it, within the meaning of the statute, (Mansf. Dig., sec. 1640), and liable as such for its unlawful conversion. But he could not be prosecuted for collecting a check received for the price of the horse, since it was in the line of his duty to make the collection.

2. SAME: *Indictment: Description of money.*

A defendant cannot be lawfully convicted of embezzling paper currency on an indictment which describes it as "ten bills of the paper currency of the United States of the denomination and value of ten dollars each," as the description is insufficient because of its uncertainty.

3. SAME: *Criminal intent: Instruction.*

On the trial of an indictment for embezzlement the court instructed the jury "that if they found from the evidence that the defendant converted the money alleged * * to have been embezzled, to his own use," they "would be authorized to infer the criminal intent." *Held:* That the instruction was not erroneous as calculated to mislead the jury, since the effect of it was to tell them that the conversion of the money was a circumstance from which a criminal intent might be inferred.

APPEAL from *Sebastian* Circuit Court.

J. S. LITTLE, Judge.

The appellant pro se.

1. "Paper currency of the United States" not sufficiently descriptive or definite. Bish. Cr. Pro., vol. 2, p. 321; 59 Ala., 73; 2 Gratt., 716.

2. It was misleading to instruct the jury that if the defendant lost the money gambling they would presume a fraudulent intent to convert to his use. This eliminates intent from crime. The intent to do a thing is always open to rebuttal. 1 Bish. Cr. Pro., 1099; 4 Ga., 14.

3. The verdict not supported by the evidence. The money was paid in paper currency, but there was no proof of the size or denomination. 2 Bish. Cr. Pro., 703. No gold was received at all, and the description of the paper currency being insufficient, there was no evidence to base the verdict on.

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

1. The description of the money was sufficient. 34 Ark., 159; 1 Whart. Cr. Law, sec. 355; 4 Sneed, 357; 138 Mass., 433; 3 Hawk., 618.

2. The effect of the court's instruction was to tell the jury that the conversion of the money to his own use was a circumstance from which a criminal intent might be inferred. See 34 Ark., 446.

BATTLE, J.

O. M. Bourland delivered a horse to appellant to sell for him. Appellant sold the horse for $125 and received the money, but failed to deliver it to Bourland. On account of this failure he was indicted for embezzlement. The indictment charges as follows: "The said Lewis Dotson, on the 15th day of January, 1888, in the county and district aforesaid, then being a bailee of one O. M. Bourland to sell a certain horse, the property of said O. M. Bourland, of the value of one hundred and twenty-five dollars, and as such bailee having received said horse into his care, custody and charge, and then as such bailee sold the horse for the sum of one hundred and twenty-five dollars, and having received said money into his hands as such bailee, which said money was described as follows: Ten bills of the paper currency of the United States of America, of the denomination and value of ten dollars each; twenty bills of the paper currency of the United States of America, of the denomination and value of five dollars each; six bills of the paper currency of the United States of America, of the denomination and value of twenty dollars each; six pieces of the current gold coin of the United States of America, of the denomination and value of twenty dollars each, did then and there wilfully and unlawfully make way with, embezzle and convert to his own use the money described aforesaid, the property of said O. M. Bourland, without his consent so to do, against the peace and dignity of the state of Arkansas." It also charges that he received a check for the $125, and wilfully, feloniously and unlawfully, embezzled, made way with, and converted it to his own use, without the consent of Bourland. He demurred to the indictment; and the court overruled his demurrer;

and he was tried and convicted. Should he have been convicted?

The statute under which he was indicted reads as follows: "If any carrier or other bailee shall embezzle, or convert to his own use, or make way with or secrete with intent to embezzle, or convert to his own use, any money, goods, rights in action, property, effects or valuable security, which shall have come to his possession, or have been delivered to him, or placed under his care or custody, such bailee, although he shall not break any trunk, package, box or other thing in which he received them, shall be deemed guilty of larceny, and on conviction shall be punished as in cases of larceny." Mansfield's Digest, sec. 1640.

The term "bailee" when used in statutes declaring what acts of embezzlement shall constitute a public offense, is not to be understood, says Mr. Wharton, "in its large, but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods first *bona fide*, and then fraudulently convert." "When it does not appear that any fiduciary duty is imposed on the defendant to restore the specific goods of which the alleged bailment is composed, a bailment under the statute is not constituted, though it is otherwise when a specific thing, whether money, securities, or goods, is received in trust and then appropriated." 1. Wharton Cr. Law. (9th Ed.), sec. 1055; *Krause v. Commonwealth*, 93 Penn. St., 418; *Watson v. State*, 70 Ala., 13.

By 24 and 25 Vict. c. 96, s. 3, it is provided that "whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the

bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny."

In *Reg. v. Aden*, 12 Cox Cr. C., 512, Kelly, C. B., in delivering the opinion of the court, said: "In this case, a sum of money was placed in the hands of a boatman for the purpose of purchasing coals for the prosecutor from a colliery company, which coals the prisoner was to pay for with the money so placed in his hands by the prosecutor. The prisoner did not buy any coals, but paid away part of the money in satisfaction of a debt owing by him to the colliery company, and failed to procure the coals. This was a clear case of larceny of money entrusted to the prisoner as a bailee, within 24 and 25 Vict., c. 96, s. 3."

In *Reg. v. Hassall*, 8 Cox Cr. C., 491, the defendant was a treasurer of a money-club, and in his official capacity received small weekly payments from each member, "and had authority, with the secretary's consent, to lend the club money to members." Under the rules of the club a periodical division of the money among the members was required to be made. He was indicted for larceny of moneys paid to him by the members of the club, under the fourth section of 20 and 21, Vic. c., 54, which provided: "If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, he shall be guilty of larceny." The court held a conviction under the indictment could not be sustained. The court said "that the word 'bailment' must be interpreted according to its ordinary legal acceptation. Understood in that sense, bailment relates to something in the hands of the bailee which is to be returned in *specie*, and does not apply to the case of money in the

hands of a party who is not under obligation to return it in precisely the identical coins which he originally received."

In *Reg. v. Bunkall*, 9 Cox, C. C., 419, "the prisoner was intrusted with money to buy coals, and to bring them home to the prosecutor, for remuneration, with the prisoner's own horse and cart. The prisoner having purchased the coals and loaded them, on his way home abstracted part, with intent to convert it and to deprive his master of the same." He was indicted for and convicted of larceny as a bailee under 20 and 21 Vict., c. 54, s. 4.

In *Reg. v. DeBanks*, 15 Cox Cr. C., 450, the indictment charged, "that the prisoner, as a servant of the prosecutor, received a sum of money and fraudulently embezzled and appropriated it, and so did steal the money." The evidence was: "The prisoner not being otherwise in the service of the prosecutor, was employed by him merely to take care of a horse for a few days and afterwards to sell it;" and that he sold it and received the money. The prosecutor, as he could not go himself, sent his wife to receive the money from the prisoner. She pressed him for the money; and he absconded with it and appropriated it to his own use. The court held that he was a bailee of the money, and could be convicted of larceny. Lord Coleridge, C. J., said: "I think the effect of the evidence is, that he was to sell the mare, and receive the money for the prosecutor; that is, he was to hand over the money, when he received it, to the prosecutor or his agent, as and when he received it. * * * She demanded it, and he appropriated it to his own use; and it appears to me that under these circumstances, the case comes directly within the statute; that the prisoner fraudulently converted the money to his own use, and that, therefore, he was properly convicted." Grove, J., said: "Was

he a bailee of the money for the prosecutor? I think he was, and not the less so because the prosecutor had not himself given him the money."

1. EMBEZZLEMENT: Conversion of money by bailee.

According to these authorites, appellant was a bailee of the money he received for the horse, in the sense that term is used in the statute under which he was indicted, if it was expressly or impliedly understood that he should deliver the identical proceeds of the sale to Bourland. If it was the intention of the parties that appellant should hand the money received for the horse to Bourland, then he was liable as bailee, under the statute, for the unlawful conversion of it.

The evidence adduced at the trial proves that he sold the horse for $125 and received a check on a bank for the amount. He collected the check in the paper currency of the United States, and received no part of it in gold. It is obvious that he could not be held liable, under these circumstances, for embezzling the check; for it was only a means to enable him to collect the purchase money, and it was in the line of his duty to Bourland to collect it. As the paper currency alleged to have been converted is not sufficiently described in the indictment, he should not have been convicted of unlawfully converting it. There was no evidence of his having received gold coin. He ought not, therefore, to have been convicted under the indictment.

2. SAME: Indictment: Description of money.

It was held by this court, at its present term, in *State v. Oakley*, that it was not sufficient in an indictment for larceny to describe the property stolen as "two ten dollar bills in the currency of the United States," and that a demurrer to the indictment in that case was properly sustained on that account. It has also been held by this court in *State v. Thompson*, 42 Ark., 517, that an indictment for embezzlement must describe the money embezzled as specifically as in larceny.

As it is obvious that a new indictment against the appellant will have to be found and returned by a grand jury before he can be lawfully convicted of the offence charged, it is unnecessary to say anything further as to the indictment.

3. SAME: Criminal intent: Instruction.

The court below instructed the jury "that if they found from the evidence that the defendant converted the money alleged in the indictment to have been embezzled, to his own use, the jury would be authorized to infer the criminal intent, and this rule would apply to a case where the money had been gambled off by defendant." It is urged that this instruction was erroneous, because it was calculated to mislead the jury. But we think not. The effect of it was to tell the jury that the conversion was a circumstance from which they might infer a criminal intent. Understood in that way, it is correct; for in the absence of evidence to the contrary, it is presumed he intended the natural consequences of his acts. Of course, in considering the intent of the appellant, the jury ought to have taken into consideration the conversion and all other evidence which tended to prove it.

Reversed and remanded for a new trial.

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RUBLE v. STATE.

CRIMINAL PROCEDURE: *Swearing the jury: Waiver.*

In a prosecution for a misdemeanor, it is too late after verdict to object for the first time that the jury, composed of the regular panel and sworn generally for the term, was not also sworn specially as provided in Mansfield's Digest, sec. 2248. The defendant in such case waives his objection to the form of the oath, if he fails to make it before going to trial.

APPEAL from *Boone* Circuit Court.

R. H. POWELL, Judge.

Crump & Watkins, for appellant.

The record fails to show that the jury was sworn as prescribed by law.

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

The ten jurors who tried this case by consent were of the regular panel, who had been sworn, the presumption is, according to sec. 4006, of Mansfield's Digest. The trial was for a misdemeanor, whose punishment was simply a fine. No exception was taken by appellant to being tried by the jury under that oath; and in his motion for a new trial he did not make that a ground for the motion.

Can he complain now? The cases in our reports that we have been able to find, where the failure to swear the jury was held to be a fatal omission on the part of the trial court, were felonies.

COCKRILL, C. J.

This is a conviction for an illegal sale of spirituous liquors. The only error assigned for reversal is that the record fails to show that the jury was specially sworn to try the case. It recites that the defendant, "for plea, saith that he is not guilty as charged, to which plea the state joins issue, and to try said isue, comes a jury of ten of the regular panel by consent of parties, and after hearing the evidence," etc., return a verdict of guilty. This discloses that the jury was composed of the regular panel. The presumption is that the general oath for the term had been administered to them. It is to the effect that they will well and truly try each and all of the issues, inquisitions and other matters submitted to them as jurors at that term of court. But in a criminal prosecution the accused has the right to have the special oath prescribed by sec. 2248 of Mansfield's Digest administered to the jury. It was so determined in *Chiles v. State*, 45 Ark.,

143, and the judgment of conviction of a misdemeanor was reversed in that case, because the court refused to grant a new trial based upon the ground that the jury composed of the regular panel had not been specially sworn. In this case there was no motion for a new trial on that ground, and no objection to going to trial without the administration of the special oath. It is error to deprive a defendant of the right to have the jury sworn specially, but objections to the form of the oath under which a jury tries a cause are likened to objections to the panel, or to the qualification of jurors, which are considered waived unless made when the jurors are offered. Thompson & Merriam on Juries, sec. 288; Proffat on Jury Trials, sec. 203; *State v. Wilson*, 36 La., An. 864; *State v. Schlagel*, 19 Iowa, 169.

The objection to the incompetency of jurors made after verdict avails nothing, even in a capital offence, unless it is shown to have been unknown to the party objecting, and that by proper inquiry it could not have been known before the jurors were sworn. *Cassat v. State*, 40 Ark., 511; *Werner v. State*, 44 Ib., 122.

Swearing jury: Waiver.

While the court has adhered to a strict rule in requiring the records in prosecutions for felony to show that the jury was properly sworn, it has never ruled in a misdemanor that he may not waive the right. A prosecution for a misdemeanor is nearly assimilated by the statute, to the trial of a civil action: the jury is selected, and challenges are allowed as in civil cases; the trial may take place in the defendant's absence; he may waive a jury, or by his consent be tried by a less number than twelve, [*Warwick v. State*, 47 Ark., 568.]; if the offence is punishable by fine alone, the court may set aside a verdict of accquital; and this court is prohibited from reversing a judgment of conviction for any error or irregular-

ity which does not prejudice the accused. *Moore v. State, post, 130.* If the defendant in such a prosecution should expressly waive the right to have the special oath administered to the jury, his consent would estop him from assigning the neglect as error. *Volenti non fit injuria.* Why should he not be held to an implied waiver when the circumstances justify it? In a prosecntion for felony, a prisoner may waive many rights without expressly announcing that he does so. See *Ransom v. State*, 49 Ark., 176; *Johnson v. State*, 43 Ib., 391.

In the *State v. Wilson, supra*, the supreme court of Louisiana says: "Even if the oath were defective in form, advantage cannot be taken of it in a motion for a new trial. Objection should have been made at the time it was administered. It seemed to have been good enough, in the opinion of the prisoner, for the purpose of acquittal, and he cannot take the chances of a favorable verdict, withhold objections that should have been made on the instant, and remit the disclosure of them to the close of the trial." See, too, *State v. Schlagel, supra.* Both cases were prosecutions for felony.

In Thompson & Merriam on juries, it is said: "A favorite ground of objection to the regularity of proceedings in criminal cases, is that the jury were not sworn according to law. When a form of oath is prescribed by statute, that and none other can be administered. Nor in a criminal proceeding will it suffice that the oath prescribed by statute for jurors in civil cases was administered. Such an oath generally differs in terms from that prescribed for jurors in criminal cases, and is in other respects inappropriate in a criminal trial. But after verdict it is too late to object for the first time to the form of the oath administered." Sec. 288.

In New York the statute required the jury to be specially sworn in each case. The panel had been sworn generally at the commencement of the term for all cases, but the twelve jurors selected to try the case of *Hardenburgh v. Crary* were not sworn specially to try that case. The supreme court, where the case was determined, adhered to the above rule, and were of opinion that it was applicable to criminal and civil cases alike. 15 How. Pr. Rep., 309.

The rule exacts of a defendant in a criminal case only that degree of fairness and frankness that ought to characterize the conduct of every judicial proceeding. It certainly applies in trials for misdemeanors.

Affirm.

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MOORE V. STATE.

1. EVIDENCE: *Of justice's judgment: Docket entry.*

Where a paper purporting to be the docket entry of a justice of the peace, but not certified as a copy of the docket, nor accompanied by proof that it is genuine, is offered in evidence to prove the imposition of a fine, it is not error to exclude it.

2. CRIMINAL PROCEDURE: *Failure to enter plea: Practice on appeal.*

A judgment of conviction for a misdemeanor will not be reversed because the record fails to show that a plea was entered by the defendant, where the court and parties treated the cause as at issue on the plea of not guilty.

APPEAL from *Polk* Circuit Court.

RUFUS D. HEARN, Judge.

The Appellant pro se.

1. The record in the justice's court verified the plea of defendant. 32 Ark., 722.

2. There was no plea by defendant, and no issue to be tried. 34 Ark., 275; 37 Id., 54; 39 Id., 180.

3. Neither the official signature of the justice, nor the for-

mal entry of the judgment, were necessary to the validity of the justice's record. 12 Ark., 670; 14 Ohio, 295; 2 Yerger, 24.

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

The plea of former conviction was not verified by the record of the former conviction, and the court properly sustained the demurrer to it. *Bradley v. State*, 32 Ark., p. 722.

The demurrer having been sustained it was of course improper to admit any testimony of that conviction. The issue of law upon that had been determined against the appellant.

The record shows, or rather fails to show, the entry of any other plea; but it must be borne in mind that this is a conviction for a misdemeanor, punishable by fine alone, and we submit that the defendant by standing by, consenting to the trial by the court, and in his motion for a new trial raising no question of a plea of not guilty having not been entered, waived whatever of rights he had in that matter.

The cases in this court holding that the entering of a plea previous to trial is a pre-requisite to a proper conviction are all felonies, so far as we have been able to ascertain.

COCKRILL, C. J.

The appellant was indicted for assault with intent to murder. There was a *nol. pros.* as to the felony, when he interposed a plea of former conviction. A demurrer to the plea was sustained, and that is assigned here as error. But there is no plea in the record and therefore nothing from which we can draw the deduction that the court erred in sustaining the demurrer.

Upon the call of the indictment for trial, a jury was waived and the cause submitted by consent to the court. There was incontestible proof of the assault, and the defendant to

1. EVIDENCE: Docket entry of justice

meet it offered in evidence what purported to be the docket entry of a justice of the peace imposing a fine on him for an assault upon the person named in the indictment It was not a certified copy from the justice's record, nor was it accompanied by an offer to prove its genuineness. Error cannot be laid to the rejection of the proposed evidence.

2. CRIMINAL PROCEDURE. Failure to enter plea.

But it is said the judgment should be reversed because the record fails to disclose that a plea was entered by the defendant.

It is not essential that a defendant should enter a plea to the indictment—a plea of not guilty may be entered by the court for him if he declines to plead. And if the court treats the cause as at issue without a formal entry of the plea, and he acquiesces in the court's action by availing himself of every privilege that could be accorded him under the plea, no substantial right has been affected; but only an irregularity of the most technical character has been countenanced. Where the objection is technical and the thing complained of might have been obviated by the mere mention at the time the irregularity occurred, and it has been productive of no injury, it would be inconsistent with the intelligence that ought to govern the whole course of judicial proceedings, to arrest the judgment on account of it. Indeed, we are commanded by the statute, which regulates the practice on appeal in misdemeanors, to reverse no judgment except for errors apparent on the record to the prejudice of the appellant. Mansfield's Dig., sec. 2468.

Practice on appeal.

No prejudice has resulted from a failure to enter a formal plea in this case. The appellant voluntarily submitted to the trial, and precisely the same proceedings were had as if he had formally entered a plea of not guilty. The cause was treated by both parties as though the issue was made on the plea of not guilty. The formal plea was thereby waived.

See *State v. Ward*, 48 Ark., 39; *State v. Hayes*, 67 Iowa, 27; *State v. Cassady*, 12 Kan., 550; *Ransom v. State*, 49 Ark., 176.

The judgment was for a simple assault and it is affirmed.

HERRON V. STATE.

LIQUORS: *Executory contract to sell*: "*Three mile law.*"

A sale of liquors is not punishable under "the three mile law," unless it is completed within a prohibited district, so that the title to the liquor sold passes there from the vendor to the purchaser. The statute does not apply to a mere executory contract to sell. *Carl v. State*, 43 Ark., 353; *Berger v. State*, 50 Ib., 20.

2. SAME: *Same.*

The defendant being at B., where the sale of liquors was prohibited under the three mile law, received an order for one-half gallon of whiskey, for which he was then paid by the person giving the order. The defendant had no whiskey within the prohibited district, but at N., beyond its limits, he was a licensed dealer and kept whiskey there in barrels. It was agreed at the time the order was received that the defendant should cause the whiskey to be measured out at N. into a jug and deposited in the express office addressed to the purchaser and for transportation to him at B., he to pay the charges—and this was done. *Held:* That the appropriation of the half gallon of whiskey to the contract was necessary to complete the sale; and that having been done at N., the sale was made at that place.

3. SALES: *Delivery of goods.*

The delivery of goods to a carrier, when made in pursuance of an order to ship them, is in effect a delivery to the consignee.

APPEAL from *Monroe* Circuit Court.

M. T. SANDERS, Judge.

This was a prosecution before a justice of the peace, under sec. 4524, Mansfield's Digest, for selling whiskey within three miles of the Methodist church in Brinkley in the county of Monroe. The appellant was convicted and appealed to

the circuit court, where he was again convicted and fined and appealed to this court. The case was tried upon an agreed statement of the facts, in substance as follows: The appellant was a licensed liquor dealer, doing business at Newport, in Jackson county, more than three miles distant from the Methodist church at Brinkley; that on the——day of May, 1887, he was in Brinkley soliciting orders for whiskey; that he then and there accepted an order from one, Mays, for one-half gallon of whiskey, for which Mays then paid him in cash $1.50; that the whiskey was at the time in barrels, unappropriated in Newport; that the appellant had no whiskey in Brinkley; that it was agreed at the time that the appellant should cause the whiskey to be measured out in Newport, put into a jug, address it to Mays and deposit it in the office of the Southern Express Company at Newport to be transported to Brinkley and delivered to Mays, he paying the charges for transportation—all of which was done. It was agreed that the sale of whiskey was regularly prohibited within three miles of the Methodist church at Brinkley by order of the county court of Monroe county. This agreed statement was made a part of the record; a jury was waived and the case submitted to the court; the court found that the sale was at Brinkley, and reduced its findings to writing; the appellant was convicted; he moved for a new trial, because the finding of the court was contrary to the evidence; this was overruled, and he accepted and appealed.

The bill of exceptions sets out the motion for a new trial and the conclusions of fact.

Franklin Doswell, for appellant.

The sale was at Newport. 43 Ark., 353. The price was paid in Brinkley; but the payment of the price does not pass

title to the property as long as anything has to be done by the seller to designate the thing sold. Benjamin on Sales, secs. 324, 325.

The effect of the transactions at Brinkley was to form an executory agreement for a sale and not to make a sale of a specific half gallon of whiskey. Until the parties are agreed upon the specific individual goods, the contract can be no more than a contract to supply goods answering a particular description. Ib., sec. 352 This doctrine is approved in this state. *Beller v. Block*, 19 Ark, 593; *Upham v. Dodd*, 24, Ib., 545; *Jones v. Pearce*, 25 Ib., 545. The sale was not complete until the goods were measured, put in the jug, labeled and addressed to the consignee and deposited with the carrier for transportation by direction or agreement between the parties. *Burton v. Baird*, 44 Ark., 557. In *Yowell v. State*, 41 Ark., 355, the goods were delivered by the seller himself within the prohibited district. Criminal statutes are construed strictly. No case is brought by construction within the statute, unless completely within its word. *State v. Graham*, 38 Ark, 519. Hence, an executory contract for a sale cannot be construed to be a sale. The sale was at Newport, where the goods were delivered to the carrier by agreement of the parties.

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

The contract of sale and payment of the money were at Brinkley. Nothing remained to be done but ship the goods. The minds of the parties had assented to the present purchase and sale of a specific chattel, which could be clearly identified and separated, and the sale was on no condition nor contingencies, and such possession was given as the parties could under the circumstances. See 35 Ark., 197. The vendee acquired the right of property and the right of possession at Brinkley. See *State v. Carl*, 43 Ark.

The object of the "three mile law" was to *prohibit any kind* of a sale.

COCKRILL, C. J.

The question in this case is whether the sale of a half gallon of whiskey, for which the appellant is prosecuted, was made at Newport, in Jackson county, or at Brinkley, in Monroe county. The prosecution is for a sale at the latter place, where the three mile law was in force; and, if the sale was made there, the conviction is right. But an executory contract to sell is not punishable under the three mile law. *Carl & Tobey v. State*, 43 Ark., 353; *Berger v. State*, 50 Ib., 20. "I cannot construe a penal statute which punishes a sale," says Judge Curtis in *Sortwell v. Hughes*, 1 Curtis C. C., 244, "so broadly as to hold that it applies to a mere executory contract for a sale. In my judgment it extends only to executed sales by which the property passes from the vendor to the vendee." Such, in effect, is the judgment of this court in the cases above cited, and in *Parsons Oil Co. v. Boyett*, 44 Ark., 230. See, too, *Boothby v. Plaisted*, 51 N. H., 436; *Sarbecker v. State*, 65 Wis., 171; *Garbracht v. Com.*, 96 Penn. St., 449; *Frank v. Hoey*, 128 Mass., 263.

1. LIQUORS: Executory contract to sell: "Three mile law."

2. SAME.

The quantity and the price were the only particulars agreed upon by the parties at Brinkley. It remained for the vendor, after his return to Newport, to fix upon the specific liquor to answer the order; to separate it from a larger quantity, and forward it in accordance with the agreement. There is no room to presume that it was the intention of the parties to the contract of sale that the buyer of the half gallon of whiskey should become a joint owner of the entire stock held by the firm of which the appellant was a member at Newport. The intention was only to confer several title to a half gallon

thereafter to be appropriated to the contract of sale by the seller. Any whiskey in stock would answer the contract, and until it was actually appropriated to it, the title remained in the firm and the sale was incomplete. Cases *supra*. Hare on Contracts, p. 415; Benj. Sales, secs. 352 *et seq*. and notes; *Upham v. Dodd*, 24 Ark., 545; *Beller v. Block*, 19 Ib., 566; *Hives v. Hurff*, 17 Am. Law Reg., 11 and n. But the appropriation of the liquor to the contract was made at Newport, and as there was not a complete sale until that was done, the sale was made at that place and not in the prohibited district.

The circuit judge found specially that the express company to which the whiskey was delivered was the agent of the seller, and that as such it delivered the liquor to the purchaser in Brinkley in pursuance of the contract made by the parties at that place. If such an inference were warranted by the agreed statement of facts upon which the cause was tried, the judgment would be sustained by the decisions in Berger's and Yowell's cases reported in the 50th and 41st volumes of the Arkansas Reports. But delivery to a carrier is delivery to the consignee when made in pursuance of an order or agreement to ship. *Carl & Tobey v. State*, *Berger v. State*, and other cases *supra*. *Burton v. Baird*, 44 Ark., 556. We see no circumstance in this case, as there was in Berger's case *sup*. from which to draw the conclusion of a different intention. The delivery was therefore at Newport.

3. Sale of goods: Delivery to carrier.

Reverse the judgment and remand the cause.

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THOMAS V. STATE.

1. PERJURY: *Assignment of, in indictment.*

The defendant was indicted for perjury alleged to have been committed in an affidavit appended to an account for the burial expenses of a pauper. The affidavit stated that the articles furnished were reasonably worth the sums charged for them—thirteen dollars for clothing and ten dollars for a coffin—and that they were charged at their cost prices. The assignment of perjury is "that the said R. F. T. did not furnish the said E. J., deceased, a suit of clothes, pants," etc., "of the value of thirteen dollars as charged and sworn to in said account, and one coffin of the value of ten dollars, as sworn to as above stated." *Held:* That the effect of such assignment, if sufficient for any purpose, is to admit the furnishing of the articles and to deny that they were of the value stated in the affidavit.

2. SAME: *Evidence to sustain charge.*

On a trial for perjury, the oath of the defendant which is charged to have been false, is to be considered equal to that of a credible witness. One witness is sufficient to prove what he swore, but not to establish its falsity; and where there is only one accusing witness, his testimony must be corroborated, not merely as to slight or immaterial circumstances, but as to some particular false statement.

APPEAL from *Randolph* Circuit Court.
JAMES W. BUTLER, Judge.
The Appellant pro se.

As to what an indictment should contain, see Mansf. Dig., sec. 2121., sub. 2d; as to certainty and form, 24 Ark., 591. It is vague and uncertain and therefore bad.

The evidence shows that the clothes and coffin were furnished, and the witness as to value is uncorroborated by any testimony whatever, or any circumstances. See article in January No., 1888, Nat. Law Review, page 22.

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

The indictment good. Mansf. Dig., secs. 1704-5; 24 Ark., 594. It is sufficiently definite and certain. Mansf. Dig. secs. 2105-6-7 and note (EE) to sec. 2105. It charges

an offense within the jurisdiction of the court. Mansf. Dig., sec. 2302; 47 Ark., 233.

BATTLE, J.

Appellant presented an account for allowance, to the Randolph county court, in which he charged the county of Randolph thirteen dollars for a coat, pants, vest and underclothing, and ten dollars for a coffin, furnished by him for the dressing and burial of the remains of Elijah Johnson, a poor and indigent person who died in the county. He appended an affidavit to the account, in which he swore that the amount charged was the cost of the same; that the coffin furnished was such as cabinet workmen usually sell for ten dollars; that the account was just; that the prices charged are what the articles furnished were reasonably worth in currency; and that the statements made in the account are true. For making this affidavit he was indicted for perjury. The assignments of perjury in the indictment are in the following words: "The said R. F. Thomas well knew that said affidavit was false and fraudulent when he so made it, the truth being that the said R. F. Thomas did not furnish the said Elijah Johnson, deceased, a suit of clothes, pants, vest and underclothing of the value of thirteen dollars as charged and sworn to in said account, and one coffin of the value of ten dollars, as sworn to as above stated."

1. PERJURY: Assigment in indictment.

The effect of the assignments of perjury contained in the indictment, if sufficient for any purpose, is to admit the furnishing of the clothes and coffin, and to deny that the clothes were of the value of thirteen dollars, and that the coffin was worth ten dollars. *Schaetzel v. Germantown, etc., Ins. Co.*, 22 Wis., 412; *Feely v. Shirley*, 43 Cal., 369; *Larney v. Mooney*, 50 Cal., 610. The question, therefore, is, did appellant feloniously, wilfully, *falsely*, knowingly, and corruptly

swear that the clothes were worth thirteen dollars and the coffin ten dollars, as charged in the indictment?

2. SAME: Evidence.

To sustain an indictment for perjury, the evidence must more than counterbalance the oath of the prisoner and the legal presumption of his innocence. One witness is sufficient to prove what the witness swore, but more is necessary to prove the falsity of what was sworn. The oath of the prisoner is entitled to have the same effect as is given to that of a credible witness. If nothing more than the testimony of one witness was introduced to prove its falsity, the scale of evidence would be exactly balanced, and additional evidence would be necessary to destroy the equilibrium before the accused could be convicted. The additional evidence must, therefore, be corroborative of the testimony of the accusing witness; and the corroboration must go beyond slight, indifferent or immaterial particulars, and must go to some one particular false statement. "It will not be sufficient to prove by one inadequate line of testimony that one statement made by the defendant is false, and then by another inadequate line of testimony that another statement made by him is false." 1 Greenl. Ev., secs. 257, 258; 3 Ib., secs. 198, 200; Wharton Cr. Ev., sec. 387; 2 Bish. Cr. Pro. (3d Ed.), secs. 928, 933, 938.

Tested by the rule laid down, the verdict of the jury in this case was not sustained by evidence. The judgment of the court below is, therefore, reversed and this cause is remanded for a new trial.

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CLINE V. STATE.

1. WITNESSES: *Impeachment of: Reputation for morality.*

A witness cannot be impeached by showing that his reputation for unchastity or other particular immoral habit, renders him unworthy of belief. The

impeaching testimony cannot go beyond his general reputation for morality.

2. SAME: *Same.*

It is not admissible to inquire whether from a witness' "reputation for truth and veracity, morality and chastity," he is worthy of belief, since an opinion is thus called for as to the effect of chastity, or a want of it, upon the credibility of his testimony.

3. SAME: *Same. Evidence sustaining.*

When the only objection to evidence introduced by the State to sustain the reputation of an assailed witness is, that it relates to a period twenty-five or thirty years before the trial, a judgment of conviction will not be reversed because of its admission, unless it appears that the refusal to exclude it was an abuse of the court's discretion.

4. PRACTICE IN SUPREME COURT: *Instruction assuming undisputed fact.*

A judgment will not be reversed because an instruction to the jury assumes the existence of an undisputed fact.

5. SAME: *Reading law books to jury: Failure to object.*

It is no ground for the reversal of a conviction that the prosecuting attorney read to the jury, in argument, the report of another case, where it does not appear that the report was used in opposition to the court's charge, and no attempt to prevent its use or request for a ruling of the court in relation to it is disclosed by the record.

APPEAL from *Carroll* Circuit Court.

J. M. PITTMAN, Judge.

J. D. Walker, for appellant.

1. The court erred in its instructions on justifiable homicide. If there is doubt as to guilt, there must be an acquittal; if there be justification or excuse, there cannot be guilt, Sackett on Inst. to Juries, p. 532; *Sawyer v. People*, 74 Ills.

2. The case of *Duncan v. State*, 49 Ark., not applicable to a case like this, where defendant had been annoyed, threatened and pursued by deceased.

3. Reading law books to juries is certainly bad practice.

4. The oath prescribed by the statute was not adminis-

tered to the jury. Bish. Cr. Law, 2 vol., notes to "oath;" 3 Minn., 444; 69 N. C., 383; 41 Texas, 496.

5. The court in its charge to the jury assumed to take from the jury the fact of the killing.

6. Testimony as to the reputation of a witness twenty-five or thirty years before trial not admissible. It is too remote.

Dan W. Jones, Attorney General, for appellee.

The court followed the statutes in regard to testimony impeaching and sustaining witnesses. Mansfield's Digest, secs. 2902-4; 32 Ark., 220.

It was in the discretion of the court to permit the State's Attorney to read a law book to the jury. 32 Ark., 550; 34 Id., 737; 36 Id., 292; 38 Id., 304.

The oath administered to the jury was substantially, almost literally, that prescribed by statute. Mansfield's Digest, sec. 2248.

COCKRILL, C. J.

The appellant was indicted for murder. He was convicted of murder in the second degree and sentenced to imprisonment for five years. On the trial he proposed to impeach a material witness for the State through numerous depositions which had been previously taken for the purpose. After the impeaching witnesses had testified that the general character for morality of the assailed witness was regarded as bad by his neighbors, they were asked whether from their knowledge of his "reputation for truth and veracity, morality and chastity" they would believe him on oath. The court excluded the testimony given in response to the two last questions, and we are asked to reverse the judgment on that ground.

In the case of *Hudspeth v. State*, 50 Ark., 534, we ruled, in accordance with the established practice in this State, and what appears to be the general rule elsewhere, [see *Hamilton v. People*, 29 Mich., 186], that it is proper to inquire of an impeaching witness, whether, from his knowledge of the general reputation of the assailed witness among his neighbors, he regards him as worthy of belief on oath. But the rejected offer to discredit the witness in this case was based, not upon his general reputation, but upon his reputation for a particular vice.

1. WITNESSES: Impeachment of.

It is a vexed question, on authority, whether it is the general moral character of a witness or his general reputation for veracity that is the proper subject of judicial inquiry. A provision of the Code of Civil Proceedure extends the inquiry beyond the general reputation for truth to that of morality in general. Mans. Dig. sec. 2902, and this provision has been construed by this court to apply to criminal causes. *Majors v. State*, 29 Ark., 112; *Lawson v. State*, 32 Ib., 220; *Anderson v. State*, 34 Ib., 262. But the statute, in terms, limits the inquiry to the general reputation for immorality, and it was intended only to make a legislative selection between the contending arrays of judicial authority.

The case of *Bakeman v. Rose*, 18 Wend., 146, is commonly cited as a leading case on the side of the more extended inquiry. But it is there distinctly announced that it is the general character only that can be enquired into—whether it be reputation for untruth or other general immorality such as renders the witness unworthy of belief. P. 148. The law rejects the conclusion, it is said, that a person guilty of one immoral habit is necessarily disposed to practice all others. The term, general character, is used in this connection in contradistinction to particular facts or parts of character.

Ward v. State, 28 Ala., 63. "It certainly is a salutary and even necessary rule of evidence," says Tracy, S., in *Bakeman v. Rose, supra*, "that the credit of a witness should only be impeached by proof of his moral character generally, and not by proof of a particular immoral act, or by proof of a general reputation for a particular immorality, unless that particular immorality be falsehood. This principle is concurred in by all elementary writers upon evidence, and has been maintained by courts everywhere." P. 153. Statutes similar to ours are in force in other states, and they have not been construed to extend the inquiry further than to the general reputation for morality. *State v. Egan*, 59 Iowa, 636; *Kilburn v. Mullen*, 22 Ib., 498; *People v. Beck*, 58 Cal., 212. Evidence of want of chastity is not, therefore, permissible to impeach the credibility of a witness. *Bakeman v. Rose, supra; Kilburn v. Mullen, supra; State v. Larkin*, 11 Nev., 330; *Commonwealth v. Churchill*, 11 Metc., 538; *Gilchrist v. McKee*, 4 Watts, 380; Rapalje Law of Witnesses, sec. 197; 1 Green'l. Ev., sec. 461.

Reputation for chastity.

2. SAME. As the naked question whether, from the witness' reputation for chastity, he was or was not worthy of belief, was inadmissible, it was improper to couple the question with one relating to his reputation for truth and morality, as it would still call for an expression of opinion as to the effect of chastity, or a want of it, upon the credibility of testimony. *Massey v. Farmer's Nat'l Bank*, 104 Ill., 334-5. It was not error, therefore, to exclude the evidence.

3. SAME: Evidence sustaining. The State introduced witnesses to sustain the character of the assailed witness. Some testified that they knew his reputation in the community where he resided at the time of the trial, and that he was worthy of belief; and others knew that he bore a good reputation in the community where he

resided 25 or 30 years before. This evidence was all objected to by the appellant. There can be no question about its admissibility except as to the limit that was given in going back to so remote a time to establish character. But the exclusion or admission of testimony in such cases rests in the discretion of the court, and where remoteness is the only objection and the circumstances of the case show no abuse of judicial discretion, the rule is to allow the verdict to stand. *Snow v. Grace*, 29 Ark., 131. It may be that the evidence was too remote to shed much light upon the question, but it was relevant and responsive to the collateral issue raised by the appellant, and we cannot see how he was prejudiced by it.

In the course of a somewhat lengthy but well considered charge, the court used this language: "In considering whether the defendant was justified in taking the life of the deceased at the time and in the manner that he did you will consider the circumstances," etc. It is said that this is erroneous because it assumes that the appellant did the killing charged in the indictment. It is not the province of the court to instruct juries upon the facts. It is prohibited by the constitution, and instructions which assume that a controverted fact is proved, though the testimony on one side be slight, is erroneous. We have so held frequently. But where no other conclusion could be arrived at upon the evidence, it is a harmless error, if error at all, to assume the existence of the fact; and a judgment is never reversed for a cause from which no prejudice could have resulted. Hayne New Trial, 121 [b] pp. 344-5; Sackett Instruction to Juries, chap. 1, sec. 17 and cases cited. See *Overton v. Matthews*, 35 Ark., 155.

3. PRACTICE IN SUPREME COURT: Instruction assuming undisputed fact.

In this case there was no controversy about the fact of the

killing. All the witnesses for the State and the defence who knew anything of that fact, testified that the prisoner did it. The fact was never controverted by him at any time. He testified in his own behalf on the trial, admitting the killing, and undertook to justify it then, as he had done before, upon the plea of self-defence. The killing was not a disputed fact and the charge affords no grounds for a reversal. It was so held upon a charge of murder in the case of *Davis v. The People*, 114 Ill., 86; see *Hanrahan v. People*, 9 Ib., 142.

The only other objection urged against the charge is on the question of reasonable doubt. The court refused no instruction upon this point, but charged the jury to acquit the prisoner if they entertained a reasonable doubt of his guilt, and defined "reasonable doubt" in accordance with our decisions. There is no error in that regard.

4. SAME: Reading law-books to jury: Failure to object.

A reversal is asked because the prosecuting attorney read to the jury the report of the case of *Duncan v. State*, 49 Ark., 543. Granting that the obligation to retreat before taking the life of the assailant, which we held rested upon the defendant in that case, did not exist under the facts of this, it does not follow that the judgment should be reversed. The charge of the court was applicable to the facts of the case under trial; the Duncan case was read, not as controlling this case, but in argument, and there is no suggestion that it was used in opposition to the court's charge, but only by way of illustration; and the record does not disclose that any attempt was made to prevent its use, or that the court was asked to make any ruling in regard to it. Appellate jurisdiction is limited to the correction of errors committed by the circuit courts, and until the trial court has ruled upon the question, or grossly neglected its duty in not ruling, no error has been committed. The rule is applicable to this class of irregularities. *Green*

v. State, 38 Ark., 318; *L. R. & Ft. S. Rw'y v. Cavaness*, 48 Ib., 106. The court may permit law books to be read to the jury, *Curtis v. State*, 36 Ark., 292, but it is not a practice to be commended. Finding no error in the record the judgment is affirmed.

SHARP v. STATE.

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1. HOMICIDE: *Cause of death: Maltreatment of wound.*

Where one unlawfully inflicts on another a dangerous wound which proves to be mortal, he is guilty of murder or manslaughter, according to the circumstances of the case, although it may appear that unskillful or improper surgical treatment aggravated the wound and contributed to the fatal result.

2. CRIMINAL PROCEDURE: *Instructions: Practice on appeal.*

This court will not review the refusal of the trial court to give an instruction asked for by the defendant, where all it contains that could have benefitted him was given to the jury in other instructions.

3. SAME: *Examination of witnesses: Remarks of judge.*

On the trial of a criminal cause the presiding judge may ask a witness any question which either party has failed to propound, and the answer to which may tend to show the guilt or innocence of the accused. But in doing so he should carefully avoid the use of language which may be taken by the jury to intimate an opinion on any fact which it is their duty to decide.

3. SAME: *Same.*

On the trial of D. and S., jointly indicted for the murder of M., committed by stabbing him, the testimony showed that the wound was inflicted by D. After witnesses had testified that they saw the defendants with knives in their hands a short time before and after the deceased was wounded, a witness was introduced who stated that he saw a difficulty arise between D., and the deceased, which the latter commenced by striking D.; that D., retreated and asked deceased not to cut him; that S., coming into the room about that time, requested them to stop and on their refusal to do so, grabbed at one or both of them; that the defendant D., then fled, the defendant S., and deceased following him; and that as they went through the door he saw a knife in the hands of deceased, but did not see S. with

any. He also stated that he made no effort to prevent the fighting. The presiding judge then asked the witness the following question: "Do you mean to say that you remained there and saw these men fighting with knives and did not interfere in any way to prevent it?" Whereupon the attorney for defendants remarked that the witness had not said that he saw them fight with knives; and the judge responded: "The jury will be the judge of that. I am examining the witness and you can object if you don't think it proper." *Held:* That as the guilt of S. depended on his participation in the wounding of the deceased, the question and reply of the judge—which the jury may reasonably have taken to indicate an opinion that he was concerned in the stabbing—tended to deprive him of his constitutional right to have the judgment of the jury in deciding the facts of the case, unaffected by any opinion of the judge.

APPEAL from *Garland* Circuit Court.

J. B. WOOD, Judge.

G. W. Murphy, for appellant.

1. The instructions refused by the court stated a correct principle of the criminal law. Wharton Am. Cr. Law, 4th Rev. Ed., sec. 568; 57 Ind., 80; 134 Mass., 215; 47 Am. Dec., 265; 36 Ga., 91; 1 Cr. Def., 125-6.

2. The question and reply of the judge was improper.

3. Reviews the evidence and contends that it is not sufficient to support the verdict. (The case was also argued orally.)

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

Argued the case orally.

BATTLE, J.

Appellant and Jasper Dunkin were jointly indicted for murder in the first degree; were jointly tried, and were convicted of murder in the second degree. They moved for a new trial. During the pendency of the motion Dunkin died. The motion was denied and Sharp appealed.

It is alleged in the indictment that the accused murdered

Mike Martin by stabbing him with a knife. The evidence shows that Dunkin stabbed him, and that a physician was called in to treat his wound. Defendants introduced the testimony of experts for the purpose of proving that the wound was not mortal, and that the death of the deceased was caused by the maltreatment of the physician.

As to the responsibility for the death of Martin the court instructed the jury, over the objection of defendants, as follows: "When one willfully and unlawfully inflicts upon another a wound which is not within itself mortal, yet, if by improper treatment of such wound by the physician in charge, it becomes mortal, and the person so wounded dies from such wound and the erroneous treatment of the same by such physician, the person inflicting such wound is criminally responsible for the death." "If you find from the evidence in this case that the defendants inflicted upon Mike Martin a mortal or dangerous wound with a knife, and you also find that said wound was erroneously treated by the physician, and that said Martin died from said wound and such erroneous treatment of the same, you will find the defendants guilty of murder or manslaughter, according as the evidence may show."

1. HOMICIDE: Cause of death: Maltreatment of wound.

Are these instructions erroneous? Chief Justice Bigelow, after a careful examination of the authorities upon this question in *Com. v. Hackett*, 2 Allen, 141, said: "The well established rule of the common law would seem to be, that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offense of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical oper

ation, or that unskillful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. 1 Russell on Crimes, 7th Amer. Ed., 505; Roscoe's Crim. Ev., 3rd Ed., 703, 706; 3 Greenl. Ev., sec. 139; *Commonwealth v. Green*, 1 Ashm., 289; *Regina v. Haines*, 2 Car. and Kir., 368; *State v. Baker*, 1 Jones Law R., N. C., 267; *Commonwealth v. McPike*, 3 Cush., 184. The principle on which this rule is founded is one of universal application, and lies at the foundation of all our criminal jurisprudence. It is, that every person is to be held to contemplate and to be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such a manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality that other causes co-operated in producing the fatal result. Indeed, it may be said that neglect of the wound or its unskillful or improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible. But however this may be, it is certain that the rule of law, as stated in the authorities above cited, has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime, and take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant upon the treatment of bodily ailments and injuries, it would be easy in many cases of homicide to raise a doubt as to the immediate cause of death, and thereby to open a wide door

by which persons guilty of the highest crime might escape conviction and punishment."

In *Regina v. Holland*, 2 Moody & R., 351, "it appeared by the evidence that the deceased had been waylaid and assaulted by the prisoner, and that, amongst other wounds, he was severely cut across one of his fingers by an iron instrument. On being brought to the infirmary, the surgeon urged him to submit to the amputation of the finger, telling him, unless it were amputated, he considered that his life would be in great hazard. The deceased refused to allow the finger to be amputated." At the end of two weeks lock-jaw followed as the result of the wound, and caused his death. It was held that the prisoner was guilty of murder.

Mr. Greenleaf, in his work on Evidence, says: "If death ensues from a wound, given in malice, but not in its nature mortal, but which, being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it; but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for if the wound had not been given, the party had not died."

Mr. Bishop, in his work on Criminal Law, says: "But, where the wound is not of itself mortal, and the party dies in consequence solely of the improper treatment, not at all of the wound, the result is otherwise. * * But we should not suffer these propositions to carry us too far; because, in law, if the person dies by the action of the wound, and the medical and surgical action, jointly, the wound must clearly be regarded sufficiently a cause of the death. And the wound need not be even the concurrent cause; much less need it be

the next proximate one; for if it is the cause of the cause, no more is required." 2 Bishop on Criminal Law, 7th Ed., sec. 639; *The State v. Morphy*, 33 Iowa, 270; *Kee v. State*, 28 Ark., 155; *Smith v. State*, 50 Ark., 545; *Crum v. State*, 26 Am. Law. Reg., 368.

The instructions were properly given.

The defendants asked and the court refused to give the following, and other instructions to the same effect, to the jury: "The right of self-defence is measured by the necessity, or what appears to be the necessity in the given case, and, therefore, if a person of great physical strength assaults a feeble one, without any manifest or apparent intent to kill him, but with much greater force and violence than he is able to resist by the mere use of his natural members, the person thus assaulted, may, if he has no other reasonable way or means of avoiding or averting the violence and injury, avail himself of any reasonable instrument or means of defence in his possession or within his reach, and, if while defending himself therewith against such assault and injury, and not in a spirit of revenge, ill-will, wantonness or recklessness, or for the purpose of unnecessarily injuring the assailant, he inflicts upon the assailant a wound or stab which is not mortal, but a person called as a surgeon by performing upon it an unwarranted operation renders it mortal, or makes an additional one which is mortal, and death results therefrom, he, the person assaulted, cannot be held criminally liable for the death or homicide."

2. CRIMINAL PROCEDURE: Instructions: Practice on appeal.

The death of Dunkin makes it unnecessary for us to decide the question raised by this instruction. The evidence shows that appellant was present when deceased was stabbed, and prevented Dunkin from stabbing him the second time. He gave no active aid or assistance to Dunkin in the inflic-

tion of the wound. There was no positive evidence that he advised or encouraged it at the time it was done. The facts which implicated him, if any, preceeded the conflict in which the wound was inflicted. In convicting him the jury must have concluded that there was an understanding between Dunkin and Sharp to do some unlawful act, and that Dunkin, when proceeding according to the common plan, inflicted the wound. Under this state of facts the instructions asked and refused could have been of no service to appellant.

All that is in them which could have been of any advantage to him was included in other instructions, which were given. For the court expressly told the jury, that they could not convict both of the defendants, unless the evidence showed that they inflicted upon the deceased the wound of which he died, or that one inflicted the wound and the other was present and aided and assisted him therein, or was present and ready and consented to aid, abet or assist; and that, if they believed from the evidence, that the wound was not inflicted by Sharp, they must acquit him, unless they found from the evidence that he assisted the person who inflicted it by acting in concert with him, or counselled or advised him to inflict it. If Dunkin was assaulted by the deceased, and to protect himself, through no spirit of revenge, ill-will, wantonness or recklessness, or for the purpose of unnecessarily injuring his assailant, stabbed him, it was the duty of the jury, under these instructions, to have acquitted the appellant.

On the trial, one Woods testified, that he saw the difficulty between Dunkin and the deceased; that he was talking with Dunkin, when deceased asked Dunkin where his, (deceased's) wife was, and Dunkin replied he did not know. Deceased then said he, Dunkin, was a liar, and commenced

striking at him. Dunkin retreated and deceased followed. When they reached a corner of the room, in which the difficulty occurred, Dunkin asked the deceased not to cut him. About this time Sharp came into the room and requested them to stop, and, they refusing to do so, he sprang forward and grabbed at them, or one of them, and Dunkin fled, the deceased and Sharp following; and as they went through the door, he, witness, saw a knife in the hands of the deceased, but did not see Sharp with any. Other witnesses had testified that they had seen Sharp and Dunkin with knives in their hands a short time before and after the deceased was wounded. Woods further testified that he made no effort to prevent or stop the fighting. After he had made this statement, and while he was testifying, the presiding judge asked him this question: "Do you mean to say that you remained there and saw these men fighting with knives and did not interfere in any way to prevent it?" Whereupon defendant's attorney stated that the witness had not said that he saw them fight with knives; and the judge responded: "The jury will be the judge of that. I am examining the witness and you can object if you don't think it proper." And the defendants excepted; and appellant now insists he was prejudiced by this question, in the manner in which it was asked, and by the remark made by the judge in response to his attorneys, and on that account, should have a new trial.

SAME: Examination of witnesses.

The judge has the right, in a criminal prosecution, to interrogate the witnesses, but he has no right to usurp the place of the State's attorney, "and prescribe the order of introduction of the witnesses and become active in their examination;" nor has he the right to assume the duties resting on the prisoner's counsel in the general conduct of the defence.

He may ask questions which the attorneys had the right to propound and failed to ask, when the answers to the same may tend to prove the guilt or innocence of the accused. It would be a reproach to the laws of the State if he was required to sit and see the guilty escape or the innocent suffer through a failure of parties, or their attorneys, to ask a witness a necessary question. *State v. Ice*, 80 N. C., 483; 1 Wharton Ev., sec. 496.

Remarks of the Judge.

In all trials the judge should preside with impartiality. In jury trials especially, he ought to be cautious and circumspect in his language and conduct before the jury. He should not express or intimate an opinion as to the credibility of a witness or as to controverted facts. For the jury are the sole judges of fact and the credibility of witnesses; and the constitution expressly prohibits the judge from charging them as to the facts. The manifest object of this prohibition was to give to the parties to the trial the full benefit of the judgment of the jury, as to facts, unbiased and unaffected by the opinion of judges. Any expression or intimation of an opinion by the judge as to questions of fact or the credibility of witnesses necessary for them to decide in order for them to render a verdict would tend to deprive one or more of the parties of the benefits guaranteed by the constitution, and would be a palpable violation of the organic law of the State.

In *McMinn v. Whelan*, 27 Cal., 300, a witness on cross-examination, was interrogated in respect to her residence and business. Objection was made to this course of examination, the court overruled the objection, at the same time remarking that the witness was a woman of respectability. The appellant insisted that the remark of the judge was an irregularity of sufficient magnitude to authorize the reversal of the judgment of the court below. Mr. Justice Currey, in

delivering the opinion of the court upon this question, said: "From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other. We regret the necessity for an expression of our disapproval of the irregularity of which complaint is made, and though we do not impugn the expression as designed to aid the side of the plaintiff, we may say, we should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing was thus endorsed."

In *People v. Williams*, 17 Cal., 146, the judge charged the jury that, "the fact that the deceased was a Chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find, that the defendant was seeking to enforce the collection of taxes against another Chinaman, or even against his victim, give the defendant any right to take his life. Our laws do not sanction the sacrifice of human life in order to enforce the collection of taxes or licenses." In reference to this charge the supreme court said: "The word *victim* in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to

the character of the killing. We are not disposed to criticise language very closely in order to reverse a judgment of this sort, but it is apparent that in a case of conflicting proofs, even an equivocal expression coming from the judge, may be fatal to the prisoner. When the deceased is referred to as a 'victim,' the impression is naturally created that some unlawful power or dominion had been exerted over his person. And it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. The court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision from themselves to the court. A word, a look, or a tone may, sometimes, in such cases, be of great or even controlling influence."

In *People v. Dick*, 34 Cal., 663, the judgment of the court below was reversed on account of the use of the following language in the charge to the jury: "The defendant is charged with having murdered, in this county, on or about the 12th day of May, 1866, one S. M. Simpson. Now, the first question for your decision is this: Was S. M. Simpson on or about the 14th day of May, 1866, in this county, murdered? In determining that question, the court thinks you can have *no hesitation* whatever." In respect to this language, the court said: "We are of opinion, however, that the other portion of the charge noted is within the clause of the constitution which prohibits judges from charging juries upon matters of fact, and are unable to conceive

of any state of facts under which, in view of that restriction, a judge can be allowed to address such language to a jury. * * Whether wisely or not, the constitution has abrogated the rule of common law by which judges were allowed to express their opinions as to the facts in issue, or as to the weight of evidence. To weigh the evidence and find the facts is, in this State, the exclusive province of the jury, and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law."

3. SAME.

The conviction of the appellant depended upon his participation in the wounding of the deceased. Upon this point the evidence was weak and unsatisfactory. When the judge said: "Do you mean to say that you remained there and saw *these* men fighting with knives and did not interfere to prevent it?"—the jury might, reasonably, have inferred that "these men" referred to were the defendants, and that the judge was of the opinion they were concerned in the stabbing of the deceased; and when the defendant's attorneys stated that the witness had not said that he saw them fighting with knives, and the judge responded, "the jury will be the judge of that," they might, reasonably, have concluded that the men referred to by the judge in the question asked were the defendants, and that, in his opinion, they fought with knives, as they were selected to decide whether defendants were guilty or innocent of the killing of the deceased. In the midst of doubt as to what their verdict should be as to appellant it was natural for them to seize upon and adopt any opinion which they understood the judge to have expressed or intimated upon the questions which they were required to decide. It is, therefore, evident he did not have a trial according to law—such as was guaranteed to him by the constitution of this State; and, in this respect, was prej-

udiced by the question and reply of the court. In so deciding, we do not mean to impute to the judge an improper motive. On the contrary, we are satisfied that the question was asked, and the reply, was made with no intention to influence the jury or prejudice the defendants.

Judgment reversed and a new trial granted.

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McCULLOUGH, *ex parte*, AND McCULLOUGH v. BLACKWELL.

1. LIQUORS: *Proceedings under three mile law: Appeal from judgment of county court.*

Petitioners for a prohibitory order under the three mile law, may appeal to the circuit court from a judgment of the county court rejecting their petition. And a liquor dealer admitted as a party to contest such petition, may also prosecute an appeal from a judgment awarding the order.

2. SAME: *Same: Withdrawal of petitioner on appeal.*

When a petition to put the three mile law in force has been acted upon by the county court, and an appeal from its judgment prosecuted, a petitioner will not be allowed to withdraw his name in the circuit court, except for good cause.

3. SAME: *Same: Allegations of remonstrance.*

The allegations of a remonstrance filed against a petition for a prohibitory order under the three mile law, to the effect that certain signatures were unduly obtained, are not evidence and must be sustained by proof.

APPEAL from *Faulkner* Circuit Court.

J. W. MARTIN, Judge.

Blackwell and others petitioned the county court of Faulkner county, under the three mile law, for an order prohibiting the sale or gift of intoxicating liquors within three miles of a certain school-house. McCullough and other licensed dealers were permitted to become parties in the county court

and contested the petition, which was denied. The petitioners appealed to the circuit court, where the parties resisting the application raised the objection that eighty-one of the persons whose names were on the petition, were not then in favor of the order prayed for; that they signed the petition without understanding it and that their signatures were procured through misrepresentation. The eighty-one petitioners referred to filed a request to be allowed to withdraw from the petition, which was refused on the ground that they could not, in the circuit court, by a mere petition have their names withdrawn. The court found the number of adult residents within the designated limits, at the time the petition was filed in the county court, to be 1094, and that of this number 623 had signed the petition, which was a majority of such residents. The court thereupon held the petition to be sufficient and made the order therein prayed for, and required the county court to enter the same as the order of that court. McCullough moved for a new trial, which being refused, he appealed. He also filed his petition in this court for a writ of *certiorari* to quash the order and proceedings of the circuit court for want of jurisdiction, contending that the law provides for no appeal in such cases from the judgment of the county court. His petition was demurred to and by agreement the appeal and *certiorari* were argued and submitted as one cause.

Cohn & Cohn, for appellants.

The practice outlined in 40 Ark., 290, seems to have been followed in this case. The circuit court ought to have heard the petitioners who desired to withdraw from the petition, and allowed them to withdraw if they were imposed on. See 1 Whart. Cont., sec. 529; Morawetz Pr. Corp., (1st Ed.),

sec. 302, n. 1; 2d Ed., vol. 1, sec. 97; 59 Texas, 438; 14 Phil., 251; 13 Id., 241.

Certiorari lies where a new jurisdiction is created. 2 Tidd., 1134; 29 Ark., 173; Hempst., 195; 10 Minn., 30, 37; 80 Ala., 287. The remedy here was certiorari to the circuit court. Mansf. Dig., sec. 1368. Where circuit court exceeds its powers, certiorari and not appeal is the remedy. 29 Ark., 173, 181; 24 Wend., 249; 26 Ark., 51.

No appeal is provided for by the law in these cases. Dig., sec. 4524 *et seq*. The petitioners are analogous to voters. 35 Ark., 73 *et seq*. The law contemplates that the county court should not have the power to revoke any order it had made. 35 Ark., 423-4. Under the rule *expressio unius*, etc., sec. 51 of article 7, constitution 1874, contemplated that there should not be an appeal in such cases as these.

Here we, having been made parties, can have certiorari. 45 Barb., 167; 40 Ark., 290; 30 Ark., 578; 26 Id., 461; 26 Id., 95; 32 Id., 45.

Prior to sec. 51, art. 7, constitution 1874, as shown by 30 Ark., 578; 26 Ib., 461; Ib., 95; 32 Ib., 45, no law authorized an appeal by a county, or person who had no pecuniary interest at stake. Sec. 33, art. 7, is not broader than sec. 1436 Mansf. Dig., which was in force when the above decisions were rendered. Indeed, not as broad. Sec. 1436 only provides for appeals in ordinary cases, by parties aggrieved. Besides, sec. 33 is not self-executing, nor does it define who may take an appeal. See Cooley Cons. Lim. (5th Ed.), 98 *et seq.*; 38 Ark., 329; 5 Dillon, 380; 9 Ind., 15.

The general provisions of the law are presumed to be enacted in view of usual and ordinary proceedings, and do not embrace proceedings under special acts. If such special

acts do not authorize appeals, none can be taken by virtue of the general law. 9 Ind. (Tanner), 475; 16 Ind., 15. Where an inferior court exercises a special limited jurisdiction conferred by statute, no appeal lies unless given by the statute. 8 Md., 5; 15 Md., 193; 7 Gill., 157; 3 Gill., 497; 69 N. Y., 209.

In 35 Ark., 69; 37 Ark., 374; 40 Ark., 290, and 43 Ark., 42, 49, the right of the *liquor seller* to appeal was passed upon, but the right of petitioners under the local option law has never been decided. The "three mile law" does not provide for an appeal by either side.

W. S. McCain and *E. A. Bolton*, for appellees and respondent.

1. There is no testimony to show that the eighty-one petitioners were imposed on or that their names were procured by fraud. None was offered.

2. The court properly refused to allow the petitioners to withdraw their names. See 40 Ark., 290. The petition is like an election and the petitioners like voters, and after they have signed and the county court has acted, they can no more change than voters can change their votes after voting.

3. As to the right of appeal, see Const., art. 7, sec, 33; Mansf. Dig., sec. 1436; 33 Ark., 508; 34 Id., 240; 43 Id., 42; 43 Id., 33; 44 Id., 509; 50 Ark., 18.

COCKRILL, C. J.

To sustain the *certiorari*, it is argued that the circuit court acquired no jurisdiction to reverse the order of the county court refusing the prayer of the local option petitioners, because the law makes no provision for appeal in this special statutory proceeding. Our decisions do not sustain the position. Appeals from all judgments of county courts to

the circuit courts, under such regulations and restrictions as the legislature may prescribe, are guaranteed by the constitution. Art. 7, sec. 33. In practice, the terms of the act passed in aid of this provision of the constitution, has been applied habitually in special proceedings where the statute regulating them contains no provisions about appeals. Mans. Dig., sec. 1436; *Levy, ex parte*, 43 Ark., 43; *Phillips County v. Lee County*, 34 Ib., 340; *Dodson v. Fort Smith*, 33 Ib., 508; *Williams v. Citizens*, 40 Ib., 290; *Trammell v. Bradley*, 37 Ib., 374; *Boyd v. Bryant*, 35 Ib., 69.

1. THREE-MILE LAW: PROCEEDINGS UNDER: Appeal.

Most nearly analogous to this case of any in which the question is discussed, is that of *Levy, ex parte, supra*, where a petitioner, whose prayer for the issuance of a license to sell liquor had been denied by the county court, was permitted to prosecute his appeal. In *Miller, ex parte*, 49 Ark., 18, the petitioner's right of appeal to this court from an order of the circuit court refusing to put the three mile law in operation, was silently recognized, as it had been previously in *Williams v. Citizens, supra*, from the county to the circuit court. The petitioners in such cases, like the liquor dealer in Levy's case, are parties to the record by virtue of the statute, and their right to test the validity of the proceeding by *certiorari* or appeal, is clear. But no provision is made by the statute for a remonstrance against the issue of a license where the county court is authorized to issue licenses, nor is provision made for a hearing of those who desire to oppose the prayer of a petitioner under the local option law. The right of remonstrance has nevertheless been ruled to exist in the former case (*Austin v. Atlantic City*, 48 N. J. Law, 118; *Dufford v. Nolan*, 46 Ib., 87; *Ferry v. Williams*, 41 Ib., 332), as it unquestionably does in the latter. *Williams v. Citizens*, 40 Ark., *sup*. As against the petition to prohibit

the sale of liquor, the licensed dealer, or any one who has taken the necessary steps to procure a license, who moves to be made a party for the purpose of showing that the petition does not contain a majority of the signatures, legally obtained, of the adult residents of the district, does not manifest the impertinent interference of a stranger without interest, and when made a party by order of the court, may sue out a writ of *certiorari* or prosecute an appeal from the judgment thereafter rendered, just as the petitioners may do. *Ferry v. Williams, sup.: Miller v. Jones*, 80 Ala., 89; *McCreary v. O'Flinn*, 63 Miss., 204. The right to prosecute an appeal on the part of the liquor dealer was recognized by this court in the case of *Boyd v. Bryant*, 35 Ark., *supra*, and in *Williams v. Citizens*, 40 Ib., *sup.*, and we affirm those rulings.

2. SAME: Withdrawal of petitioner.

2. The question arising on the appeal is this: Where a petition to put the three mile law in force has been acted upon by the county court, and an appeal from the order prosecuted to the circuit court, has the petitioner the unqualified right to withdraw from the petition in the circuit court?

The question is answered in the negative by the decision in *Williams v. Citizens, sup.* Speaking of the right of a petitioner to withdraw from the petition in the county court—the court of first instance—it is said that if the original signatures were obtained intelligently and without fraud, and have not been erased *before presentation*, or afterwards by leave of the court for cause, they fulfill the requirements of the statute. See *Grinnell v. Adams*, 34 Ohio St., 44; *Hays v. Jones*, 27 Ib., 218; *Dutton v. Village of Hanover*, 42 Ib., 215.

The presentation of the petition is in the nature of an election. When the county court has acted, the votes have been cast and the election returns made, and an appeal does not

invest the petitioner with the power to change his vote or to withdraw it except for good cause, as is indicated in *Williams v. Citizens, supra.* While the circuit court tries the issue on appeal, *de novo*, it can award or refuse a prohibitory order only upon the petition as signed when acted upon by the county court.

No cause for striking from the petition the names to which objection is made, was offered or shown. The remonstrance alleged that they were unduly obtained, but that the allegations of the remonstrance are not evidence was decided in *Williams v. Citizens, supra.* No proof was offered to sustain the allegation.

3. SAME: Remonstrance.

Let the judgment be affirmed.

MUSICK V. STATE.

1. LIQUORS: *Sale of brandy cherries.*

A conviction of selling liquor without a license, is sustained by proof that the defendant sold brandy cherries in pint and quart bottles containing one-half their capacity of intoxicating liquors.

2. SAME: *Same.*

Where intoxicating liquor is sold intentionally, without a license, in bottles partly filled with brandy cherries, the sale cannot be excused by showing that the vendor believed he had the right to sell it as "brandy fruit."

APPEAL from *Mississippi* Circuit Court.

J. E. RIDDICK, Judge.

H. M. McVeigh, for appellant.

No license is necessary to sell fruits preserved in brandy. 39 Ark., 204. Appellant sold them openly as he did other merchandise; he resorted to no trick or device to evade the law, and the fact that men *could* get drunk from drinking

enough of the liquor, or that he had U. S. license, did not make him guilty of selling liquor. 43 Ark., 95.

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

The evidence is that the liquor was intoxicating and was sold as a beverage. He had U. S. license, thereby recognizing the fact that he was engaged in a business prohibited by law.

Rabe v. State, 39 Ark., not applicable. Appellant was simply selling liquor with cherries in it to evade the law.

COCKRILL, C. J.

The appellant was convicted of selling liquor without a license. He made no specific objection to the charge of the court at the trial and urges none here. His contention is that the verdict is not sustained by the evidence. The proof was that he sold brandy cherries, and the case of *Rabe v. State*, 39 Ark., 204, is relied upon to reverse the judgment.

1. Sale of brandy cherries.

Rabe's case is only to the effect that it is not a violation of the law to sell fruit preserved by the use of brandy. The proof in the case in hand is to the effect that the defendant was engaged in business as a merchant; that knowing, as he stated to one of the witnesses, that customers would come to trade where they could get something to drink, he kept a stock of brandy cherries in pint and quart bottles, which he offered openly for sale, furnishing glasses to the purchasers when they desired to drink the liquor on the premises. The bottles were filled with fruit, but contained nevertheless one-half their capacity of liquor, which the proof clearly shows was intoxicating. The defendant himself testified that the use of it sometimes made his customers "boozy," which the jury doubtless understood to mean the incipient stage of drunk-

enness, and he would refuse to sell, he said, to persons in that condition. Having a fear of incurring the heavier penalties imposed by the act of congress, or, as he expressed it on the witness stand, in order that he might not be "put to any trouble in the Federal court," he procured a United States revenue license.

He testified that he thought he had the right to sell brandy fruit. He was not prosecuted for selling brandy fruit, but brandy; and in at least one of the sales put in evidence, he sold the liquor and retained the fruit, setting the bottle containing it back upon the shelf. But it is not necessary to resort to this sale to sustain the conviction. When, not mistaking the fact, one intentionally makes a sale that is prohibited by statute, he violates the law—it being no excuse for him that he deemed what he does to be right. Bish. St. Cr., sec. 1023; 1 Bish. Cr. L., sec. 345; *Beard v. State*, 43 Ark., 284; *U. S. v. Jackson*, 25 Fed. Rep., 550; *Reynolds v. U. S.*, 98 U. S., 167. The jury would have failed in their duty, had they returned any other verdict. 2. Same.

Let the judgment be affirmed.

PRATT V. STATE.

1. RAPE: *Charge of, includes assault to commit.*

Under an indictment for rape, the accused may be convicted of an assault with intent to commit rape, the latter offence being included in the charge of the former.

2. SAME: *Trial for: Conviction of assault.*

Where the jury on a trial for rape find the defendant guilty of assault with intent to rape, the judgment will not be reversed on the ground that the evidence showed that the defendant was guilty of rape or of nothing, since the jury had the power to return a verdict for the assault, although the

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evidence required a conviction of the higher offence in which it was included.

3. SAME: *Charge made under threats: Instruction.*

On a trial for rape, the defendant requested the court to instruct the jury, that if the woman charged to have been assaulted made the complaint against him under the threats of her husband, they should acquit. *Held:* That it was not error to refuse the instruction, as such threats of the husband could only affect the credibility of his wife and not the question of the defendant's guilt or innocence.

ERROR to *Randolph* Circuit Court.

J. W. BUTLER, Judge.

The defendant was tried on an indictment for rape and the jury convicted him of an assault with intent to commit rape. He was refused a new trial and sentenced according to the finding of the jury.

Section 2288 Mansf. Dig. is as follows: Upon an indictment for an offence consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offence included in that charged in the indictment.

The Appellant pro se.

To sustain the charge of rape, or assault with intent to rape, force or drugs must be used. Here there was no force, drugs, threats or intimidation. 11 Ark., 389.

The court erred in refusing to charge the jury, that if the charge was made under duress or threats of the husband, they should acquit. Defendant should have been convicted of rape or acquitted.

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

The instructions given are based upon our statutes and supported by our decisions. *Dawson v. State*, 29 Ark., 116; *Coates v. State*, 50 Ark., 330.

The instruction asked, as to duress by the husband, is not law. That was a question for the jury, affecting only her credibility.

COCKRILL, C. J.

1. ASSAULT: Included in charge of rape.

An assault with intent to commit rape is included in the charge of rape, and a conviction may be had of the former offence under an indictment for the latter. Mansf. Dig., sec. 2288; *Davis v. State*, 45 Ark., 464; 1 Bish. Cr. Law, sec. 809.

2. RAPE: Trial for: Conviction of assault.

2. It is conceded that the testimony would sustain a verdict for rape. That being true, there can be no question of its sufficiency to sustain the verdict for assault with intent to commit the offence. If it be conceded that the testimony would logically demand a verdict of guilty of rape or nothing, it does not follow that a conviction of an attempt to rape should be avoided here. The jury had the power to return the verdict and the offence is less than the crime charged. The case is not distinguishable in that respect from Fagg's case, 50 Ark., 506; *Green v. State*, 38 Ark., 319; *Allen v. State*, 37 Ark., 435.

3. SAME: Charge made under threats: Instruction.

3. The court refused to charge the jury as follows: "If the jury believe from the evidence that Nora Shaver, the woman upon whom the assault is charged to have been made, made the charge against the defendant as mentioned in the indictment under duress or threats of and from her husband, you will acquit." There was evidence tending to show that the husband threatened to abandon the woman unless she made complaint of her treatment to the magistrate. This could not have affected the question of defendant's guilt or innocence. The most that could be claimed was, that under the influence of the threat, the wife may have made a false charge of rape, and so affected her credibility. Affirm.

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RUBLE V. STATE.

LIQUORS: *Sale to minor: Plea of former conviction.*

A sale of liquor without a license and its sale to a minor without the written consent of his parents or guardian, are separate offences and may both be committed by one act of selling. A conviction of the former offence will not, therefore, bar a prosecution for the latter, although both prosecutions are for the same transaction.

APPEAL from *Boone* Circuit Court.

R. H. POWELL, Judge.

Crump & Watkins, for appellant.

There is only one question in this case: Can a party for a single sale be convicted of selling without license and for selling to a minor? 1 Bish. Cr. Law (6th Ed.), sec. 1058; Ib., sec. 1054 and note to sec. 1061, and sec. 1057.

Only one offence can be carved out of the same illegal act, and the state must elect which it will prosecute. The lesser crime (selling to a minor), is merged into the larger (selling without license), of which appellant had already been convicted.

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

The plea was not verified by a transcript of the record of conviction.

There was no motion for new trial, and no bill of exceptions, and hence nothing before this court.

BATTLE, J.

Appellant sold one pint of ardent spirits to Peter Dees, a minor, without the consent of his parents or guardian. For doing so he was indicted for and convicted of selling liquor without license, and fined in the sum of two hundred dollars, and was indicted for selling ardent, alcoholic and vinous liquors and intoxicating spirits to a minor, without the written

consent of his parents or guardian. After he was convicted under the first indictment he pleaded such conviction and not guilty to the second indictment, and was convicted of the offence therein charged, and fined. Were the trial and conviction under the second indictment lawful?

It is sometimes difficult to determine whether the offence for which an accused party stands charged is the same offence of which he has before been acquitted or convicted; and this is the only inquiry in this case.

Mr. Justice Blackstone says: "It is to be observed, that the pleas of *autre fois acquit* and *autre fois convict*, must be upon a prosecution for the same identical act and crime." 4th Com., 336.

In *Com. v. Roby*, 12 Pick., 496, Chief Justice Shaw, in delivering the opinion of the court, as to what is necessary to constitute offences charged in two indictments the same, said: "It must, therefore, appear to depend upon facts so combined and charged as to constitute the same legal offence or crime. It is obvious, therefore, that there may be great similarity in the facts, where there is a substantial legal difference in the nature of the crimes; and on the contrary, there may be a considerable diversity of circumstances, where the legal character of the offence is the same. As where most of the facts are identical, but by adding, withdrawing or changing some one fact the nature of the crime is changed; as where one burglary is charged as a burglarious breaking and stealing certain goods and another as a burglarious breaking with an intent to steal. These are distinct offences. *Rex v. Vandercomb*, 3 Leach, 816. So, on the other hand, where there is a diversity of circumstances, such as time and place, where time and place are not necessary ingredients in the crime, still the offences are to be regarded as the same.

"In considering the identity of the offence, it must appear by the plea, that the offence charged in both cases was the same *in law* and *in fact*. The plea will be vicious, if the offences charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact. As if one is charged as accessory before the fact and acquitted, this is no bar to an indictment against him as principal. But it is not necessary that the charge in the two indictments should be precisely the same; it is sufficient if an acquittal from the offence charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offence upon that indictment; and in the second instance, since the defendant was not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder."

Chitty, in speaking of the identity of the offence necessary to sustain a plea of former acquittal or conviction, says: "As to the identity of the offence, if the crime charged in the former and present prosecution are so distinct, that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law, to say that the offences are so far the same, that an acquittal of the one will be a bar to the prosecution of the other." 1 Chitty Cr. Law, 453; *State v. Hall*, 50 Ark., 29; *Emerson v. State*, 43 Ark., 372; *Wilson v. State*, 24 Conn., 57; *State v. Nash*, 86 N. C., 650; *King v. Vandercomb*, 2 Leach, 816, 828;

State v. Sias, 17 N. H., 558; *Durham v. People*, 4 Scam., 172; *Guedel v. People*, 43 Ill., 226; *Truland v. People*, 16 Ill., 380; *Foster v. State*, 39 Ala., 233; *Dominick v. State*, 40 Ala., 680; *Hite v. State*, 9 Yerger, 375; *State v. Glasgow Dudley*, [S. C.] 43; *State v. Warner*, 14 Ind., 572; *Lewis v. State*, 1 Texas Appeal, 323; 1 Russell on Crimes, 831; Wharton Cr. Pl. & Pr., [8th Ed.] secs. 471, 472; Bishop Cr. Law, [7th Ed.] secs. 1051, 1065.

Mr. Bishop says: "Looking further to see when the offences are the same, we have in reason the following propositions: They are not the same, first, when the two indictments are so diverse as to preclude the same evidence from sustaining both; or, secondly, when the evidence offered on the first indictment, and that intended to be offered on the second, relate to different transactions, whatever be the words of the respective allegations; or, thirdly, when each indictment sets out an offence *differing in all its elements from that in the other*, though both relate to one transaction, a proposition of which the exact limits are difficult to define; or, fourthly, when some technical variance precludes a conviction on the first indictment, but permits it on the second; yet, fifthly, the offences are the same in all other circumstances wherein the evidence to support one of the indictments sustains also the other; and, sixthly, if the two indictments set out offences which are alike, and relate to one transaction, yet, if one contains more of criminal charge than the other, but upon it there could be a conviction for what is embraced in the other, the offences, though of different names, are, within the constitutional protection from a second jeopardy, the same." 1 Bishop Cr. Law, [7th Ed.] sec. 1051.

In *Com. v. Bubser*, 14 Gray, 83, it was held that, "an acquittal upon an indictment for a nuisance in keeping a tene-

ment house used for the unlawful sale of intoxicating liquors, is no defence to an indictment for being a common seller of intoxicating liquors at the same time and place." Mr. Justice Hoar, in delivering the opinion of the court, said: "The offences were not identical. The gist of one offence is the keeping a tenement house for an illegal purpose, which makes it a nuisance; of the other, the doing certain acts which constitute an offence, to the commission of which it is not necessary that the defendant should have been the keeper of any building or tenement whatever. On the trial of the first indictment, the jury would have been properly instructed to acquit the defendant, if he did not keep the tenement described, however great a number of sales of intoxicating liquors he might have made within it."

LIQUORS: Sale to minor and sale without license, distinct offences.

Tested by the authorities cited and quoted from, was appellant twice indicted for the same offence? The sale of ardent or spirituous liquor within and of itself is no offence. Whether it be criminal or not depends on other facts. One statute makes it an offence to sell it without license, and another makes it an offence to sell it to a minor, without the consent of his parent or guardian. The objects of the two statutes are entirely different. The object of the first is the enforcement of the law which requires license to be granted and fees therefor to be paid, and of the other to protect the morals of minors and prevent them from being led into intemperance. The act or circumstance which makes the sale illegal in one case is entirely different from the facts which make it an offence in the other. Under the first statute he was guilty if he had no license, although he sold to a minor with the written consent of his parent or guardian; and under the other he was guilty, if he sold to a minor without the written consent of his parent or guardian, although he

had or had not license. The acts necessary to constitute the offences are so wholly unconnected and distinct as not to be comprehended, the one within the other. The essential and constituent elements of the same are different. A party may be guilty of one and innocent of the other, or guilty of both; and the acquittal of one is not an acquittal of the other. They are separate and distinct offences.

In holding that the two offences charged against appellant are not the same we are not without precedents. In South Carolina two statutes were in force at the same time. One imposed a penalty of fifty pounds on persons retailing liquors without license to persons of any description, and the other a penalty of one thousand dollars and imprisonment on those trading with a negro without a ticket. In *State v. Sonnerkalb*, 2 Nott & McCord, 280, it was held that a person who sold liquor to a negro without a license and a ticket, was lawfully convicted under these statutes of two offences and subject to the penalties imposed by both. In *State v. Taylor*, 2 Bailey, 49, the same court held that the act of buying goods of a negro, knowing them to be stolen, subjected the purchaser to two punishments: One for trading with a negro without a ticket, and the other for receiving stolen goods. And it was adjudged in *State v. Inness*, 53 Me., 536, that "to punish a person for keeping a drinking house and tippling shop, and also for being a common seller of intoxicating liquors, although the same individual act contributed to make up each offence, is not a violation of the law which forbids a prisoner to be put in jeopardy twice for the same offence." In *Com. v. Harrison*, 11 Gray, 308, it was held that "a conviction for an illegal sale of intoxicating liquor is no bar to a subsequent charge of keeping open a shop for the transaction of business on the Lord's Day, al-

though the business transacted was the sale of liquor for which the party had been previously convicted." And in *State v. Faulkner*, 2 South. Rep., 539, it was held that the accused, who, being entrusted with cotton for a particular purpose by the owner, obtained money on it from a third person, by falsely representing himself as the owner and selling it to him, was lawfully indicted for embezzling the cotton and for obtaining the third person's money under false pretences, and that the conviction of the latter offence was no bar to a prosecution for the other.

According to the rule laid down by some authorities *one* of the tests to determine the identity of offences is, if the evidence of the facts alleged in the second indictment is not within itself sufficient to convict under the first indictment, the offences charged in the two indictments are not the same. Tested by this rule, are the offences charged in the two indictments against appellant the same? In *Com. v. Thurlow*, 24 Pick., 374, it was held, that it was necessary, in an indictment for selling spirituous liquors without a license, to allege that the defendant was not duly licensed, and on the trial it was incumbent on the State to produce *prima facie* evidence of that fact. According to that case the offences charged against appellant were clearly not the same. But this court has held, that the State in such trials, is not required to prove that the accused had no license, because, if he has, it is *particularly within his own knowledge*, and within his power to produce or prove it, and if he has not, it is not convenient for the State to prove that he was not licensed. *Hooper v. State*, 19 Ark., 146; *Williams v. State*, 35 Ark., 434. It is, nevertheless, true that the sale alone does not constitute an offence, and in a trial for selling without a license the State must introduce *prima facie* evidence that

the accused had no license when he made the sale, or the defendant fail to prove he had. The failure of the accused to prove he had is evidence that he had none, for if he had, it is presumed he would have proven it. So that proof of a sale of spirituous liquors to a minor, without the written consent of his parent or guardian—without other material evidence—would not be sufficient to prove a sale without a license; and, according to the rule, the offences charged against appellant are not the same.

But reverse the order of the indictments, and suppose that the appellant has been convicted upon the first indictment of selling liquor to a minor without the written consent of his parent or guardian, and pleaded such conviction in bar of the second, would the evidence necessary to sustain the second indictment, in that case, have been sufficient to procure a legal conviction on the first? Most unquestionably it would not. Then they are not the same offences. The evidence of the one will not support the other, and "it is," in the language of Chitty, "inconsistent with reason, as it is repugnant to the rules of law, to say that the offences are so far the same, that an acquittal (or conviction) of the one will be a bar to the prosecution of the other."

Judgment affirmed.

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MAZZIA V. STATE.

1. LIQUORS: *Sale in prohibition districts: "Drag-net proviso."*

Under the act of 1883, amendatory of the license law, and known as the drag-net proviso, (Mansf. Dig., sec. 4522,) a conviction for selling liquor without a license may be sustained in a prohibition district where no license can be legally issued. *Chew v. State*, 43 Ark., 361.

2. SAME: *Same: Penalty of revenue law.*

The provisions of the revenue act of 1883, creating the offence of carrying on the business of a liquor seller without a license, amended by implication the general license act of which they thus became a part. By such amendment the drag-net proviso of the license law, (Mansf. Dig., sec. 4522,) was made applicable to the penalty of the revenue act, and that penalty may therefore be imposed on one who carries on the business of selling liquors in a prohibition district.

3. INSTRUCTIONS: *Oral explanation of written charge.*

Where a party demands that the jury be instructed in writing, it is error to make verbal explanations of the written charge; and unless it affirmatively appears that such error was harmless, it is ground for reversal.

APPEAL from *Saline* Circuit Court.

J. B. WOOD, Judge.

L. Leatherman and *G. W. Murphy*, for appellant.

The revenue law and the local option law cannot be enforced in the same territory at the same time. The penalties provided by the revenue law are suspended in territory where no license can be issued. Acts 1883, p. 212; Ib., p. 192; Acts 1879, p. 33; 35 Ark., 414–422; 34 Id., 381; 41 Id., 305; Ib., 308.

Since the drag-net proviso of act March 26th, 1883, this court has held that the indictment might be framed under the three mile law or the amended license act, 43 Ark., 361. But the general revenue act contains no such drag-net provision. The penalty is alone to enforce payment of license *when license can be had*, and the *gravamen* of the offence is *defrauding the State of her license tax*. 45 Ark., 93. The legislature certainly never intended to collect a tax in a locality where the sale of liquor was *prohibited*. Sec. 4, revenue law, provides for a *tax* upon those engaged in the business of a liquor seller. 34 Ark., 383. The act 31st March, 1883, passed *after* the three mile law and license law as amended did not expressly or impliedly

repeal them, for if so no license could have been granted. In enforcing penalties the revenue law should be construed strictly and not be extended beyond the exact words and intent of the act. It was not intended as a police regulation, but to guard against *defrauding* the State out of her revenue. See *Chamberlain v. State*, 6 S. W. Reporter, 424; 9 Id., 11; 41 Ark., 308; Ib., 305.

2. The court erred in giving to the jury verbal explanations of written instructions. Constitution Ark., 1874, Art. 7, sec. 23; 29 Ark., 268.

3. The indictment should charge that defendant was a liquor dealer, and the evidence must show not a solitary sale, but that the trade had been carried on in violation of law. 34 Ark., 340.

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

Appellants were indicted for engaging in the sale of liquors without paying the tax required by the revenue act of March 31, 1883, (sec. 5594, Mansf. Dig.,) as amended by act of March 20, 1885, (Acts of 1885, p. 88.)

The act of March 31, 1883, is a revenue act strictly, and not a license act. It is not inconsistent with and does not repeal the act of March 8, 1879, entitled, "An act to regulate the sale of vinous, ardent, malt or fermented liquors," which is the liquor license act of the State. This license act prescribes the terms and conditions upon which one may exercise the privilege of engaging in the liquor business, and the revenue act levies a tax upon such business. The license act punishes *any sale of liquor without license*, regardless of the quantity sold, while the revenue act only punishes those who *engage in the business as a liquor dealer, without paying the tax*. They cover different fields of legislation. *Blackwell v. State*, 45 Ark., 90.

The "local option act," in localities where it was put in force, suspended only the license act. Such only is the extent of the decision of this court in *State v. Cathey*, 41 Ark., 308. It never suspended the revenue act a for any purpose whatever. The act of March 26, 1883, (sec. 4522, Mansf. Dig.,) was necessary to sustain an indictment in local option districts under the license act, but it was not necessary to sustain an indictment under the revenue act. There is no inconsistency between the local option and the revenue acts, but both may exist and be enforced in the same locality.

The tax levied on the traffic in liquors is not equivalent to a license of the traffic; *Youngblood v. Sexton*, 32 Mich., 408, 418. Taxes upon business are usually collected in the form of license fees, but this does not imply a license. There is no necessary connection whatever between them. A business may be licensed and not taxed, or it may be taxed and not licensed, and a tax may be levied on a business already licensed independently of the tax. *Youngblood v. Sexton*, *supra*, 425; *McGuire v. Com.*, 3 Wall., 387; *Pervear v. Com.*, 5 Ib., 475; *License Tax Cases*, Ib., 462. In the three cases last cited, it is clearly held by the Supreme Court of the U. S. that the Federal government may lawfully tax the business of carrying on the liquor traffic in a State where such traffic is forbidden by the State law. And the same thing may be done by the State in localities where local option prevails. It is not licensing the unlawful traffic, but it is simply taxing it, imposing a burden upon it. *Youngblood v. Sexton*, *supra*, 425–6. And the failure to pay such tax may be punished criminally. *License Tax Cases*, *supra*. The convictions were proper and should be sustained.

COCKRILL, C. J.

The appellant was convicted of carrying on the business of a liquor seller without license, in the city of Hot Springs, Garland county, where the local option law was in force. It is argued that the penalties of the statute defining the offence are suspended in the territory where no license can be issued; and, to sustain the position, we are cited to the case of *State v. Cathey*, 41 Ark., 308, where it was held that the liquor seller was liable only to the penalties pronounced by the local option law, for sales in local option districts. See, too, *DeBois v. State*, 34 Ark., 381; *State v. Orton*, 41 Ib., 305. But the legislature remedied this defect in the license law by an amendment passed in 1883, known as the drag-net proviso to the license law, [Acts 1883, p. 192,] by which it was provided that one who sold liquor in territory where sales were prohibited, might be convicted as for a violation of the license law, or of the local option or special law which prevailed in the territory where the sale was made. Since that enactment we have regarded the penalties of the license act as in force in prohibition districts, and have adjudged that a conviction for selling without a license may be sustained even in a locality where no license could be legally issued. *Chew v. State*, 43 Ark., 361. But the offence of carrying on the business of a liquor seller, as distinguished from the offence of casual selling without license, was created by the revenue act of 1883, which was enacted subsequent to the license law; and it is argued that this offence is not within the terms of the drag-net proviso above mentioned, and that the case is controlled, therefore, by the decisions cited *supra*.

1. LIQUORS: Sale in prohibition districts: Drag-net proviso.

The drag-net proviso was enacted prior to the revenue law of 1883, and by its terms extends the penalties of the

2. SAME:

general license law to sales in prohibition territory. Now, as penal acts are construed strictly so as not to extend their terms beyond the clearly expressed intent of the legislature, the proviso mentioned cannot be said to cover the subsequently defined offence, unless it is apparent that the act creating it became a part of the license law to which the proviso is attached. The rules for construing a proviso are not different from those that govern any other legislative expression. *Friedman v. Sullivan*, 48 Ark., 214. It is the intent that is to be arrived at from the context in all cases. The proviso here is not coupled with any particular provision of the license law, but it was the evident intention to extend it to all the penalties denounced by that law. Hence, its denomination as the drag-net proviso. If the license act had been expressly amended subsequent to the proviso so as to change the penalties, or add a new offence, the terms of the proviso would attach to the amendment without doubt, because the intention to make the new provisions part and parcel of the old law would be express. But an act may be modified, changed or amended by implication as effectually as by express reference, [*Hill v. Coates*, 41 Ark., 149; *Scales v. State*, 47 Ib., 476; *People v. Mahaney*, 13 Mich., 481,] and when that is done the law is read as one harmonious whole, just as though it had been originally so arranged by the law making power. It is the only method of arriving at the legislative intent where there are several acts upon the same subject. Following this well understood and common practice, the learned gentlemen who revised the statutes in 1884, incorporated the liquor license provision of the revenue act of 1883 into the general license act, making the drag-net proviso read as applicable to the new penalty denounced by the revenue act, Mansf. Dig., secs.

4511, 4522. It is true we held in *Blackwell v. State*, 45 Ark., 90; that the revisers fell into error in substituting the penalties of the revenue act for those of the license act; but that was only upon the theory that the two acts were consistent in that respect, both penalties remaining in force. But there is nothing in that case from which it can be inferred that the revisers erred in applying the proviso to the new penalty.

Penalty of revenue law.

The provisions of the revenue law about the liquor traffic were not designed for revenue only, else the traffic would not have been prohibited and made illegal except upon the condition of taking out a license. The heavier penalty imposed shows it a severer disciplinarian than the former license act. The price to be paid for the liquor license provided for in it superceded the regulation of the license act, both as to wholesale and retail licenses, leaving the machinery for obtaining license to be governed by the latter act, as was ruled in *Drew Co. v. Bennett*, 43 Ark., 364. The license provisions of the revenue act have thus been treated by the court as modifying and amending the general license act, thereby becoming a part of it. When thus amended, the general proviso of the former act became applicable to the act as amended, and made the liquor seller chargeable with the heavier penalty wherever he carries on the business illegally. We applied the same rule in construing the several statutes of limitation in the case of *Railway v. Manees*, 49 Ark., 248, and there are numerous instances in which it has been silently recognized. The body of the statute law would be in inextricable confusion under any other rule of construction.

In sustaining a conviction for selling without a license where the law prohibits the issue of a license, the courts thus

follow the expressed will of the legislature; but, if the appellant's contention were true that the provisions of the revenue act above referred to were directed solely to the purpose of taxation for revenue, with no other object in view, he could derive no relief from it, for the seeming inconsistency of condeming one for selling without paying the tax where no tax is legally payable, is not real. The assumption that to charge one with selling without paying the tax implies (falsely) that the payment of the tax would have legalized the business in a prohibited district, rests upon the judicial anomaly that a violation of the local option law, which prohibits the traffic, is a justification for a violation of the taxing law. But the two acts tend to the same end—the heavier tax of the revenue law being in aid of and not antagonistic to the local option law. *Youngblood v. Sexton*, 32 Mich., 406; *License Tax Cases*, 5 Wall., 462.

3. INSTRUCTIONS: Oral explanation of written charge.

When the court was about to instruct the jury, the defendant made a special request that the charge be wholly in writing. The court charged the jury in writing, but in doing so made "verbal explanations," as the bill of exceptions has it, "of the written instructions, explaining to the jury how they were to be construed and what the court considered they meant." Objection to this mode of charging was renewed at the time, and the action of the court was assigned as a ground for new trial. The verbal charge was not reduced to writing.

The constitution requires the judge to reduce his charge or instructions to the jury to writing at the request of either party. Art. 7, sec. 23. The law is mandatory and cannot be evaded, when a party demands its execution. *National Lumber Co. v. Snell*, 47 Ark., 407.

A judgment will not be reversed, however, for an unsub-

stantial error in this regard more than any other; as where provisions of the statute are read to the jury without being transcribed, [*Palmore v. State*, 29 Ark., 268] or where the oral charge is simple and without complication and is accurately reduced to writing without unnecessary delay and is set out in the bill of exceptions. *Lumber Co. v. Snell*, 47 Ark., *supra*. In such cases we can judicially determine that the error was not prejudicial. *O'Donnel v. Segar*, 25 Mich., 379–80. But when it does not affirmatively appear that the error is harmless, we cannot disregard the mandate of the constitution. The right guaranteed by the fundamental law would be worthless if it was incumbent on the defendant to show that the charge was erroneous, because that error itself would be ground for reversal. The object of the law was to obtain a carefully considered charge and to prevent any misconception and after-misunderstanding as to its exact tenor and phraseology, when the bill of exceptions came to be considered. *Barkman v. State*, 13 Ark., 705. Oral explanations of the written charge are within the mischief as well as the oral charge. *O'Donnel v. Segar, supra; Head v. Langworthy*, 15 Iowa, 235; *Ray v. Wooters*, 19 Ill., 82; *O'Hara v. King*, 52 Ib., 306; *Bradway v. Waddell*, 95 Ind., 170; Sackett on Instructions to Juries, p. 13, sec. 1; Thompson Charg. Juries, sec. 104.

It would not do to indulge the presumption that the oral explanation did not change or modify the written charge any more than the presumption that the charge is right in a case where the court refuses to reduce it to writing.

For this error the judgment must be reversed. It is so ordered.

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HANLON V. STATE.

1. LIQUORS: *Dealing in: Penalty in prohibition districts.*

The penalty of the Revenue Act of 1883, for carrying on the business of a liquor seller without a license, is in force in prohibition districts. *Mazzia v. State, ante.*

2. SAME: *Same: Instruction.*

On a trial for carrying on the business of liquor selling without a license, a police officer testified that he collected money from the defendant on several occasions without explanation as to the purpose of the collection, but that he was instructed by his superior to collect the same amount from each liquor dealer in the city. There was evidence to show that the defendant was in fact engaged in the business and the court instructed the jury that the fact that the city officials may have permitted the defendant to carry it on and collected money from him for the privilege did not justify a violation of the liquor law. *Held:* That the charge was not erroneous and that there was evidence to justify it.

3. PRACTICE IN SUPREME COURT: *Harmless error.*

Where incompetent evidence is given to the jury without objection and is afterwards withdrawn, its admission cannot be assigned as error.

4. DEALING IN LIQUORS: *Evidence of.*

The testimony of railroad and transfer agents, that during the period in which a defendant is charged with carrying on the business of a liquor dealer without a license, they at different times received and delivered to him large quantities of intoxicating liquors, consigned to him, tended to show that he was engaged in the liquor traffic, and was not therefore irrelevant.

APPEAL from *Saline* Circuit Court.

J. B. WOOD, Judge.

G. W. Murphy and *L. Leatherman*, for appellants.

1. The penalties prescribed by the Revenue Act are suspended in the prohibited districts where no license can be issued. See argument and authorities cited in brief in *Mazzia's case, ante.*

2. There was no evidence upon which to base the instruction that the fact that the officials of Hot Springs allowed defendant to carry on the business and collected money from

him for the privilege, was not a justification for a violation of the law. The instruction was abstract and misleading.

3. The testimony of railroad and transfer agents as to freight being billed whiskey and beer was irrelevant, hearsay merely.

4. The verdict is unsupported by the evidence.

5. It is error to admit hearsay evidence, even though the court tell the jury not to consider it. It has a tendency to prejudice the jury.

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

See brief in *Mazzia's case, ante.*

COCKRILL, C. J.

1. LIQUORS: Dealing in: Penalty in prohibition districts.

The appellant was convicted of carrying on the business of a liquor seller without a license in territory where the local option law was in force. He contends that the penalties of the law creating the offence are not in force in such territory. We have determined otherwise in *Mazzia v. State, ante.*

2. SAME: Instruction.

At the trial the court instructed the jury that the fact that the officials of the city of Hot Springs, where the offence was charged to have been committed, may have allowed the defendant to carry on the business of a liquor seller and collected money from him for the privilege, was not a justification for a violation of the liquor law.

It is not contended that there is error in the proposition of law involved in the instruction, but that it is misleading because it is abstract, being without testimony to justify it.

A police sergeant of the city testified that he had collected money of the defendant on several occasions, without explanation from either of them as to the purpose of the collection, but that he was instructed by his superior to collect the

amount, which the defendant paid him from each of the liquor dealers in the city, and that he collected of the defendant because he knew he was engaged in the business. There was ample proof that he was in fact engaged in the business. The payment under the circumstances was a criminating fact, from which the jury might have inferred that the defendant was undertaking to purchase immunity from punishment by payment to the city officials, and the instruction was appropriate to prevent any misapprehension as to the law governing the case.

3. PRACTICE: Harmless error.

The sergeant also testified, without objection, that his superior had informed him that there was an agreement between the city authorities and this defendant to pay the amount collected from him; but upon the subsequent motion of the defendant this statement was withdrawn from the jury by the court as hearsay, and it cannot be assigned as error.

4. DEALING IN LIQUORS: Evidence of.

The railroad and transfer agents testified that they had, at different times, received for, or delivered to, the defendant, large quantities of freight consigned to him, consisting of intoxicating liquors, during the period he is charged to have been carrying on the business. It is objected that the testimony is irrelevant. While the fact of having the liquor in possession did not of itself constitute the offence, receiving supplies from time to time, as any dealer in the business would, tended to prove the fact that defendant was engaged in the liquor traffic. The testimony leaves no doubt of the fact.

Affirm.

GREEN V. STATE. JONES V. STATE. MITCHELL V. STATE.

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1. HOMICIDE: *Murder in first degree: Intent.*

One who commits a homicide is not guilty of murder in the first degree unless there existed in his mind before the act of killing, a specific intent to take the life of the person slain. But it is not necessary that such intent be formed for any particular length of time before the killing; and where it is the result of deliberation and premeditation and reason is not dethroned, it may be conceived in a moment.

2. SAME: *Same: Instructions.*

On a trial for homicide the court gave in charge to the jury the statutory definition of murder in the first degree, (Mansf. Dig., sec. 1521,) and instructed them that if the defendant inflicted the wounds on deceased as charged, "with the intent, formed in the mind at the time of the injuries, to take deceased's life and that such wounds did cause the death of deceased," they might convict of murder in the first degree. The court also charged the jury as follows: "An unlawful act, coupled with malice and resulting in death, will not of itself constitute murder in the first degree, but, in order to constitute murder in the first degree, the killing must have been intentional, after deliberation and premeditation." *Held:* That the jury were correctly charged as to the intent necessary to constitute murder in the first degree, since the effect of the instructions was to tell them that such intent must have preceded the act of killing.

3. SAME: *Same: Evidence.*

On a trial for homicide, the evidence showed that the defendants and others combined to take the deceased from his room for the avowed purpose of whipping him; that during the night they entered the room in which he was sleeping and having forcibly carried him out, cruelly beat him; that on the next day his dead body was found wrapped in a quilt and near it a number of switches with "frazzled ends;" that his skull was fractured, one arm, the collar bone and three ribs were broken and the body lacerated with switches. *Held:* That, although there was no evidence to show who struck the fatal blow, the defendants having combined to commit a crime, are all responsible for the killing committed in the prosecution of the common design and that the verdict convicting them of murder in the first degree is sustained by the evidence.

4. SAME: *Evidence of accomplice.*

Where a witness for the State, in a trial for murder, failed to report what he knew for two days through fear and because the accused had threatened

to kill him if he did report it, such failure did not make him an accomplice in the crime.

APPEALS from *Clark* Circuit Court.

R. D. HEARN, Judge.

A. Curl, for appellants.

It is manifest from the instructions given and refused by the court, that it held to the idea that an intentional killing, when not committed under justifiable circumstances, is, *per se*, murder in the first degree. Is this law? We think not. There is wanting the elements of deliberation and premeditation, and the intent to kill does not, necessarily, imply either. Deliberation signifies a measurable degree of calmness; premeditation means meditation upon before hand; yet the court said: "If at the time the blow is struck the intent to take life exists, the killing is murder in the first degree."

This is error. Mansf. Dig., sec. 1521; Whart. Law of Hom., p. 368. The killing must be (1) willful, (2) deliberate, and (3) premeditated. Ib., 368.

See, also, 7 Hump., 479-494; 1 Lea, (Tenn.) 285; 64 Ind., 56-60; 3 Kan., 450-482; 66 Mo., 13; 67 Id., 594.

Deliberation and premeditation are necessary ingredients in the crime of murder in the first degree. 11 Ark., 455; 35 Id., 585; 37 Id., 238; 40 Id., 511.

2. The only testimony corroborative of, or that connects appellant with, the killing is that of Bragg and Jim Mitchell. Bragg was one of the parties under indictment, and Mitchell is the only witness that corroborates Bragg. They were both accomplices, and one could not corroborate the other. Besides, their testimony is contradictory; one of them *lied*, and probably both.

3. The verdict is contrary to the evidence.

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

The evidence in this case, we think, shows a clear case of guilt, and the court properly charged the jury.

Instructions 1 and 2 are taken from the statutes. Mansf. Dig., secs. 1516 to 1522 inclusive.

Instruction number 3 was properly given. *Green v. State*, 38 Ark., 317.

Instruction number 4 properly defines the doubt upon which acquittal should be based. *Palmore v. State*, 29 Ark., 248.

Instruction number 5 is based upon the statute. Mansf. Dig., secs. 1505-1506; 37 Ark. Rep., 274.

However, it is useless to argue any of the instructions given at the instance of the State, save 7, 8 and 11, for no exception was saved to any other.

Instruction number 7 is supported by *McAdams v. State*, 25 Ark., 405; *Wright v. State*, 42 Ark., 94; *Palmore v. State*, 29 Ark., 248.

We presume the objection to instruction number 8 is based upon the concluding part of it. We think it is clearly the law. *Howard v. State*, 34 Ark., 433.

Instruction number 11 must be taken in connection with the other instructions, and when so taken the jury were properly instructed. *Dunahoe v. Williams*, 24 Ark., 264.

Instruction "1 A" was properly modified by the trial court. *Casat v. State*, 40 Ark., 511.

Instruction "2 A," asked by defendant, was properly modified by the court. Mansf. Dig., secs. 1519, 1522, 1532, 1533.

The court properly instructed the jury as to a conviction on the testimony of an accomplice, and what it takes to constitute an accomplice in instructions numbers 12 and 13.

Now, there is no evidence to show that Mitchell was an

accomplice in any sense of the word, and a legal conviction might well be had upon the evidence of him and the witness Bragg.

We think this court has fully settled all questions raised on this point in the case of *Melton v. State*, 43 Ark., 371.

The verdict is amply sustained by the evidence.

BATTLE, J.

Willis Green, Dan. Jones, Anderson Mitchell and others were jointly indicted for the murder of Arthur Horton. They severed their trials, and Green, Jones and Mitchell were separately convicted of murder in the first degree. They filed separate motions for new trials, which were denied, and, severally, appealed to this court. One of the grounds of Green's complaint is, the court did not properly instruct the jury, in his trial, as to the intent necessary to constitute murder in the first degree.

1. HOMICIDE: Murder in first degree: Intent.

In order to constitute the killing of a human being murder in the first degree, there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. It is not necessary, however, that the intention be conceived for any particular length of time before the killing. It may be formed and deliberately executed in a very brief space of time. If it was the conception of a moment, but the result of deliberation and premeditation, reason being on its throne, it would be sufficient. The law fixes no time in which it must be formed, but leaves its existence as a fact to be determined by the jury from the evidence. *Bivens v. State*, 11 Ark., 455; *McAdams v. State*, 25 Ark., 405; *McKenzie v. State*, 26 Ark., 339; *Fitzpatrick v. State*, 37 Ark., 256; *Casat v. State*, 40 Ark., 524; *State v. Wieners*, 66 Mo., 13; *Com. v. Drum.*, 58 Penn. St., 9; *People*

v. Majone, 91 N. Y., 211; Bishop Cr. Law, [7th Ed.] sec. 728; Wharton Cr. Law, [9th Ed.] sec. 380.

2. SAME: Instructions.

As to what is necessary to constitute murder in the first degree, the court charged the jury, in the trial of Green, as follows:

"All murder which shall be perpetrated by means of poison or by lying in wait or by any other kind of *willful, deliberate, malicious and premeditated* killing * * * shall be deemed murder in the first degree."

"If the jury believe from the evidence beyond a reasonable doubt that the defendant, either by himself or in connection with others, inflicted the wounds or injuries on deceased, Horton, as charged in the indictment, with the intent, *formed* in the mind at the time of the injuries, to take deceased's life, and that such wounds or injuries did cause the death of deceased, they may convict of murder in the first degree."

"An unlawful act, coupled with malice and resulting in death, will not of itself constitute murder in the first degree, but in order to constitute murder in the first degree, the killing must have been *intentional, after* deliberation and premeditation."

In order to constitute a homicide murder in the first degree according to these instructions, the killing must have been willful, deliberate, malicious and premeditated; there must have been an intent to take the life of the deceased in the mind of the slayer at the time the act of killing was done; and the intent must have been formed after deliberation and premeditation. This is, in effect, telling the jury that the intent must have preceded the killing. This is the only construction which can be fairly placed upon these instructions, and, construed in that way, they are correct.

3. SAME: Evidence.

Appellants insist that the verdicts against them are contrary to law and evidence. The evidence shows that they and others banded together to take Arthur Horton from his room and whip him; that, during the night of the 21st of May, 1888, they entered the room in which he was sleeping, and forcibly took and carried him away for a short distance and whipped and beat him most cruelly. On the next day his dead body was found wrapped in an old quilt, and near it a number of switches, or small sticks, with "frazzled ends." The skull was fractured; there was a severe cut across the face; three of his ribs were broken down; the front of the body was lacerated with switches; and one arm and the collar bone were broken. His death was, doubtless, caused by these wounds. There was evidence to sustain the conclusion of the juries, that they were inflicted by those who had taken him out with the avowed purpose of whipping him. But there was no evidence to show who struck the fatal blow. But this does not relieve appellants of responsibility for the crime thereby committed. Having combined to commit a crime, they are responsible for the crime committed in the prosecution of their common design.

In Wharton's Criminal Law the author says: "All those who assemble themselves together, with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. * * * It is not necessary that the crime should be a part of the original design; it is enough if it be one of the incidental probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose. Thus when A and B go out for the

purpose of robbing C, and A, in pursuance of the plan, and in furtherance of the robbery, kills C, B is guilty of the murder. In such cases of confederacy all are responsible for the acts of each, if done in pursuance of, or as incidental to, the common design." 1 Vol., [9th Ed.] sec. 220; *Reg. v. Jackson*, 7 Cox Cr. C., 357.

Mr. Bishop says: "A man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally from some other specific, or general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding according to the common plan, terminate in a criminal result, though not the particular result meant, all are liable." 1 Bishop Cr. Law, [7th Ed.] sec. 636.

In 1 Hale's Pleas of the Crown., 441, it is said: "If divers persons come in one company to do an unlawful thing, as to kill, rob, or *beat a man*, or to commit a riot, or do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of the party abetting him and consenting to the act or ready to aid him, although they did but look on."

In *Brennan v. The People*, 15 Ill., 512, a large number of defendants were indicted for the murder of one Story. Instructions were asked which "required the jury to acquit the prisoners, unless they actually participated in the killing of Story, or unless the killing happened in pursuance of a common design, on the part of the prisoners and those doing the act, to take his life." The court said: "Such is not the law. The prisoners may be guilty of murder, although they neither took part in the killing nor assented to any arrangement having for its object the death of Story. It is sufficient that they combine with those committing the deed to do an

unlawful act, such as to *beat*, or rob Story; and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide."

In *Williams v. State*, 81 Ala., 1, it was held, that "If five or six men combine together to invade a man's household, and they go there armed with deadly weapons for the purpose of attacking and beating him, and in furtherance of their common design, all of the confederates being present, or near at hand, one of them gets into a difficulty with their common adversary and kills him, all would be guilty of murder, although they did not all entertain a purpose to kill." The court said: "The natural and probable consequences of this [conspiracy] is homicide—either one or more of the assailants or of the party thus assailed—and such homicide, when committed by any one of the conspirators, can be nothing less than murder in all who combine to commit the unlawful act of violence, especially if they were near at hand inciting, procuring, or encouraging the furtherance of the act of assault and battery."

In *Peden v. State*, 61 Miss., 268, several persons conspired to take one Walker from his house and whip him. They accordingly took him from his bed, and severely beat him, and in executing this design one of the confederates, named Davis, struck him a fatal blow with a spade, from which he died. It was held that they all were equally guilty, whether they intended to kill or not. The court said: "It is claimed that as the fatal blow was struck by Davis, and the evidence negatives the idea that there was any intent on the part of the accused to kill, he could not be guilty of murder; but on the principle of joint responsibility between the parties

unlawfully engaged, *the guilt of Davis is imputable to the accused.* Whether or not Davis was guilty of murder depends on whether he struck the fatal blow with deliberate design to effect the death of Walker. If he did he was guilty of murder."

In all these cases the appellants, or a part of them, were convicted of murder in the highest degree and were sentenced to death, and the sentence was affirmed by the appellate court.

In *Carr v. State*, 42 Ark., 206, several persons confederated to arrest one Wyatt, and in the prosecution of this design one of them killed him. The court said in that case: "The law upon this subject is, that a man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally from some other specific, or general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding according to the common plan, terminates in a criminal result, though not the particular result meant, all are liable."

We think there was evidence to show that the killing in this case was done in the furtherance or prosecution of the common design of appellants and their associates to whip the deceased. It is highly probable that in the execution of their design they were met by resistance on the part of the deceased and in overcoming that resistance the fatal blow was struck. The circumstances accompanying the killing and the nature of the injuries inflicted indicate a purpose to kill. The cruel and brutal treatment the deceased received shows an intention to do something more than to whip. They are presumed to have intended the natural consequences of their acts. There was evidence to sustain the verdicts of the juries in these cases.

4. Same: Evidence of accomplice.

But it is contended that one of the principal witnesses in these cases was an accomplice in the killing of Horton, and that appellants could not be lawfully convicted on his testimony without corroboration. The evidence on which this contention is based is the witness' own testimony. He testified that he did not report what he testified he knew for two days, and that his reason for not doing so was, the accused had threatened to kill him if he did. The inference is, he remained silent through fear. If the jury believed what he said to be true, they had the right to receive and act upon it. For he was not an accomplice if his failure to report was caused by fear, as was held in *Melton v. State*, 43 Ark., 367.

Judgment affirmed.

ROGERS V. YARNELL.

1. PRACTICE: *Transfer to equity.*

An action at law brought to recover a disputed balance on a complicated mutual account current, extending through a period of thirteen years, was properly transferred to equity.

2. INTEREST: *On mutual account current.*

A mutual account current between the plaintiff, who was engaged in farming and money lending, and the defendants, who were merchants, was begun on the books of the latter in 1871. The plaintiff obtained from the defendants merchandise for himself and supplies for his tenants, and sometimes got from them cash advances. They borrowed money from him from time to time, and in 1873 executed to him their note for $1100, loaned money, which bore interest before maturity. The proceeds of crops raised on the plaintiff's lands, or due from his tenants, were turned over to the defendants year after year, to be credited on the account and the items of debit and credit were entered as one continuous account, without rest or balance until 1884, when the dealings between the parties ceased. The manner of keeping the account, in connection with other evidence, shows that it was permitted to run for mutual convenience, the

balance to be paid by the party against whom it should exist on a final adjustment. *Held:* That until the dealings between the parties ceased, or one of them was called to account, neither could claim a balance for which the term of credit had expired, and on which interest could be computed either by virtue of an implied agreement or by operation of law. Bur the note by its terms bore interest and as it entered into the mutual dealings, the items of the account which are demands in favor of the defendants against the plaintiff should be applied to the payment of the interest and principal of the note after first extinguishing the earlier demands of the plaintiff against the defendants, as in ordinary cases of partial payments under the statute. (Mansf. Dig., sec. 4758.)

APPEAL from *White* Circuit Court in Chancery.

M. T. SANDERS, Judge.

Rogers brought an action at law against Yarnell & Bro., to recover a balance of $2587.13, which he alleged to be due to him on a mutual account running between the parties through a period of thirteen years. The answer of defendants denied any indebtedness to the plaintiff. They alleged that a note for $1100, which they executed to him in 1873 and with the amount of which they were charged on the account as stated by him, had been paid and pleaded the statute of limitations in bar of a recovery thereon. The answer also, by way of counter-claim or set-off, alleged that the plaintiff was indebted to the defendants on the same account, as stated by them, in a balance of $3670.09. Upon motion of the defendants the cause was transferred to the equity docket and a master was appointed to state the account, making yearly rests in the same, so as to ascertain the balance and to whom due on the first of January in each year and to allow interest on such balance. The master made a report, in which he failed to credit the plaintiff by the amount of the note for $1100, and the court after sustaining exceptions to the report, restated the account and allowed the credit refused by the master. Judgment was then rendered for the defendants

for the balance which the master's statement showed against the plaintiff, less the amount of the note. The plaintiff appealed.

W. R. Coody, for appellants.

1. The court erred in transferring the cause to equity. Mansf. Dig., sec. 4929, 5175; 47 Ark., 209.

2. The statute of limitations has no application to mutual accounts current, where it is understood and agreed that the indebtedness on one side liquidates that on the other *eo instanti*. Mansf. Dig., sec. 4492; *McNeil v. Garland*, 27 Ark., 343; 32 Ark., 346; 14 Id., 192; 22 Id., 301.

3. The court erred in directing the master to ascertain the yearly balance and then calculate interest from the 1st of January of each succeeding year to the time of taking the account. 14 Ark., 196; Mansf. Dig., sec. 4738.

4. While an unliquidated account does not bear interest, yet where it is a uniform custom of a trader to charge interest after a certain time, he is allowed to do so to those who are in the habit of dealing with him, with a knowledge of that fact. 4 Wend., 483; 8 Vt., 263; 2 Dal., 193; 39 Ill., 307.

In mutual accounts interest is to be cast on the annual balances. 48 Vt., 53. The result of the authorities seems to be "that where partial payments have been made on a note or *other claim bearing interest*, the interest is to be computed on the principal sum from the time when interest commenced to run to the first payment, add the interest and deduct payments. The remainder is a new principal upon which to compute interest." 53 Me., 351; 28 Ind., 488; 66 Ill., 361; 1 Heisk., (Tenn.,) 574; 35 Cal., 692; 8 Watts & S., 18; 2 Wash., (C. C.,) 167; 4 Brown, (Neb.,) 190.

The $1100 note bore 10 per cent. from date. 4 Ark., 170; Ib., 199.

J. N. Cypert and *Sanders & Watkins*, for appellees.

The pleadings show a case clearly within equitable jurisdiction, being a case of mutual, complicated and disputed accounts, running for years.

The statute of frauds was never pleaded below and cannot be heard at the trial. 32 Ark., 97 and 116.

The $1100 note was merely brought into the account as a debit to balance credits already given appellant, but taking Rogers' view of it as an independent transaction given for borrowed money, and should not be an item in the account, then it is long since barred by limitation.

COCKRILL, C. J.

1. PRACTICE: Transfer to equity.

The subject of controversy was a complicated, disputed mutual account current, covering a period of thirteen years. The transfer to equity was not therefore error. *Trapnall v. Hill*, 31 Ark., 345; *Conway v. Rayburn*, 22 Ib., 301; *State v. Churchill*, 48 Ib., 426.

The Yarnells have prosecuted no appeal, and our inquiry is limited to the errors complained of by Rogers. The master's report of the allowance against him of items of the account to which he excepted, is sustained by the proof and it is useless to recount it. The only questions presented by the appeal that are worthy of consideration are whether the account or any of its items bore interest and if so on what part, at what rate and for what time? To decide these questions it is necessary to understand what was the agreement between the parties, and if there was no express agreement, what must have been understood to be the contract between them about interest.

It is the rule in this State to allow interest on open accounts after the term of credit has expired. *Roberts v. Wilcoxson*, 36 Ark., 355; *Railway v. Donnelly*, 46 Ib., 87;

Tatum v. Mohr, 21 Ib., 355. And according to common custom, accounts between farmers and merchants are due annually. *Higgs v. Warner*, 14 Ark., 192. But if the dealings of the parties show that they have not been conducted with reference to such a custom, there is no presumption that the accounts mature annually.

The facts in this case are in substance as follows: The Yarnells were merchants at Searcy, in White county. Rogers kept his office in their counting room and was engaged in money-lending and farming, the latter business being carried on mainly by his tenants, who drew their supplies from Yarnell's store upon Rogers' credit. He also had an account with the Yarnells for goods and merchandise furnished himself. The Yarnells borrowed money from him from time to time; the proceeds of crops raised on Rogers' lands or due from his tenants were turned over to them year after year to be credited on the account, while Rogers sometimes got advances of cash from the Yarnells to aid him in his operations. The account was opened on the Yarnells' books in 1871. The items of debit and credit were entered as one continuous account without rest or balance until it was closed by a cessation of dealings in 1884. The only effort at a statement of the account was a footing of the total debits and credits at the bottom of each page, which were carried forward at the top of the next, regardless of the dates and years, and from which an approximate idea of the shifting balances might be obtained at any time. Rogers kept no account of the transactions, but had constant access to Yarnell's books, and the proof shows that he availed himself of the opportunity to examine them when he desired. It does not appear that any communication which would shed light upon the questions under consideration ever took place between the

parties respecting the account from its commencement to its close. Occasionally a charge or credit of interest upon a cash advance appears in the account, and the evidence shows that these items were probably agreed upon at the time of entry. Rogers testified that it was not his intention to claim or charge interest on advances made by him except when he departed from the usual course of dealing and took an evidence of indebtedness in the form of a note; and the Yarnells testified that when they gave a note they did not specify that it should bear interest after maturity, because they expected the indebtedness to be extinguished at maturity by the items of their account against Rogers.

2. INTEREST: On mutual account current.

The manner of keeping the accounts between the parties, acquiesced in for so long a time, shows a reciprocity of dealing, which is confirmed by the testimony above detailed. Charges upon the one side were evidently intended to be credited or set off *eo instanti* against the charges upon the other, and the account was permitted to run for mutual convenience, the balance to be paid by the party against whom, upon final adjustment, it should be found to exist. The delay in settlement was mutual and voluntary. There were strong reasons for it on both sides—each was enjoying advantages offered by the other—and until the dealings ceased or one party was called upon to account, neither could claim a balance. Until such an event, the account was unsettled, the term of credit had not expired and there was nothing upon which interest could be computed, either by virtue of an implied agreement or operation of law. Interest is allowed only when a debtor is in default. *Adams v. Bank*, 36 N. Y., 215.

There was no foundation, therefore, for the basis of annual rests which the court fixed in its order of reference to the

master for the computation of interest, or in the computation which was subsequently made by the court when the report of the master was set aside and the account restated. That would be proper only upon the hypothesis that the dealings of the parties indicated that it was their intention to strike a balance annually. See *Pickett v. Merchant's Bank*, 32 Ark., 355–6; *Langdon v. Castleton*, 30 Vt., 285; *Davis v. Smith*, 48 Ib., 53.

As a general rule interest is allowable on cash advances from the time they are made though they rest in the form of mutual, current unliquidated accounts. *Liotard v. Graves*, 3 Caines' Cases, 226; *Reid v. Rensaler*, 3 Cow., 393; 4 Wait's Actions and Defences, p. 130. As we have seen, the parties did not so intend in this case. But there is no presumption of a want of intention to charge interest on the note for eleven hundred dollars, given for loan of money, which the court found entered into the mutual dealings of the parties and for the amount of which Rogers was entitled to credit. By its terms the note bore interest at the rate of ten per cent. per annum before maturity, and thereafter, according to the established rule, at six per cent. *Newton v. Kennerly*, 31 Ark., 626.

The note was barred by the statute of limitations unless it entered into the mutual account, and as Rogers can recover upon it only upon the theory adopted by the court and which the Yarnells have not undertaken to controvert by prosecuting an appeal, it follows that the items of the account which are demands in favor of the Yarnells against Rogers should be applied to the payment of the interest and principal of the note after first extinguishing the earlier demands of Rogers against Yarnell, as in ordinary cases of partial payments under the statute. Mansf. Dig., sec. 4738.

The very essence of a mutual account current is that the indebtedness on one side, at the instant of its creation, liquidates *pro tanto* the subsisting indebtedness on the other. *Higgs v. Warner*, 14 Ark., *supra; McNeil v. Garland*, 27 Ib., 343.

The decree of the circuit court is reversed and a decree will be entered here when the account is restated.

The account will be referred to W. P. Campbell as master for a statement of the balance due. He will take the account as kept between the parties as a basis, deduct therefrom the items that were disallowed by the chancellor on hearing the exceptions to the master's report, give Rogers credit as allowed by the chancellor for $1100 and interest at ten per cent. per annum from the date of the note executed by Yarnell for that sum until its maturity, and six per cent. thereafter until it is extinguished by charges against Rogers, the credit to be entered as of the date of maturity; he will compute no interest upon any other item of the account, but take the items as stated in the account after the corrections made by the chancellor, allowing the several cross demands to operate as payments *pro tanto* from their respective dates and strike the balance. Interest will be computed on that balance so found from the first day of January, 1885, to the confirmation of the report and entering of the final decree herein.

STATE v. WOOD.

51 205
80 309
82 412

1. COUNTY TREASURER: *Informality in bond of; Action against.*

The bond of a county treasurer by the terms of which he and his sureties bind themselves that he shall truly account for and pay over all moneys which may come to his hands by virtue of his office is valid, although it

names no obligee; and under sec. 1067, Mansfield's Digest, the State may bring an action on such bond for the use of the county to replace money never legally drawn from the treasury and for the amount of which the treasurer is a defaulter.

2. SAME: *Breach of Bond.*

The failure of a county treasurer to bring public funds received by him, and not expended, into court to be counted, under an order of the county court made at a regular settlement of his accounts, is a breach of his official bond, and such failure cannot be excused by showing that the money was lost through the insolvency of a bank in which he had deposited it.

3. SAME: *Same: Measure of damages.*

In an action to recover for the breach of a county treasurer's bond, committed by a failure to keep the public funds to be paid to those entitled thereto, the adjustment of his accounts by the county court, at a regular annual settlement, concludes further inquiry as to the state of such accounts, and the amount thus ascertained to be due with legal interest from the date of the settlement is the measure of damages.

APPEAL from *Benton* Circuit Court in Chancery.

J. M. PITTMAN, Judge.

This was a suit in equity brought by the State for the use of Benton county against T. H. Wood and the sureties on his bond as treasurer of that county. The object of the suit was to reform the bond and recover damages for a breach thereof. The informality in the bond consisted in its failure to specify any obligee. In other respects it was substantially in the form required by the statute. The complaint alleged that Wood wrote it and through fraud, accident or mistake omitted to name the obligee. The breach complained of was that the county court having found that Wood, since filing the bond, had received certain sums of money and scrip belonging to the county and to the school districts of the county, which had not been expended, required him to bring them into court to be counted and that he failed to do so and also failed to pay over said sums to the county and districts. The defendants demurred to the complaint and also

answered it. The answer contains (1) a denial of the allegation made in the complaint that the failure to name any obligee in the bond was the result of fraud, accident or mistake, and insists that the omission renders the bond void; (2) an averment that no demand had ever been made upon Wood or his sureties for the payment of the sums sued for, and that his only default was in failing to bring the moneys into the county court to be counted; (3) that there was no memorandum in writing of the agreement alleged in the complaint to insert the name of the State in said bond.

The cause was heard on the pleadings and evidence and the court sustained the demurrer and dismissed the complaint for want of equity. The plaintiff appealed.

J. Frank Wilson and *E. P. Watson*, for appellant.

1. This being a bill to reform a bond for mistake and involving a complicated account running over a period of several years and a great many school districts being involved, was properly brought in chancery. 48 Ark., 426.

2. The fact that there was no obligee in the bond did not invalidate it. Mansfield's Digest, sec. 5303; *Gray v. Rhump*, 2 Hill (S. C.) Chy.; 95 Ill.; 2 Bradwell, 332; 31 Iowa, 272; 15 La. Ann, 551; 53 Me., 89; 31 Ind., 26; 23 Mich., 457; 23 Minn., 551; *Houghtaburg v. Brock*, 44 Mich.; 45 Mich., 79; 76 Ill., 383; 22 Mich., 461; *State v. Lafayette Co.*, 75 Mo.; *State v. O'Gorman*, Ib., 77 Mo., 647; 85 Ill., 495.

3. The breach occurred when he failed to produce the funds when ordered by the county court. 16 Bradwell, 49; 78 Ill., 394; 77 Mo., 647; 75 Mo., 370; 76 Ill., 383.

4. A court of equity once obtaining jurisdiction will

pursue the matter to a conclusion. Pom. Eq., 491; 2 Johns. Chy., 592; 2 Sumn., 487.

L. H. McGill, for appellees.

1. A county treasurer must enter into *bond* to the State. Mansfield's Digest, sec. 1187. A bond without an obligee is void. 1 Bouvier L. D. "Bond;" 5 Com. Dig., "Obligation," (a) 191; 1 Wait. Ac. and D., 873; 4 Ark. 141; 5 Id., 525; 40 Id., 58; 23 Gratt., 600; 12 Am. L. Reg., 699 and notes; 7 Ire. Law, 262; 41 Cal., 85; 24 N. Y., 330; 2 Brock, 64; 2 Wall., 24; 21 Wall., 272; 59 Tex., 207; Murfree Off. Bonds, secs. 35, 430, 431, 65. See also 7 Neb. 5; 70 Mo., 228.

2. The evidence does not show any breach of the bond. The only evidence is the record of the county court's settlement with Wood, which shows a sufficient excuse for not bringing the funds into court to be counted. There was no breach until he was ordered by the county court to pay over the money to his successor in office, or on warrants properly drawn, and he failed or refused to do so. See Mansfield's Digest, secs. 1199, 1747, 1785, 1200; 35 Ark., 177; 39 Id., 172.

COCKRILL, C. J.

It is argued with great earnestness that the treasurer's bond which is the foundation of the suit is void, upon the ground that it names no obligee. The fallacy lies in the assumption that the obligation has not been assumed to any one.

A bond is construed like any other contract or instrument of writing—it is enough that the intent plainly appears, though it be not fully and particularly expressed. *Partridge v. Jones*, 38 Ohio St., 374. "If there ever was a time," says the court in the case cited, quoting from another case, "when

the court listened to trivial verbal inaccuracies in contracts when the real meaning and intention of the parties was plain, that time has gone by, and the only object of the courts is, that when the meaning and intention of the parties are perfectly plain, no grammatical inaccuracy or want of the most appropriate words, shall render the instrument unavailing."

1. COUNTY TREASURER: Informality in bond of.

It was never regarded as necessary that the obligee in a bond should be specified *eo nomine*. It was enough if he was so designated that he might be certainly ascertained. *Preston v. Hall*, 12 Am. Law Reg. and note; *Fellows v. Gilman*, 4 Wend., 419. It needs no statute to enable an officer to give a valid bond for the faithful payment of money that may come to his hands, and, if we regard the bond in suit as a common law obligation without looking for aid to the statute which the parties undertook to follow in drafting it, it will be seen that the fair import of the language used is that the bond was intended for the benefit of all whom it might concern, that is, any one who should be injured by the treasurer's official delinquency. It stipulates, among other things, that the treasurer shall truly account for and pay over all moneys coming to his hands by virtue of his office, and the principal and sureties by the terms of the bond bound themselves to the faithful discharge of this duty. The obvious intention of this was to protect and give indemnity to all persons who might be damnified by the officer's neglect legally to keep and pay out the public funds. That is the primary object of all such bonds. *Huffman v. Kopplekom*, 8 Neb., 347; *Crook Co. v. Bushnell*, 13 Pac. Rep., 886. The condition which shows the design of the bond is the important requirement in such an undertaking, and when that is properly framed, as it is conceded it was in this instance, "the naming of an obligee is," as Judge Cooley expressed

it in delivering the judgment for the supreme court of Michigan, "the merest formality possible, so that if the instrument omitted to name one, * * * the substance of the undertaking would remain." *Bay County v. Brock*, 44 Mich., 45. The substance remaining, how can the bond be void for informality?

A bond upon the condition that an officer should make amends to every person who should be injured by his breach of official duty, was enforceable at the suit of any one who was damaged by his official default, when the rules of procedure required that only the party in whom the contract vested the legal interest could maintain an action on it. *Fellows v. Gilman*, 4 Wend., *supra*. The reason is stronger for its enforcement, since the change of procedure enables the party for whose benefit the contract was primarily executed to sue in his own name. *Hunnicutt v. Kirkpatrick*, 39 Ark., 172; *Hecht v. Caughron*, 46 Ib., 132. And it is immaterial in such cases that the party beneficially interested is not mentioned in the instrument, but is undisclosed or unknown. Pomeroy on Rem., etc., sec. 177. There remains then, not even a technical objection to the enforcement of the bond in suit. The question for the circuit court was simply, who should be permitted to stand as plaintiff in the action, the State not being the party in whose name the contract was executed, nor the party in interest? The statute contemplates that the State shall stand as trustee for the parties who have the beneficial interest in such cases, as is evidenced by the requirement to execute the bond to her. Mansfield's Digest, sec. 1187. This is not required as a matter of substance, but only as a part of the machinery of convenient administration, and it would impose no new condition upon the obligors to presume that it entered into their contract that the bond

Action on bond.

should be enforced in the usual way. *County v. Bunberry*, 45 Mich., 79.

But aside from this consideration another provision of the statute allows the State to become the plaintiff for the use of a county where the latter has a demand to be enforced. Mansfield's Digest, sec. 1067. The object of the present suit is to replace in the county treasury money which has never been legally drawn therefrom. The defaulting treasurer was still in office when this suit was instituted, and the county or the State in its behalf was the proper party to move in the matter. *Hunnicutt v. Kirkpatrick*, 39 Ark., *sup.; Pettigrew v. Washington County*, 43 Ib., 33. Moreover no objection was taken in the lower court to the State's capacity to sue, and none can be heeded now. *Pettigrew v. Washington County*, *supra*.

It is argued that no breach of the bond is shown.

2. SAME: Breach of bond.

At a regular annual settlement the county court audited the treasurer's accounts, and upon counting the money brought into court by him, found that he was in default. His excuse for not bringing the other funds into court as he was required by law to do, was that the money had been lost by the failure of a local bank in which he had deposited it. The court refused, as it should have done, to allow him credit for the amount thus lost, but charged him with the full amount. These facts are made to appear from the county court's order of settlement. They show a failure to keep the public funds to be paid to those entitled to receive them. That was a breach of the bond. *Croft v. State*, 24 Ark., 550.

3. SAME: Measure of damages.

The money was lost to the county, and the measure of damages was the amount found due by the county court with legal interest from the date of auditing the account. That settlement concluded any further inquiry into the state of the

officer's accounts. *Hunnicutt v. Kirkpatrick, sup.; Jones v. State*, 14 Ark., 170; *Wycough v. State*, 50 Ib., 102; *George v. Elms*, 46 Ib., 260.

No issue was made against the recovery, except upon the points first mentioned; these were technical and formal rather than substantial. No objection was made upon the right to proceed in equity, and as the facts are undisputed and show a cause of action in the plaintiff, judgment should have been rendered accordingly. *Freed v. Brown*, 41 Ark., 495; *Smith v. Hollis*, 46 Ib., 17.

The judgment of the circuit court is reversed and judgment will be entered here in accordance with this opinion. It is so ordered.

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WILSON v. STATE.

1. COUNTY COLLECTORS: *Rates of commission: Payable "in kind."*

The commission of a collector is limited by the statute, (Mansf. Dig., sec. 5749,) to five per cent. upon the first ten thousand dollars of the whole amount of taxes collected, three per cent. upon the next ten thousand and two per cent. upon the excess over twenty thousand dollars, where the aggregate amount collected exceeds the latter sum. Each fund in which taxes are collected must be made to bear its proportion of the whole expense of collection by paying out of such fund the commission on the amount thereof.

2. SAME: *Restating account: Penalties.*

When a collector credits himself with commissions in excess of the rate which the law allows, and through inadvertence or mistake, the county court approves his account, the court may at any time within two years from the date of such approval restate the account and correct the error. And if the collector fails to pay the balance against him on the readjusted account within the time in which the law requires other balances to be paid, he incurs the penalties prescribed by the statute and he and his sureties may be proceeded against as provided in sec. 5850, Mansf. Dig.

3. PRACTICE IN SUPREME COURT: *Objection waived in court below.*

That a judgment is for too large a sum cannot be assigned as error in the supreme court, unless a new trial was asked on that ground in the court below.

APPEAL from *St. Francis* Circuit Court.

H. N. HUTTON, Special Judge.

N. W. Norton, for appellant.

1. The words "in kind" used in the statute mean from each fund. Mansf. Dig., sec. 5749. Sec. 5851 was only intended to apply to mistakes *of fact*, and not errors of law committed by courts; those can only be corrected by appeal. The question involved in 30 Ark., 306, was one *of fact*.

2. No time was given appellant to pay before the penalties were added. Mansf. Dig., secs. 5846, 5847, 5850. No proper notice was given. Sec. 5852, Ib. No action having been taken at the time and place named, no appearance by appellant and no continuance, jurisdiction was lost, and the action of the court twelve days after and without notice, was a nullity. Sec. 5201, Ib.

COCKRILL, C. J.

1. COUNTY COLLECTORS: Rates of commission: Payable "in kind."

A collector of revenue is entitled to receive as his commission 5 per cent. upon the first ten thousand dollars of the aggregate amount of taxes collected by him, three per cent. upon the next ten thousand and two per cent. upon the excess over twenty thousand dollars. Mansf. Dig., sec. 5749. The commission is payable as the statute expresses it, "in kind," which means that it shall be paid in the same kind of funds that the collector has legally received in payment of the tax, thereby making each fund bear its proportion of the expense of collection. When the aggregate amount of the items upon which the 5 per cent. rate has been computed reaches $10,000, there is no authority for further computation at that rate; and so of the three per cent rate.

2. SAME. Restating account: Penalties.

Where a county court through inadvertence or mistake approves the account of a collector in which he has credited himself with 5 per cent. commission on each item, the aggregate of which exceeds $10,000, it is competent for the court at any time within two years from such approval to restate the account and correct the error. Mansf. Dig., sec. 5851; *White Co. v. Key*, 30 Ark., 603. When the account is thus readjusted and the charge against the collector has not been paid within the time prescribed by statute for the payment of other balances, the penalties prescribed by the statute are incurred and the collector and his sureties may be proceeded against in the county court as prescribed in sec. 5850 of Mansfield's Digest.

In this case the collector had taken credit for five per cent. commissions on more than $20,000, and the county court within two years of auditing the account, set aside the allowance and corrected the error. Aside from the construction of the statute fixing the collector's fees, the only contention in the circuit court on appeal where the action of the county court was confirmed, seems to have been that it was error to set aside the order approving the account. Now it is insisted that the penalties prescribed by the statute should not have been imposed upon the collector without giving him a day to pay off the corrected statement of the account. But the transcript shows that a day was given; and it fails to show that any complaint was made in the circuit court because the judgment was for too much. If the appellant conceived that error had been committed in that regard, he should have directed the attention of the circuit court to it and made it a ground for new trial. Mansf. Dig., sec. 1310; *Railway v. Branch*, 45 Ark., 524.

3. PRACTICE: Objection waived.

Affirm.

BARNETT, Ex parte.

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1. HABEAS CORPUS: *Erroneous proceedings not corrected by.*

The petitioner entered a plea of guilty to an indictment for criminal abortion and the court assessed his punishment as upon conviction of a felony. On the next day, having concluded that the indictment charged only a misdemeanor the court, caused the plea to be withdrawn, quashed the indictment and made an order for the submission of the charge to the grand jury and for admitting the prisoner to bail. After the court had adjourned for the term the prisoner, who remained in jail, presented to the judge at chambers his application to be discharged on *habeas corpus*, which was refused. On petition to review such refusal by *certiorari*, *held:* (1.) That whether the court erred in causing the plea to be withdrawn, could be determined only on appeal or writ of error; (2.) That whether the facts entitle the petitioner to be discharged from further prosecution or not, is a question which might be presented either by a motion for discharge made in the original cause, or by special plea to a new indictment. But such question can not be raised by *habeas corpus*.

2. SAME: *Review of proceedings on: Practice.*

The action of a circuit judge in refusing to discharge a prisoner on *habeas corpus* will be affirmed, where it appears that the petitioner is held to answer a criminal charge, under an order of the circuit court regular on its face, and which that court had power to make.

CERTIORARI to *Pope* Circuit Court.

G. S. CUNNINGHAM, Judge.

D. B. Granger and *G. W. Shinn*, for petitioner.

The court erred in setting aside the defendant's plea of guilty, the sentence, in quashing the indictment and holding the prisoner to await the action of the grand jury. The indictment was valid, and it was the duty of the court to try the defendant for the misdemeanor charged therein. 45 Ark., 333; Mansf. Dig., secs. 2106-7; 43 Ark., 91; 26 Id., 260; 42 Id., 35; Mansf. Dig., sec. 2157; 18 Wall., 163, 205; Hurd on Habeas Corpus, pp. 335-6, 1st ed.; 85 U. S., 163; 93 Id., 18; 104 Id., 604; 121 Id., 1.

The remedy by *habeas corpus* is the only one left to the

prisoner, since the judgment below was set aside. There was nothing to appeal from. 18 Wall., 163; 3 Otto, 18.

W. E. Atkinson, Attorney General, for respondent.

This court cannot release the defendant from custody because of former jeopardy. This point is elaborately discussed in the following cases: *Wright v. State*, 5 Ind., 290; *Ex parte Ruthven* 17 Mo., 541; *Miller v. Snyder*, 6 Ib., 1; *Wright v. State*, 7 Ib., 324; *State v. Sheriff*, 24 Minn., 87; *Wentworth v. Alexander*, 66 Ind., 39.

The judgment of a court of general criminal jurisdiction justifies imprisonment. In such cases, the writ of *habeas corpus* should not be awarded. See Op., C. J. Marshall in *Ex parte Watkins*, 3 Pet., 193. See also *Ex parte Booth*, 3 Wis., 145. See *Ex parte Semler*, 41 Ib., 517.

When judgment is arrested and *nol. pros.* entered, the circuit court has power, independent of statute, to bind defendant over to answer a new indictment for same offence. *Gordon v. State*, 35 Ala., 432, and cases cited.

Where defendant is acquitted for a flaw in an indictment, he may be remanded for a new trial at the next court under new indictment. See *U. S. v. Smith*, 2 Cranch, C. C. 111.

COCKRILL, C. J.

This is a petition to review by *certiorari* the refusal of the judge of the Pope circuit court to discharge the petitioner upon *habeas corpus*. It appears from the record which has been certified to us in the usual way in such cases, [see *Arkansas Industrial Co., v. Neel*, 48 Ark., 283; *Jackson, ex parte*, 45 Ib., 158,] that an indictment was returned by the grand jury against the petitioner "for criminal abortion," and that he entered a plea of guilty to the indictment, whereupon the court assessed his punishment at one year's

imprisonment in the penitentiary and a fine of $50, and remanded him to custody to await sentence. On the next day the court concluding that the indictment charged only a misdemeanor, caused the defendant's plea of guilty to be withdrawn; the indictment was quashed and the cause was held for the action of the grand jury, the amount of bail required of the prisoner being fixed by the court. He remained in jail and after the court had adjourned for the term, presented his petition to the judge at chambers to be discharged. It is the action of the judge in this behalf we are called upon to review. The argument is that the indictment charges a misdemeanor and that the petitioner, having been convicted of that offence, cannot be longer held in custody for any grade of offence growing out of the same transaction.

1. HABEAS CORPUS: Erroneous proceedings not corrected by.

The indictment is set forth in the record, but it is immaterial whether it charges a felony, a misdemeanor or no offence at all. In no event could the question whether the court erred in causing the defendant's plea of guilty to be withdrawn be determined in this proceeding without making the writ of *habeas corpus* serve the office of an appeal or writ of error, which is wholly beyond its function. If the facts entitled the petitioner to be discharged from further prosecution, as to which the parties may profitably consult *Lange, ex parte*, 18 Wall., 163, he might have obtained his discharge upon motion in the same cause. *Atkins v. State*, 16 Ark., 574–5, or he may do so by special plea to a new indictment for the same offence. He cannot raise the question by *habeas corpus*. Wharton Pl. and Pr., secs. 477, 996; 1 Bish. Cr. Pro., sec. 821; Church on Habeas Corpus, secs. 253, 255; Hurd on Habeas Corpus, B'k 2, ch. 6, sec. 1; *Pitner v. State*, 44 Tex., 578; *Wentworth v. Alexander*, 64 Ind., 39; *State v. Sheriff*, 24 Minn., 87; *Com. v. Nor-*

ton, 8 Serg. and R., 71; *Ex parte Hartman*, 44 Cal., 32; *Semler's Petition*, 41 Wis., 517; *Ex parte Ruthven*, 17 Mo., 541.

2. SAME: Review of proceedings on: Practice.

The order on which he is held is regular on its face and one which the court had power to make. Mansf. Dig. secs. 2158, 2169; *Hortsell v. State*, 45 Ark., 59; *Gordon v. State*, 35 Ala., 430. We extend the inquiry no further. *Brandon, ex parte*, 49 Ark., 143.

In the case of *Jackson, ex parte*, 45 Ark., 158, where the petitioner was released on *habeas corpus* after conviction before a justice of the peace, it clearly appeared that the fact for which he was committed was not a crime for which he could be punished in any tribunal, and we proceeded only in accordance with the practice of the court of King's Bench at common law in directing his discharge. Hurd on Habeas Corpus, *supra*.

The action of the circuit judge in refusing the prayer of the petition is affirmed.

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WATSON V. PUGH.

1. LANDLORD AND TENANT: *Relation of: Giving rent note for purchase money.*

B., owning certain land, agreed to sell it to S., who gave his notes for the purchase money and was let into possession under a bond conditioned for the execution of a conveyance on payment of the notes. After the notes matured, B. conveyed his interest in the land to the defendant. On the trial of this action, B. testified, in general terms, that at the time of such conveyance there was an understanding between him and S. that their contract was canceled. But there was no written agreement to that effect. The notes were transferred to the defendant, the bond for title was not taken up and S., who testified that the contract to purchase was not canceled, was permitted to remain in possession for several years with no

claim upon him to pay rent. He subsequently executed a mortgage to the plaintiff on certain cotton produced on the land and a few weeks afterwards made his note to the defendant for $400, payable in the fall of the same year and specifying that it was for rent of the land. It was for about twice as much as the land would rent for, and S. testified that it was the understanding between him and the defendant that the amount paid on the note should be credited on his purchase. In an action to recover the value of the cotton which the defendant converted to his own use, *held:* (1.) That the evidence was sufficient to sustain the finding of the court that the contract of purchase had not been rescinded, and that the relation of landlord and tenant did not exist between the defendant and S. (2.) That the recital in the note for $400 that it was given for rent did not preclude the plaintiff from proving that it was not in fact given for that purpose.

2. CHATTEL MORTGAGE: *Description of property.*

A mortgage which describes the property conveyed as "eight bales of cotton weighing 500 pounds each of the crop" which the mortgagor should raise in a designated locality, is not void for uncertainty where the whole crop did not amount to eight bales.

APPEAL from *Ashley* Circuit Court in Chancery.

C. D. WOOD, Judge.

J. W. VanGilder, for appellant.

1. The evidence in this case shows beyond a doubt that the trade made by Bell with Simmes was canceled and it was not important that the bond for title should have been surrendered up and canceled. Pugh had notice of Watson's claim of ownership, his deed being of record. Simmes was estopped to deny that Watson was his landlord and that the note was for rent, and his mortgagee stands in no better attitude.

2. The mortgage was void as to the cotton for uncertainty. 41 Ark., 70-73; 43 Id., 350; Jones, Chat. Mortg., sec. 46, *et seq.*

M. L. Hawkins and *Jones & Martin*, for appellee.

Simmes had an interest in the land which could only be

divested by writing of equal or greater dignity than the one under which he held. 21 Ark., 83. Nor could Simmes and Watson, by any agreement after the execution of the mortgage, affect Pugh's rights under the mortgage. 19 Pick., 213; 4 N. H., 91. Watson had no contract for a lien on the crops to secure the purchase money and without that he had no lien. 39 Ark., 567.

The mortgage is sufficiently definite. It describes the cotton and the place on which it is to be raised. Jones on Ch. Mort., secs. 53, 54; 39 Ark., 397.

COCKRILL, C. J.

This is an action by Pugh, the mortgagee of one Simmes, to recover of Watson the value of six bales and a fraction of the mortgaged cotton which Watson had converted to his own use. Watson claimed to be the landlord of Simmes and to have received the cotton from him in discharge of his landlord's superior lien for rent. The facts in relation to this claim are as follows: One Bell, while the owner of the land, executed to Simmes a bond covenanting to make him a deed when the purchase price agreed upon should be paid. Simmes was let into possession under his contract to purchase; he made a small payment of purchase money, built houses and cleared seventy-five or eighty acres of land, all of which was wild and unimproved when he purchased. After the last installment of purchase money became due, Bell conveyed his interest in the land to Watson. Bell testifies in general terms, without giving any particulars of the transaction, that there was an understanding between him and Simmes at that time that their contract was canceled. There was no written agreement to that effect; Simmes' notes for the purchase money were not surrendered to him,

1. LANDLORD AND TENANT: Relation of.

but were transferred to Watson; the bond for title was not taken up; Simmes was permitted to remain in possession as before without any claim upon him to pay rent; the lands were assessed to and the taxes paid by him, and he testified that the contract to purchase had never been rescinded, and that he had always held possession as owner. In the meantime Watson notified him that he had purchased the land from Bell and would enter into a new contract of purchase on better terms than the one he held. No new contract was made, but Watson permitted him to hold the land for several years after the conveyance from Bell, as purchaser, and with the sole expectation of collecting the purchase money. At this juncture, Simmes executed the mortgage to Pugh covering the cotton in dispute. A few weeks thereafter Watson took a note from Simmes for $400, payable in the fall of the same year. It specified that it was for rent of the land which Simmes was holding. It was for about twice as much as any witness who testified to the point thought the land would rent for. Simmes, who is an unlettered man, testified that it was the understanding between him and Watson that the amount to be paid on his note should be credited on his purchase, and that he made the suggestion about calling it a rent note under the impression that Watson would more surely get the money and so aid him in paying for the land. The court found, in effect, that the contract for purchase had not been rescinded and that the relation of landlord and tenant did not exist between Watson and Simmes. The conclusion is sustained by the rule controlling the decisions of *Mason v. Delancey*, 44 Ark., 444, and *Ish v. Morgan*, 48 Ib., 413. The fact that the note executed by Simmes to Watson recited that it was given for rent did not preclude Pugh from proving that it was not in fact given for that pur-

Giving rent note for purchase money.

pose. The case is analogous in that respect to *Williams v. Roth*, 45 Ark., 447.

2. CHATTEL MORTGAGE: Description of property.

It is argued that Pugh's mortgage is void as to the cotton for uncertainty of description. It is described as "eight bales of cotton weighing 500 pounds each of the crop" which the mortgagor should raise in a designated locality.

In a contest between a mortgagee and one who has acquired a right adverse to the mortgage, a description in the instrument of a given number of articles out of a larger number is no description, where the means are not given for ascertaining what is intended. *Dodds v. Neel*, 41 Ark., 70; *Krone v. Phelps*, 43 Ib., 350. But where the number specified is more than the whole number of such articles there is no other property of the same kind from which a selection is to be made and, therefore, no uncertainty in the description. Jones Chat. Mortg., sec, 659; *Washington v. Love*, 34 Ark., 93; *Crosswell v. Allis*, 25 Conn., 301; *Kelly v. Reid*, 57 Miss., 89; *Draper v. Perkins*, Ib., 277. Here the description was of eight bales of cotton of the mortgagor's crop, when in fact his whole crop did not amount to so much. If the proof had shown that the crop amounted to more than eight bales and no particular bales had been appropriated to the mortgage, the result might have been otherwise.

Affirm.

EASTER V. GOYNE.

LIENS: *Mortgage and statutory; priority.*

The lien created by statute, (Mansf. Dig., sec. 4468), in favor of the keeper of a jack or stallion, is subordinate to the lien of a prior recorded mortgage executed after the passage of the act.

APPEAL from *Ashley* Circuit Court.

C. D. WOOD, Judge.

The appellant, *pro se*.

A mortgagor can create no lien superior to the mortgagee's without his consent. Jones Chat. Mortg., 2nd ed., sec. 472.

Unless the legislature clearly made the lien of a jack keeper superior to that of a prior recorded mortgage, the same rule will apply as in cases of mechanic's liens. 5 Ark., 217; Ib. 237; 8 Ib., 231; 25 Ib., 490.

The appellee, *pro se*.

The act (Acts 1885, p. 53) gives an absolute, unqualified lien upon the females served. It is superior to all others. 30 Am. Rep., 425; 21 Kas., 217; 3 Starkee, 172; 10 C. B., (N. S.), 417; 5 Lane, 372; Herman on Chat. Mortg., 308; 13 Kas., 492; 47 Ga., 555.

COCKRILL, C. J.

The abstract of the appellee states that the only question in this case is whether a lien upon a mare prescribed by the statute for the benefit of the keeper of a jack, (Mansfield's Digest, sec. 4468), shall take precedence of a prior recorded mortgage executed after the passage of the act. The circuit court determined the question in the affirmative.

The statute under consideration does not evince the intention to give preference to the statutory lien, and in the absence of a legislative intent to that effect, the courts have not, unless in exceptional instances, permitted the lien created by the statute to become paramount to a prior recorded mortgage. Jones on Liens, secs. 691-3, and cases cited; Jones on Chattel Mortg., sec. 474.

In accordance with this rule it has been decided by this court that a mechanic's lien is subordinate to a prior recorded

mortgage. *Brown v. Morrison*, 5 Ark., 217; *McCollock v. Caldwell*, 8 Ib., 231. The statute upon the subject of mechanic's liens, passed since these dicisions, has conformed, in express terms, to the rule established by them. Mansfield's Digest, secs. 4408, 4410.

Without express legislative declaration to that effect, the landlord's lien upon crops for the rent of the demised premises is adjudged by this court to be superior to a prior mortgage, notwithstanding a mortgage upon an unplanted crop is authorized by statute. But the preference is given because the statutory lien is coeval with the tenancy—the tenant being incapable of creating an interest in his mortgagee greater than he himself has. *Hammock v. Creekmore*, 48 Ark., 266. The lands are demised by the landlord upon the condition imposed by the statute, that he shall have a lien on the fruits thereof for the payment of his rent, and all who contract with the tenant are bound to take notice of that fact. The landlord's lien is not an exception, therefore, to the rule. The court erred in giving the statutory lien preference.

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

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COX V. GRESS.

1. INSANE PERSONS: *Proceedings against.*

The statute regulating proceedings against insane persons, (Mans. Dig., secs. 4960, 4964), adopts substantially the former practice in equity and makes it applicable to all civil cases. It is, therefore, the duty of the court in every action to which an insane person is defendant, to see that he is represented on the record by a competent guardian; and until there is such representation it is error to proceed.

2. CIRCUIT COURTS: *Proceedings before special judge at chambers.*

While the regular judge is occupying the bench, a special judge is without

judicial power to proceed with the trial of an action at chambers or to appoint a guardian *ad litem* therein. Such proceedings will not be cured by a *nunc pro tunc* order, made afterwards in court by the special judge, entering them of record as of the day on which they were had; nor will the presence of a guardian thus appointed for an insane defendant, estop the latter in a direct proceeding to vacate a judgment entered against him as the result of such trial.

APPEAL from *Pulaski* Circuit Court.

W. G. WHIPPLE, Special Judge.

This was an action for money had and received, brought by Russell B. Gress against George W. McDiarmid. The regular judge being disqualified a special judge was chosen to preside at the trial of the cause. By consent of the plaintiff's attorney and of C. W. Cox, who appeared as attorney for the defendant and also as the attorney for N. W. Cox, claiming to be the guardian of the defendant, a person of unsound mind, the trial proceeded on the 14th day of April, 1887, before the special judge at his office in a building not connected with that in which the court room was situated. The regular judge was at the same time holding a session of the court in the court room, and the trial of another cause was progressing there before him. The answer of N. W. Cox as such guardian was filed before the special judge at his chambers, and the plaintiff moved to strike it out on the ground that Cox's letters of guardianship had been revoked. The motion was sustained. The plaintiff then filed a motion stating that the defendant had since the commencement of the action become of unsound mind, and asking that an attorney *ad litem* be appointed to defend for him. The court sustained the motion and appointed George W. Williams guardian *ad litem* for the defendant. Williams as such guardian filed an answer in which, (after stating that the defendant, McDiarmid, had been for six years a

person of unsound mind, and was so adjudged by the probate court on the 13th of April, 1887), he denied that the defendant was indebted to the plaintiff in any sum and alleged "that the amount for which plaintiff sues is upon an account, and that the cause of action thereon did not accrue within three years next before the bringing of this suit." The special judge then proceeded to hear the evidence in support of the plaintiff's claim, the plaintiff himself being the only witness examined. There was "no evidence in writing in support of said claim, except the plaintiff's regular books of account, kept in due course of business by his book-keeper, F. S., who had resided in Texas for several years, and in which the transactions concerning plaintiff's claim were duly entered and charged against defendant by said S." The books were proved to be in F. S.'s handwriting. The guardian *ad litem* does not appear to have offered any testimony or made any objection to that offered by the plaintiff. The special judge found for the plaintiff in the sum of $630.00, with interest from July 1, 1883, and that he was entitled to recover that sum. *All these proceedings took place on the 14th day of April, 1887, at the special judge's law office.* On the 15th of April, 1887, the special judge took the bench and the plaintiff asked to have the record show that on April 14, 1887, he filed before the special judge a motion for the appointment of a guardian *ad litem* for the defendant on the ground that he had become insane since the commencement of the suit, and was then a person of unsound mind. The request was granted and the motion was entered accordingly. C. W. Cox thereupon appeared in person and exhibiting letters of guardianship, showing his appointment as guardian of the estate of defendant, (an insane person), made by the probate court on the 15th day

of April, 1887, moved for leave to file the defendant's answer, which he tendered with his motion. In offering to file an answer, C. W. Cox admitted in open court "that he had been attorney for the defendant" from the time a motion was made to set aside a judgment taken by default against the defendant in the same cause and set aside at a previous term. The court refused to permit the answer of C. W. Cox to be filed; and he then offered to call witnesses "and to take their testimony at the bar to support the averments embraced in his said motion," but the court refused to permit him to do so. He saved exceptions to these rulings, denying his motions for leave to answer and produce testimony. "The court then directed the clerk to enter of record the proceedings, trial and judgment heretofore had and rendered in this case on the 14th day of April, 1887, now as for then, which was accordingly done." C. W. Cox also excepted to this entry; he then moved for a new trial, which was denied, and he appealed.

W. S. McCain and *C. W. Cox*, for appellant.

The question is, what is the correct practice in a suit against a lunatic whose lunacy has not been judicially ascertained. Mansfield's Digest, secs. 4960, 4966, are not free from ambiguity, but they seem only to apply where lunacy has been judicially determined. Under the Const., art. 7, sec. 34, the probate court would seem to have exclusive jurisdiction in the ascertainment of lunacy. But where the circuit court has jurisdiction and a party becomes insane, it is probable the court could ascertain the fact of lunacy by proper proceedings for itself. For the practice at common law see 4 Coke, 123; Coke Litt., 135, b; Ib., sec. 405; Story Eq., 325, 1365; 5 Pick., 431; 18 Johns., 134;

Newman Pl. and Pr., 556-9; 12 Hun., (N. J.), 381; 7 Rob. Pr., 600-1, and notes.

A lunatic cannot employ an attorney; and the lunacy determines his attorney's authority. 1 Ark., 99; Story Ag., sec. 6; 2 Ark., 412; Story Ag., sec. 481, note 4; 2 Kent. Com., 645.

It was certainly error to appoint a guardian *ad litem* for defendant on the mere suggestion of plaintiff, without any judicial ascertainment of his insanity, and without his presence. 32 Ark., 674; Story Eq., 1365, 1365, a. Even in chancery the inquisition should be by jury. Story Eq. Ch., 35-6, secs. 1327, 1365; Story Eq. Pl., secs. 70, 871.

The appointment of the guardian *ad litem* in this cause was invalid because not made *by the court*, but by a special judge off the bench and out of court. 2 Ark., 252; 48 Id., 155; 20 Id., 77; 24 Id., 249; 3 Black. Com., 23; 45 Iowa, 503; 3 Ark., 284; 34 Id., 574. The so-called trial is also void for the same reasons. See cases *supra*, and art. 7, sec. 21, Const. If *consent* could have cured this, there was no one capable of consenting to these proceedings; nor could a *nunc pro tunc* order cure them or make valid the acts of a *mere individual*.

Consent cannot give jurisdiction. 39 Ark., 254; 45 Id., 478; 3 Comst. (N. Y.), 547; 2 Ark., 252. The trial on April 14 was void, 48 Ark., 227, and the *nunc pro tunc* entry could not cure it. 1 Wall., 627.

This court will reverse where no proper defence was made for an infant, and lunatics stand in the same position as infants. 42 Ark., 222; 24 Ark., 377; Ib., 438; 47 Id., 300; Ib., 445; 39 Id., 235; 8 Peters, 128; 1 Bibb, 203.

In this case the defence was an *empty form* and palpable injustice was done a lunatic.

E. W. Kimball, for appellee.

A judgment against an insane person is not void nor voidable, nor can it be reversed for error on account of the insanity; and he may appoint an attorney. Freeman on Judg., sec. 152. The case was tried at chambers by the consent of defendant's attorney, and the agreement was binding. The court had a right to appoint a guardian *ad litem*. Mansfield's Digest, secs. 4963-6; Bliss Code Pleading, Lunatics' Guardians.

Insanity of defendant is no ground for new trial. Freem. Judg., *supra*. He was represented by guardian, who made the only defence that could have been made for him.

The trial was had by consent, by agreement of parties, and they are estopped from objecting now. It is not a jurisdictional question; the special judge was regularly elected; the proceedings were duly entered in open court.

COCKRILL, C. J.

At common law a lunatic could be sued without the intervention of a guardian or committee. If of full age he could appear by attorney as any other defendant. But he was incompetent to employ an attorney, and so the court performed that duty for him. Buswell on Insanity, secs. 128, 132; Freeman on Judgments, sec. 152; *Van Horn v. Mann*, 39 N. J. Law, 213, and cases cited.

In equity, the practice was different. That court would not proceed without the intervention of a guardian to protect the interests of the insane defendant. If he had been judicially ascertained to be insane, his committee or guardian was required to conduct his defence, but if they were hostile in interest to him, or if for any reason it was deemed best for his interest, the court appointed some other person com-

petent to protect his interest as guardian *ad litem*. It was regarded as error to proceed against him without such a guardian. If the insanity of a defendant in a pending suit was suggested, but had not been judicially ascertained, the court gave opportunity for an inquisition to be held, or took the necessary steps to determine the question for itself; and having ascertained that the defendant was mentally incapable of making his defence, it appointed a guardian *ad litem* for him and thereafter imposed upon him the restraints of infancy.

1. INSANE PERSONS: Proceedings against.

Our statute regulating proceedings against lunatics adopts substantially the former practice in equity and makes it applicable to all proceedings. Mansfield's Digest, sec. 4960, *et seq.* It is therefore incumbent upon the court in every civil case where an insane person is defendant, to see to it that he is represented upon the record by a competent guardian and it is error, as in a proceeding against an infant, to proceed without it.

2. CIRCUIT COURTS: Proceedings before special judge at chambers.

For the application of the practice to this case, we may concede, as the appellee contends, that a trial had by consent before a special judge at his chambers, while the regular judge is upon the bench, may be the foundation for a subsequent valid judgment, when the special judge assumes the functions of his office in court. But no such trial could be forced upon an unwilling party, and nothing less than consent to the proceeding at chambers could justify the judgment. *Butler v. Williams*, 48 Ark., 227.

Did the defendant consent in this case?

When the authority of his supposed guardian was rejected by the judge at chambers, the defendant stood as though he had never been represented in the cause by him. If he was not in fact the guardian and was not authorized to appear

for the defendant, as the judge found, then he had not the authority to waive the defendant's rights. If we treat his action as void *ab initio* for one purpose, we must do so for all. We cannot look then, to his consent to estop the defendant. The judge ascertained upon proof what the plaintiff had previously suggested, that the defendant was insane. He was, therefore, incapable of giving consent. The silent acquiescence in the subsequent proceedings of the person designated by the judge at chambers as guardian *ad litem*, cannot be held to estop the defendant in a direct proceeding to vacate the judgment; nor did the *nunc pro tunc* order made in the court on the next day as of the date of the trial at chambers, add anything to the effectiveness of the trial. Such an order is effective only when it records a previously omitted truth—it does not create, but only speaks what has been done. When it causes the record to speak a palpable untruth, it is as worthless as any other exposed error. There had been no judicial action until the time of the entry of judgment, and it was not competent for the court to cut off the defendant's right to make his defence by guardian, by a retroacting order reciting that certain things had been previously done which had in fact no judicial existence until the order was made, When, therefore, the defendant was legally declared a lunatic and a guardian appointed to defend his interest, the evidence had been heard, the trial had and the cause practically determined. That was erroneous.

In an unreported case against an infant, at a previous term, we adjudged it to be error to take proof in a cause by deposition before the appointment of a guardian *ad litem*. We have frequently ruled that the appointment of such a guardian is to serve a practical and useful purpose, and not to fill an

empty form. The latter is all that can be said to have been done in this case.

Reverse the judgment and remand the cause for further proceedings.

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DUGGER V. WRIGHT.

1. SURETIES: *On bond of executor: Contribution.*

Where the sureties on an executor's bond are discharged, by the probate court and new sureties taken, the two sets of sureties become jointly liable for a breach of the bond which occurred before the discharge, and the right of contribution exists, as between co-sureties.

2. SAME: *Same:*

After property of an estate had been converted by the executor, his sureties at the time of such conversion were released by the probate court from future liability and others were accepted in lieu of them. The executor was subsequently charged with the value of the property, and the probate court ordered him to pay it over to the distributees. He failed to make such payment, and to recover the amount for which he was thus delinquent part of the distributees brought an action against the sureties on the first bond. Three of the plaintiffs were sureties on the second bond. *Held:* (1.) That the defendants are liable for the property converted by the executor; but the breach of his bond, thus occasioned, was a continuing one and the new sureties are also liable for his failure to pay over the value of the property, and they are therefore co-sureties of the defendants. (2.) That the defendants are equitably entitled to contribution against the three plaintiffs who are their co-sureties and the latter can only recover their distributive shares of the fund sued for, less the sums they are severally bound to contribute, in order to equalize the common burden of all the sureties.

APPEAL from *Independence* Circuit Court.

R. H. POWELL, Judge.

Coleman & Yancey, for appellants.

The executrix appropriated to her own use the property belonging to the estate, Dec. 28, 1883. This was the time of the conversion, and fixed the liability of her sureties as it

was *before* they were released. Mansf. Dig., sec. 35. The sureties on the bond when a default is made are liable. Murfree Off. Bonds, sec. 635; 32 Ark. 424.

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

Several settlements were filed and approved after the alleged conversion, and these can only be impeached in equity. Mansf. Dig., sec. 128; 14 Ark., 122; 16 Id., 474; 20 Id., 526; 30 Id., 67; 34 Id., 63; 36 Id., 384; 40 Id., 393.

At the time the executor was ordered to pay over, appellees had long since been released and appellants were the sureties. Parties who are the sureties at the time of the breach are the ones responsible. Murfree Off. Bonds, secs. 635, 638; see also 35 Fed. Rep., 397.

COCKRILL, C. J.

This is a suit by some of the distributees of the estate of John S. Dugger against the sureties on the bond of the delinquent executor to recover the sum of $291.50 and interest as the value of property of the estate converted by the executor. The validity of the bond and the delinquency of the executor are not questioned. The defendants, who are the appellees here, were released from future liability upon the bond by the probate court, and new sureties were supplied in lieu of them after the converted assets were received by the executor. It is argued that the breach of the bond occurred after their release and that they are not liable. But the facts as certified to us fix the date of the conversion in the lifetime of the defendants' liability. The property was not accounted for, nor was the claim for it passed upon in the adjudication and allowance of any of the executor's accounts in such a manner as to preclude the probate court from eventually charging him with it and requiring a distribution,

1. SURETIES: On bond of executor:

as it did, of the full amount due to the distributees. The right of recovery is, therefore, plain. But there is an obstacle in the way of a full recovery. Three of the distributees, who are plaintiffs in this cause, became sureties on the bond at the time the defendants were released. They signed the old bond upon which the defendants were sureties, and the conditions of their undertaking were of course identical with those the defendants had assumed. The conversion had taken place when they signed and the liability of the defendants, who were the former sureties, had become fixed. It required only the order of the probate court to authorize suit against them. But the breach was a continuing one, because it was still the executor's duty to account to the probate court for the proceeds of the property; and when he failed to comply with the order of the court directing him to pay over the amount with which he had been charged on that account, the new sureties became liable by the terms of their undertaking to make good his default. There are no terms in the office of executor or administrator, and the principle which is properly invoked in the case of a public officer who executes a bond for the faithful discharge of the duties of his office for the term upon which he is about to enter, is not applicable. The new bond, or the obligation of the new sureties, relates back, and the two sets of sureties are jointly liable to the distributees and others for whose benefit they have contracted, for breaches committed prior to the second execution. Schouler on Executors, sec. 148; *Beard v. Roth*, 35 Fed. Rep., 397; *Scofield v. Churchill*, 72 N. Y., 565; *Choate v. Arrington*, 116 Mass., 552; *Dawes v. Edes*, 13 Ib., 177; *Com. v. Gould*, 118 Ib., 300; *Pinkstaff v. State*, 59 Ill., 148; *State v. Berning*, 74 Mo., 87; *Morris v. Morris*, 9 Heiskell, 814; *Powell v. Powell*, 48 Cal., 234; *Field v. Pelot*, 1 McMul. Eq. (S. C.,) 369.

But where there are two or more sureties for the same principal debtor and for the same obligation, whether on the same or on different instruments, they are co-sureties, and as between themselves are under the obligation to equalize their common burden. Schouler Ex., *supra;* 3 Pomeroy's Eq., sec. 1418; *Powell v. Powell, supra; State v. Berning, supra.* The case is readily distinguished from the class to which *Chrisman v. Jones*, 34 Ark., 73, belongs. See *Dering v. Earl of Winchelsea*, 1 Lead. Cas. in Equity, pt. 1, p. 155, *et seq.* If the defendants then are forced to pay the deficiency sued for, they will be entitled to contribution against the new sureties. But the new sureties are distributees and are all plaintiffs in this suit. The defendants' answer which sets forth all the facts, presents an equitable defence to the extent of the amount they could claim by way of contribution against their co-sureties, who are plaintiffs. For the excess over that sum the plaintiff co-sureties are entitled to recover as distributees. Narcissa Davis, who is one of the distributees and a plaintiff and appellant here, is not a surety on the bond and is entitled to her full distributive share of the sum sued for. The judgment will be reversed and a judgment entered here in accordance with this opinion.

Contribution.

2. SAME.

ORGAN V. MEMPHIS AND LITTLE ROCK RAILROAD CO.

1. PLEADING AND PRACTICE: *Error in adopting proceedings: Transfer to proper docket.*

An error of the plaintiff as to the kind of proceedings he adopts is no ground for dismissing his action, which may be transferred to the proper docket on the motion of either party. If such motion is not made, the error is waived and the cause should be tried according to the principles involved.

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2. SAME: *Misjoinder: Waiver.*

A misjoinder of causes of action is waived unless objected to before defence.

3. SAME: *Parties plaintiff: Action for damages to land of decedent.*

W. and O. were joint owners of certain lands. W. died in 1856, and his executor and devisees held possession of the lands jointly with O. until 1873, when partition was made and thereafter the devisees of W. held possession of the portion allotted to them. Part of such portion was wrongfully appropriated by the defendant in 1873 or in 1874, for railroad purposes. *Held:* That in 1880 the devisees could maintain an action to recover compensation or damages for such wrongful appropriation, although the executor had not then been discharged and was still acting. (Following *Mays v. Rogers*, 37 Ark., 155; *Stewart v. Smiley*, 46 Ark., 373; *Graves v. Pinchback*, 47 Ark., 470.)

4. RAILROAD COMPANIES: *Appropriating land for right of way.*

The charter under which the Memphis and Little Rock Railroad Company was organized, granted by the legislature January 11, 1853, gave it the right to enter on lands and appropriate a right of way, and limited the owner of the lands to a period of five years after the road was built on his lands, in which to apply for an assessment of damages. In 1873 all the property of the Memphis and Little Rock Railroad Company was sold under a deed of trust and conveyed to persons who in that year organized the Memphis and Little Rock Railway Company. *Held:* That the legislature could not empower the Memphis and Little RockRailroad Company, to appropriate to its use private property without first providing for just compensation to the owner, and that company having failed to secure a right of way over the plaintiff's land, the Memphis and Little Rock Railway Company could only acquire such right in the manner prescribed by the laws under which it was organized.

5. SAME: *Same: Acts 1855 and 1873.*

The act of 1855 prescribing the mode of obtaining the right of way for railroad companies, and authorizing the owner of land taken for that purpose, to apply within a limited period for an assessment of damages, was repealed by the act of April 28, 1873, which embraces the whole subject matter of the former act and prohibits the appropriation of land as a right of way, without the owner's consent, until he is fully compensated therefor.

6. SAME: *Same: Injunction to prevent wrongful appropriation.*

Equity will enjoin a railroad company from taking possession of land in the construction of its road until proper compensation is made to the owner; and will, on timely application, also restrain the continuous, unlawful use

of land by operating a railway over it without grant from the owner and without having instituted proceedings under the statute to acquire the right of way. But such relief will be denied to a land owner who acquiesces in the use of his property by a railroad company, until it has constructed across his land a track which at that point has become part of a line in which the public have an interest.

7. SAME: *Same: Claim to compensation: Enforcement against land.*

Where a railway company appropriates land to the use of its road without right acquired by purchase and without statutory proceedings for the assessment of damages, the owner may waive such proceedings and electing to regard the act of the company in taking the lands as done under the right of eminent domain, may demand and recover a just compensation. In such case the land owner assumes to the company the relation of a vendor who sells real estate on a credit, and while he holds the title equity will enforce his claim to compensation against the land, as it would a vendor's lien.

8. SAME: *Same: Alienation of land taken without compensation.*

Where a railway company takes land in the construction of its road without grant from the owner and without compensation, its alienee, mediate or immediate, can hold such land only by paying the value thereof, unless the owner is estopped to assert his claim to compensation by an equity growing out of his conduct.

9. SAME: *Same: Statute of limitations: When action of land owner barred.*

Seven years adverse possession of land, wrongfully taken by a railway company in the construction of its road, will bar an action to enforce the claim of the owner against the land, or to enjoin the company from using it until compensation is made.

10. SAME: *Same: Damage to riparian rights.*

Where lands bordering upon a navigable stream are partitioned, and by agreement of the owners the riparian rights belonging thereto are not divided, but remain their joint property, they can still maintain a joint action against a railroad company for damages to such rights caused by the company's wrongful construction of tracks and buildings. But no damages can be recovered in such action for the mere transportation of passengers across the river on a boat kept by the defendant for that purpose, unless it appears that the plaintiffs are licensed ferrymen.

11. SAME: *Same: Personal responsibility of company.*

Land bordering on a river and which was wrongfully appropriated by a rail-

road company, was lost by the caving of the river banks after the owner had commenced an action to recover compensation. *Held:* That, although no action could be maintained after the destruction of such land, to enforce the owner's claim against it or to enjoin its use, the company is personally responsible to him for its appropriation.

APPEAL from *Crittenden* Circuit Court in Chancery.
W. H. Cate, Judge.
W. M. Randolph and *T. B. Turley*, for appellants.

1. That plaintiff's remedy was at law is no ground to dismiss the bill for want of equity. The cause should have been transferred and have proceeded on its merits. Sec. 4925 Manf. Dig.; Ib., secs. 4927–8. The error, if any, was waived by the failure to move for its correction. 26 Ark., 54; 31 Id., 411, 422; 32 Id., 562.

See also 13 Ark., 193; 14 Id., 50; 15 Id., 307; 17 Id., 340; 18 Id., 583; 2 Johns. Ch'y, 369; 4 Cold., 370; 5 Id., 240.

2. The appropriate remedy was in equity, because a court of law was inadequate to afford the protection plaintiffs were entitled to. The constitution and laws of this State provide no remedy at law, save only his right to compensation for the land *before* the railroad takes it. Const., 1868, art. V., sec. 48; Const., 1874, art. XIII., sec. 9; Mansf. Dig., secs. 5447, 5458, 5467; 31 Ark., 494. Conceding that plaintiffs had the right to maintain an action at law, (2 Wood R. Law, sec. 245, p. 797; Mansf. Dig., secs. 2637–9, 2640, 2643; 28 Ark., 460; 41 Id., 202,) the question is whether the remedy afforded was such as they were entitled to. 33 Ark., 633; 13 Ark., 198; 43 Id., 111; Wood Ry. Law, Vol. 2, sec. 244, p. 794; 1 Rorer on R. R., p. 334; Kern on Inj. in Eq., ch. 17, sec. 10, p. 296; 40 Wis., 653; 127 Mass., 571; 30 Wis., 105; 12 Id.,

16; 20 A. and E. R. cases, 379; 22 Ib., 81; 64 Mo., 453; 6 Cold., 162; 7 Heisk., 518; 13 Lea, 669; Bish. Eq., sec. 37; 37 Ark., 164, 286. These cases show that when the remedy at law is inadequate, equity will relieve by injunction or other appropriate remedy.

3. DEFENDANTS CLAIM UNDER SECTIONS 15 AND 16 OF ACT OF JANUARY 11, 1853.

It has been seen that the railroad company defendant does not claim ever to have purchased the property, on which it has put down its tracks, or which it is using in connection with its incline and transfer boat, and that the only title which it sets up is such as has resulted from its occupation of the premises, and secs. 15 and 16 of the charter of the old Memphis and Little Rock Railroad Company, granted by the General Assembly, and approved on the 11th of January, 1853. Acts of 1852–1853, pp. 133–135.

But sec. 15 was never complied with, the road having been completed long before the land in controversy was appropriated by defendant or its predecessors. Sec. 16 has no application and affords no protection. Especially so in view of art. V., sec. 48, Const. 1868, and art. XIII., sec. 9, Const. 1874. Sec. 16 could have no force after the adoption of the provisions of the Const. 1868 and 1874. But the Memphis and Little Rock Railway Company was a distinct corporation from the Memphis and Little Rock Railroad Company, and was organized under the general laws of Arkansas, and the present corporation, the Memphis and Little Rock Railroad Company, as reorganized, is not the same corporation created by act January, 1853; 112 U. S., 609. The present corporation does not antedate the present Constitution and is not entitled to any of the special privileges, immunities or exemptions contained in the original cha-

rter. Art. 2, sec. 18, Const. 1874; 41 Ark., 202; 112 U. S., 609.

Besides, sec. 16 was unconstitutional. 3 Hump., 483; 2 Sneed, 104; Cooley Const. Lim., ch. XI., p. 351; 10 Yerger, 71–80; 13 Ark., 206–211.

4. EXTENT AND CHARACTER OF PLAINTIFF'S RIGHTS AND DEFENDANT'S WANT OF TITLE.

Sec. 5258, Rev. St., U. S., merely gave the consent of Congress to the operation of railroads between States, and gave no right to occupy land of others and appropriate their riparian rights. 5 Amend. Const. U. S. Plaintiffs are entitled to the banks of the river and the use of the water in the river, as much so as they are to the land. It is a valuable right, and they are injured as effectually by taking one as the other. Tiedeman Lim. Pol. Powers, p. 397, sec. 121, d.; 13 Wall., 166; 10 Wall., 497; 1 Black., U. S. S. C., 23; 24 How., 41; 4 Mo., 343; 7 Wall., 272; 82 Mo., 367; 113 U. S., 567; 102 U. S., 180. Plaintiffs also had the right of ferry. Mansf. Dig., sec. 3309. This is a valuable right as property, though they had no license. 20 Ark., 561; 25 Id., 26; 26 Id., 464; 44 Id., 184; 1 Black., 603; 3 Yerger, 386.

A railroad cannot acquire any right whatever in the land or riparian rights until compensation is paid; and one corporation succeeding another which has undertaken to take property in the exercise of the right of eminent domain, is equally bound with its predecessors to pay the compensation in all cases where it accepts and uses the property, and no compensation has been made for it. 18 Wis., 155; 37 Id., 319; 40 Id., 653; 127 Mass., 571; 59 Penn. St., 290; 37 Ark., 23; Ib., 164; 20 A. and E. R. Cases, 379; 44 Id., 258; 45 Id., 252; 28 Id., 465.

5. As to defendant's plea of occupation and the statute of limitations. This suit was brought July, 1880. The occupation of the old Memphis and Little Rock Railroad Company scarcely goes behind the year 1871, and as to the present company not beyond its organization, May 1, 1877. From the continual changes occurring by reason of caving, etc., it has occupied no particular locality connectedly or continuously long enough to bar plaintiffs. 47 Ark., 66; 11 Lea, 382; 24 Am. Law Reg., 432. Defendant had no color of title, and its occupancy would be limited to the land actually occupied continuously. 115 U. S., 407. The legislature has provided no time within which the owner of property taken by exercise of the right of eminent domain may sue to recover compensation, the theory being that compensation must be had prior to the condemnation. If the defendant is a corporation at all, it became one under the general laws of Arkansas, with all the restrictions imposed by the Constitution of 1874. 112 U. S., 609. It cannot tack its possession to that of its predecessors. Wood Lim., sec. 271, p. 579; Ib., sec. 256, p. 513. Defendant has never claimed to enter upon possession under any title, and the rule is that possession thus acquired is treated as held in subservience to the legal title, and however long continued can never ripen into an adverse title. Wood Lim., sec. 256, etc.; 115 U. S., *supra;* 2 Wall., 328. By constant changing of its tracks, etc., neither the defendant or its predecessors have occupied any portion of the land for a connected period of three years before suit. The possession must be actual, visible, continuous, notorious, distinct and hostile. Wood Lim., sec. 257; 22 Ark., 79; 33 Id., 150; 27 Id., 77; 24 Id., 371; 42 Id., 118; Wood Ry. Law, sec. 244, p. 791; 35 Ark., 541.

Most of the plaintiffs are married women and minors and are not barred even if the statute ran. 40 Ark., 108.

6. The value of the land taken, or injured and the value of the riparian rights appropriated, is the measure of the plaintiffs' recovery. They are entitled to the largest price they will bring for any purpose whatever. 98 U. S., 403; 41 Ark., 202; 10 Bush. (Ky.,) 382.

7. The heirs and devisees of Winchester were the proper parties to sue. 5 Ark., 608, 629; 8 Ark., 9; 21 Id., 65; 31 Id., 576; 32 Id., 297; 34 Id., 391; 40 Id., 102; 42 Id., 25; 27 Id., 235; 30 Id., 775. There are no debts to be paid, and the lands have long since been partitioned to the heirs and devisees, and are not needed for purposes of administration.

8. The partition between Overton and Winchester's devises, by which they divided the lands and held the riparian rights in common, cannot be objected to by defendants. It does not concern them. Similar partitions have been made and sanctioned. 1 Washb. R. P., p. 429, sec. 7, par. 10; 1 Hoffm. Chy., 506. The decree making partition binds all parties and third parties owning no interest. 58 Barb., 58; Freeman on Judg., sec. 304. That decree cannot be inquired into collaterally. 102 U. S., 461; 22 How., 1. See, also, Mansf. Dig., sec. 4802.

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

The original complaint by the devisees of Winchester was for compensation for taking their lands for railroad purposes. The amended complaint in which Overton is joined as plaintiff is no longer for the taking of the land, but is for the breach of a personal contract to pay for the rent of a ferry franchise granted by the State of Tennessee. The land had been partitioned in severalty and Overton and Winchester's

devisees could not join in a suit to recover damages for entry upon their several tracts. 27 Hun., 582. This was a misjoinder of parties.

The complaint states that the land was very valuable when it was filed; the question of value is to be considered with regard to the time of the taking of the land, and as no such value is set forth, the complaint shows no cause of action. 70 Ala., 227.

The railroad was built on the land in 1858 or 1859, and yet counsel begin their arguments by quoting the constitution of 1868, as showing the power the railroad had in regard to taking possession of the land.

The plaintiffs' remedy was adequate at law. 2 Wood on Ry. Law, sec. 245, p. 797. No new legislative remedy was required as the old ones were amply sufficient. 70 Ala., 227; 29 Minn., 256; 54 Wis., 136.

It is said repeated trespasses afford a ground of equitable jurisdiction. But no trespasses are shown. The complaint states the railroad company went on the land by consent, and the only complaint is cutting timber and removing earth, and there is no proof of this.

The suit was simply one for damages and could not be brought in equity. Nor was there any ground for injunction, since the statute gave express power to enter on the land to build the road; and, moreover, the plaintiffs state that consent thereto was granted.

The entry under the statute gave to the railroad company a right to the strip of land 200 feet wide. *Prather v. W. U. Tel. Co.*, 84 Ind., 501.

Where one voluntarily consents to the occupation of land by a railroad company, he cannot afterwards recover damages for the use of it. *Texas Ry. Co. v. Sutor*, 59 Texas, 29. Nor can

he recall his grant after the road has been built. *Rio Grande Ry. Co. v. Brownsville*, 45 Id., 88. And the failure of the company to comply with the terms on which the grant was made will not operate as a forfeiture of a right of way once granted. In such case the remedy is by a suit for damages for breach of the contract. *Texas Ry. Co. v. Sutor, ubi sup.* Even a verbal concession of a right of way is sufficient. *Clement v. Durgin*, 5 Greenl., 9; *Currie v. Natchez Ry. Co.*, 61 Miss., 725; *Louisville Ry. Co. v. Thompson*, 18 B. Mon., 736; *Marble v. Whitney*, 28 N. Y., 298. Particularly is this the case where the statute, as here, gives a right of entry. *Noyes v. Chapin*, 6 Wend., 461. And consent will be implied from long acquiescence. *Cottrill v. Myrick*, 22 Me., 222.

Where there is no contract made, and the land owner merely permits the railway company to build its road on his land, he cannot afterwards enjoin its operations. *St. Julian v. Morgan's Ry. Co.*, 35 La. An., 924; *Bourdier v. Morgan's Ry. Co.*, Id., 947. Where a land owner agrees that a railway company may build its road on his land he cannot afterwards interfere with its possession. *Pryzbylowicz v. Missouri Ry. Co.*, 3 McCrary, 587.

There is no evidence that the railroad company ever built any part of its road or occupied any land belonging either to Winchester or Overton outside of the tract conceded by them to it. But if from the overflows, or other inevitable causes, it was compelled to make slight changes of track from time to time, the consent of the land owner will be implied, unless upon proof that they objected at the time that the changes were made, or within a reasonable time thereafter. *Hosher v. Kansas City Ry. Co.*, 60 Mo., 329.

Confessedly if ever there had been any claim for damages

on the part of the plaintiffs, it was barred by limitations many years before the suit was brought. The charter of the Memphis and Little Rock Railroad was approved January 11, 1853. Acts 1852, p., 130.

The constitution then in force did not require prepayment as a prerequisite of the right of condemnation of lands for public purposes. That part of the charter then authorizing the company to enter on lands for the purpose of locating and building the road was not in violation of any constitutional provision and was perfectly valid. *Carolina Ry. Co. v. McCaskill*, 94 N. C., 746; *Praether v. W. U. Tel. Co.*, 89 Ind., 501.

The sixteenth section of the charter gave the company the right to enter on lands, and to appropriate to its use 200 feet of land, the middle of the road to be in the middle of the land thus to be taken; and it limited the remedy of the owner for redress, in case of his non-acquiescence, to a period of five years next after that part of the road built on his land might be finished. If the land owners did not invoke a remedy within the reasonable period named in the statute, this remedy was lost. *Praether v. W. U. Tel. Co., ubi sup.; Mills on Eminent Domain*, sec. 340.

As to the seven years' statute, it is said that seven years did not intervene between the time of the last change of track and the commencement of this suit. We have already shown that there is no proof that this change extended to land beyond the limits of two hundred feet allowed by the charter, or beyond the limits of the concession made by Winchester and Overton, and that plaintiffs have proved by Claybrook that the change was made by consent of the landowners. We now have to say that the testimony fails to show that any change was made within the seven years next before the commencement of this suit.

Of course the plaintiffs must prove affirmatively that the action was brought within the statutory period. *Taylor v. Spears*, 6 Ark., 382; *Guthrie v. Field*, 21 Id., 38; *McNeill v. Garland*, 27 Id., 344; *Ouachita County v. Tufts*, 43 Id., 139. This suit was brought July 26, 1880. Organ says that the last change of track was made in 1873 or 1874. Richards says that the change was made in 1873.

The affirmative of the issue is, therefore, not sustained.

But in point of fact the seven years' statute had nothing to do with the question. The true period of limitation was five years, as prescribed in the charter. In the absence of that the period would be three years—the period of limitations for actions of trespass. Mansf. Dig., sec. 4477.

We have seen that the damages in such cases may be waived by parol. Therefore the question is not one involving the title to land. Where the statute gives the company the right to enter on the land the demand for damages is not an interest in the land, but only a pecuniary claim. *Fuller v. County Com'r.*, 15 Pick., 81.

Counsel for appellant seek to take the case out of the statute as to a few of the plaintiffs, on the ground that some of the Winchester devisees were married women when the land was taken, and that they left husbands surviving, who were tenants by curtesy, and that these have died within seven years next before the commencement of the suit. This claim may go along with the rest. We had never heard before that a husband had an estate in curtesy in the choses in action of his deceased wife. We are always willing however to learn. There are only two grounds of action set up in the substituted complaint, viz: damage to the land by needless excavation for the purpose of getting earth to use elsewhere, and damage to riparian rights. They both neces-

sarily fail, because there is not a particle of testimony to sustain either.

As to damages to the land, it is not stated that the admitted contract under which the company entered contained any limitation as to the use of earth or timber. It must then be presumed, especially after twenty years' acquiescence, that the company had the right to use them; for the grant of the land included the timber growing on it, and certainly it did not exclude the earth. *Norris v. Vermont Ry. Co.*, 28 Vt., 99; *In re Utica Ry. Co.*, 56 Barb., 456.

The law is well settled that after lands are partitioned, or conveyed in separate parcels, riparian rights cannot remain in common; because these are a part of the land itself, and each parcel of land bounded by water must necessarily have its own riparian rights attached to it as an essential part of its very being. *Linthicum v. Ray.*, 9 Wall., 241; *Haynes v. Wells*, 26 Ark., 464.

On the argument in the court below it was contended by counsel for Overton that the running of the railway ferryboat for the sole purpose of carrying the cars of the railway company, and freight and passengers in those cars, was an infringement of the ferry right of the plaintiffs, and that damages should be paid to them for that infringement; but the law is perfectly well settled that a railway ferryboat which is run for the purpose of carrying cars, passengers and freight for railway purposes only, and to connect lines of railway on either side of the river, is not an infringement of an ordinary ferry franchise. *Bridge Proprietors v. Hoboken Co.*, 1 Wall., 149; Rev. Stat. U. S., sec. 5258; *Mayor v. New England Transfer Co.*, 14 Blatch., 159; *Railroad Co. v. Richmond*, 19 Wall., 588; *The Hazel Kirke*, 25 Fed. Rep., 601; *Piatt v. Covington Bridge Co.*, 8 Bush., 31; *Lake v. Virginia R.*

R. Co., 7 Nev., 294; *Bridge Co. v. Hoboken Land Co.*, 13 N. J. Eq., 81.

The statute of limitations affects the pretended Greenlaw claim, as well as the rest of the claims made by plaintiffs. The statute was pleaded in various ways; but it need not have been pleaded at all, as in equity the statute bar destroys the equity of the complaint. *Riley v. Norman*, 39 Ark., 158. As long as there is an administration pending it must be presumed, in the absence of a contrary showing, that it is kept open for the payment of debts; and the administrator alone can sue, either on a contract or for trespass on lands. *Culberhouse v. Shirey*, 42 Ark., 25.

The statute of limitations ran against Vance as executor until he was made a party in 1886. *Lagow v. Neilson*, 10 Ind., 183. The executor being barred, the heirs are barred also. Hill on Trustees, 267, 403, 504; 2 Perry on Trusts, secs. 858, 859; *Meeks v. Olihuts*, 100 U. S., 569: *Coleman v. Walker*, 3 Metc. (Ky.,) 65; *Rosson v. Anderson*, 9 B. Mon., 423; *Couch v. Couch*, 9 Id., 169; *Danrall v. Adams*, 13 Id., 279; *Edward v. Woolfolk*, 17 Id., 381; *Williams v. Otey*, 8 Humph., 563; *Woolridge v. Planter's Bank*, 1 Sneed, 297. The Act June 22, 1855, Acts 1855, p., 238, was a general one. It was recognized in 31 Ark., 504, and has never been repealed.

A land-owner who stands by and acquiesces until a railroad company has expended money, and constructed its track across his land, so that the track at that point has become part of its line, cannot maintain injunction against a corporation which has succeeded to its right and franchises, by purchase at foreclosure sale, without notice of any claim or objection on the part of such land owner. *Midland Ry. Co. v. Smith*, (Ind.,) 15 N. W. Rep., 256; *Evansville Ry. Co. v. Nye*, (Ind.,) Id., 261.

BATTLE, J.

On the 3rd day of August, 1880, the appellants commenced this action against appellee in the Crittenden circuit court, on its equity side. They allege in their complaint that Marcus B. Winchester and John Overton jointly owned the north half of Spanish grant, No. 2337, in township 6 north, ranges 9 and 10 east, and fronting on the west bank of the Mississippi river, in Crittenden county, Arkansas, just opposite the upper part of the city of Memphis; that Winchester died in the year 1856, leaving a last will and testament; that the land had been divided between Overton and the devisees of Winchester and their representatives, to whom the interest of Winchester belongs; and that the riparian rights pertaining to the land, by consent, were not divided, but remain the joint property of appellants. They further allege, that about the 8th day of November, 1872; the Memphis & Little Rock Railroad Company, without their consent, entered upon the land and constructed its railroad across the entire tract, until it reached the Mississippi river; that in constructing its railroad the company excavated and filled and otherwise changed the face of the tract, and cut timber, and took earth, therefrom, and used the same, and had thereby greatly impaired the use and reduced the value of the land; and that the place where the tract extends to the river is on land set apart, in the division, to Overton. They further state, that on the 8th of May, 1872, one Greenlaw, who was the manager, superintendent, or chief executive officer of the Memphis & Little Rock Railroad Company, leased from Overton his undivided one-half interest in the ferry privilege belonging to the land, so far only as to allow Greenlaw to run a transfer boat between the eastern terminus of the railroad and Memphis, for the purpose of trans-

ferring freight and passenger cars, with their freight and cargoes. That as soon as he obtained the lease he began running a transfer boat under it, transferring the cars of the railroad company, with their contents, to and from the Tennessee and Arkansas shores, the point of landing on the Arkansas shore being at the place where the railroad touched the river on the land of appellants; and that the railroad company had constructed and maintained an inclined railway, leading from the top of the bank of the river into the river, and other appurtenances for transferring cars to and from the transfer boats. That the Memphis & Little Rock Railroad Company and appellee had constructed side tracks, buildings, structures and appurtenances, both on the banks and along the margin of the river. That the side tracks ran up and down the river front, the one way upon the land set apart to Overton, and the other upon the land allotted in the division to the devisees and representatives of Winchester, for several hundred yards. That the railroad companies had moored and anchored a wharf boat in the river in front of the land of appellants, and had securely fastened the same to the shore; and had constructed or located an elevator on the wharf-boat for the handling of the freight transported by appellee; and had built along the margin of the river and upon its bank a platform to be used in connection with the wharf-boat and elevator, for the loading and unloading of cars. That Greenlaw continued to run the transfer boat for several years, and so long as he remained the managing officer of the railroad company. That afterwards and when he had ceased to be the managing officer of the Memphis & Little Rock Railroad Company the transfer boat, and his right to run the same, were transferred to the last mentioned company, which continued to run it, transporting thereon its

cars, with their freight, cargoes and passengers, between the Arkansas and Tennessee shores, to and fro, until it was succeeded by appellee, which, claiming it had acquired all the property of that company, and had succeeded to its rights, had since then been using and operating its railroad upon and across the lands of appellants and the side tracks, switches and buildings thereon, and had continued to run the transfer boat, and was then running it in the same manner it had been run by its predecessors. That neither the Memphis & Little Rock Railroad Company, nor the appellee, nor any one else, had ever caused the land, or any part of it, to be lawfully condemned, for the uses for which it had been appropriated, or acquired the right to go upon, or pass over, or use the land, or the riparian rights thereto belonging, or paid anything whatever for the use of the riparian rights or the land, or the rights and appurtenances belonging thereto, or for damages, or the timber and earth taken therefrom, or for incidental injuries to the land. The prayer of the complaint was, that an injunction be issued restraining appellee from further occupying or using the land or any part of it, and the riparian rights and privileges thereto belonging, and from running the transfer boat, perpetually, or until it pay just compensation therefor to be fixed by the court; and that the amount due appellants on all the grounds and accounts set out in their complaint, from the appellee and its predecessor, might be ascertained by proper accounts; and that appellants have a decree therefor and execution of such decree, and all other just, proper and general relief.

Appellee answered the complaint and demurred thereto, first, because the appellants had not the legal capacity to sue on account of the matters stated therein, and second, because it did not state facts sufficient to constitute a cause of action;

denied it was liable to appellants in any manner on account of what is alleged therein; stated the reasons why it was not liable and pleaded the statute of limitations in bar of the right to maintain the action.

Depositions of witnesses and agreements of the parties as to facts were filed and submitted to the court. From this evidence we find the following facts: The Memphis & Little Rock Railroad Company was chartered by an act of the general assembly of this State, approved January 11, 1853. The company was formed soon after the act incorporating it was passed. On the 1st of May, 1860, it conveyed to Tate and others, its charter, franchises, road, road-bed, right of way and all its other property, in trust, to secure the payment of its certain bonds mentioned in the conveyance, with power to sell the property on default by the company. Afterwards on the 1st of March, 1871, it executed a second deed of trust, conveying all its property and franchises to Henry F. Vail, in trust for the holders of bonds secured thereby, subject to the first deed of trust. Default having been made in the payments due on the bonds secured by the latter deed of trust, Vail, the trustee, in execution of the power vested in him, sold and conveyed the property described therein, on the 17th of March, 1873, to Stillman Witt. Afterwards, on the 29th of March, 1873, Witt made a declaration showing for whom he had purchased, and that he held in trust for them. On the 9th of December following, the grantor and grantees in the declaration of trust so made by Witt, organized a company called the Memphis & Little Rock Railway Company, to which the property sold by Vail was conveyed. This railway company issued its bonds, and to secure the same, by a deed of trust, conveyed all the property, privileges and franchises so acquired by it to trus-

tees, in trust for its bondholders. Both of these companies made default in the payments due on the bonds secured by the deeds of trust executed by them. Afterwarns a suit in equity was instituted by the trustees against the two companies, to foreclose these deeds of trust, in which a final decree was rendered ordering a sale of the property described in the same; and a sale thereof was made and confirmed, and a conveyance of the same was made to certain persons in trust for the holders of certain bonds. On April 28, 1877, the holders of these bonds formed the appellee, the Memphis & Little Rock Railroad Company, as reorganized. Afterwards, on the 30th day of April, 1877, the last named trustees conveyed the charter, franchises and property vested in them to the appellee.

It is conceded that the tract of land described in the complaint was acquired by Overton and Winchester as early as the year 1846, and that they held possession of it jointly, to the death of Winchester; that Winchester died in 1856, leaving a will; that William Vance was appointed and qualfied as the executor of such will; that Overton and the executor and devisees of Winchester held joint possession after that time and until the partition mentioned in the complaint, which was made in the manner stated in the complaint at the April term, 1873, of the circuit court of Crittenden county; and that since such partition Overton and Winchester's devisees and heirs have held possession in severalty of the land set apart to them, and, jointly, of the riparian rights belonging to the whole tract of land, except in so far as the appellee and its predecessors, the Memphis & Little Rock Railroad Company and the Memphis & Little Rock Railway Company, have held and possessed parts of the same; and that Vance has never been discharged, but is still acting as executor of Winchester's will.

On the 23rd of May, 1856, the Memphis & Hopefield Real Estate Stock Association, in consideration that the Memphis & Little Rock Railroad Company would locate its eastern terminus and depot on the land given, gave and conveyed to it twenty acres of ground lying four hundred and twenty-three feet west of the Mississippi river, opposite Memphis, in what is known as the town site of Hopefield, in Crittenden county in this State. The Memphis & Hopefield Real Estate Stock Association agreed to permit the railroad company to use the land between the river and the twenty acres for the purpose of discharging and receiving freight, passengers and the like, but reserved to itself the right of landing steamboats, ferryboats and other water crafts on or at the same. Under this agreement the railroad company located its eastern terminus and built its depot on this twenty acres of ground in the year 1857 or 1858. Afterwards, a sand bar having formed in the river in front of Hopefield, and prevented the landing of boats near the terminus of the railroad, the company constructed a track up the bank of the river from its main track in Hopefield to a point above and on the land of appellants, at or near a place on the river where the water was deep and there was a good landing for steamboats, where it built a depot. The track running up the bank of the river was used until 1859, when it was taken up and the track was changed and laid through appellants' land, in the locality of the track used by the appellee when this suit was begun. This last mentioned track was used until the war came on. It was then torn up by the military authorities of the United States. After the war the railroad company again laid iron on the track running up the bank of the river to the depot before mentioned, which was used until about the year 1873 or 1874, when the iron on it was taken up

and put back by the railroad company on the track running through the land of appellants, which was used when this suit was commenced, and afterwards until the land caved into the river. At the same time the iron was moved the railroad abandoned the land covered by the track running up the bank of the river to the owner. The depot on the land, however, was continuously used from about the year 1866 by the appellee and its predecessors until the land on which it stood caved into the river.

It is conceded that tracks and switches were laid on appellants' land as stated in their complaint. The switches were not placed until about the year 1873 or 1874, and were changed from time to time as the railroad company saw proper. About the 8th of November, 1872, William B. Greenlaw, who was the managing officer of the Memphis & Little Rock Railroad Company, leased for one year from John Overton, one of the appellants, his one-half interest in the right to run a transfer boat across the river from the land of appellants, for the purpose of transferring the cars of railroad companies to and from the Tennessee shore. Thereupon an inclined railway was built from the tracks of the railroad to the river and Greenlaw ran a transfer boat in connection with it, under his lease, and received from it cars and transferred them to the Tennessee side, and received cars on the Tennessee bank and transferred them to the Arkansas shore and discharged them on the inclined railway. The inclined railway in existence and use at the commencement of this suit was built in 1874. The lease was renewed from year to year, and the boat continued to run under it until Greenlaw transferred his right to the Memphis & Little Rock Railway Company, under an arrangement made about the 8th of February, 1875, and then the railway company ran

the boat just as Greenlaw had done, until appellee succeeded to its rights, and since appellee so succeeded it has run a transfer boat in the same way. The evidence, however, does not show that either one of them ever secured a lease. Appellee commenced operating the railroad and transfer boat about the 1st of May, 1877.

Since the commencement of this action the bank of the Mississippi river in front of the land has caved to such an extent that not one of the railroad tracks, nor one of the buildings or structures of any kind of appellee remains now where they were then. But the locality on which every track and every building and structure on the land claimed by the appellants was then situated is now a part of the bed of the Mississippi river. As the banks caved and washed into the river appellee, since the year 1881, has moved back its tracks and buildings so as to keep them on the land adjacent to the river bank, but outside the caving.

It is further conceded that no application has ever been made to the court by parties owning the land in question and claiming the riparian rights pertaining thereto, for compensation therefor; and that no compensation has ever been paid to appellants, or any one of them, or any of their devisors or ancestors for the land taken and appropriated, or for the use of the inclined railway, or the land upon which it is built, or for running the transfer boat; and that the appellee and its predecessors have never made application to the courts for the condemnation of the land taken or used by them, or for the condemnation of the riparian rights they have appropriated; nor does the evidence show that the appellee or its predecessors ever procured the right of way over appellants' land by their, or their devisors', or ancestors', or grantors' express agreement or consent.

Agreements in writing made and entered into by the parties to the action were filed, by which it was agreed that each of them should have the benefit of the foregoing facts as to the caving of the banks of the Mississippi river and the removal of appellee's tracks and buildings, and that no amendment of the pleadings of either party should be required in order to present them, and that the same relief should be granted to either party as if the facts were formally set out in his or their pleadings; and that testimony as to damages of all kinds, including damages for taking timber, making excavations, as well as for road-bed taken and the riparian rights claimed, and all testimony of like character, might be deferred until the hearing, on the merits, of the rights of the parties; and that the testimony might be thereafter taken, if desired, upon a reference to a master; and that all questions of law were reserved for argument and adjudication—each party being at liberty then to claim any legal rights that belong to such party, or deny the legal rights set up by the other.

Upon a final hearing the complaint was dismissed by the court without prejudice to the appellants' bringing an action at law upon the same cause of action set up therein; and plaintiffs appealed.

As to the course which the courts should pursue in cases where the plaintiffs have adopted the wrong proceeding and no motion to correct the error has been made, the decisions of this court are not entirely consistent. In *Phelps v. Jackson*, 27 Ark., 591, it is said: "It is an old and familiar rule of chancery practice that, if the complainant has a plain and ample remedy in a court of law, his bill cannot be entertained but must be dismissed for the want of equity. The code, however, has changed this practice, and allows a plaintiff

who has committed an error as to the kind of proceedings adopted, to change them and transfer the action to the proper docket; but this change and transfer must be done by the plaintiff. If the error is discovered before the answer is filed, it may be done without motion; if afterwards, on motion, in court. The transcript in this case does not show that the plaintiffs in the court below made any effort to have the proceedings changed. It is within the province of the court to make the transfer, but it is not bound to exercise this discretion, unless asked to do so by the party desiring it. When the bill has been examined, and judgment pronounced of 'no equity in it,' unless the party complaining makes some effort to have the proceeding changed to the proper forum, it is the duty of the chancellor to dismiss the bill."

The same rule of practice was laid down in *Berry v. Hardin*, 28 Ark., 458; *Hendricks v. Keese*, 32 Ark., 714; *Crawford v. Carson*, 35 Ark., 583, and in *Little Rock & Fort Smith R. R. Co., v. Perry*, 37 Ark., 164.

In *Apperson v. Moore*, 30 Ark., 56, which was a suit in equity on the mortgage of a future crop, executed prior to the act of February 11th, 1875, which made mortgages on crops to be planted valid, it was held that the lien of a mortgage on an unplanted crop attaches, in equity, as soon as the subject of the mortgage comes into existence, and could be enforced, in a proceeding to foreclose, against the mortgagor and those holding under him with record notice. In *Tomlinson v. Greenfield*, 31 Ark., 557, which was an action on the law side of the trial court, it was held, that a mortgage on an unplanted crop, executed before the act of February 11th, 1875, became a law, was void.

Miller v. Nieman, 27 Ark., 233; *Chapline v. Holmes*, Ib., 414; *Sale v. McLean*, 29 Ark., 612; *Crane v. Randolph*,

30 Ark., 579; *Lawrence v. Zimpleman*, 37 Ark., 643; *Bryan v. Winburn*, 43 Ark., 32, and *Matthews v. Marks*, 44 Ark., 436, were actions to quiet title to lands. In these cases it was held that, in order to maintain such actions, the plaintiff must show he is in possession, or that the land is wild or unimproved, or his title is an equitable one, and that if he fails to do so his action should be dismissed. "For," says the court, "when the title is a purely legal one and the defendant is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment cannot be maintained under the guise of a bill in chancery." In these cases, however, the relief sought was purely equitable and the plaintiffs failed to show the condition on which it could be granted.

In *Talbot v. Wilkins*, 31 Ark., 411; *Moss v. Adams*, 32 Ark., 562; *Hammond v. Harper*, 39 Ark., 248; *Dorsey County v. Whitehead*, 47 Ark., 208, and *Catchings v. Harcrow*, 49 Ark., 20, it was held that an error as to the kind of proceedings adopted is not a good cause for dismissal, but only for a transfer of the cause to the proper docket; and that where no motion is made to correct the error, the court may either transfer on its own motion, or may proceed to a trial upon its merits.

1. PLEADING AND PRACTICE: Error in adopting proceedings: Transfer to proper docket.

The latter rule is more in harmony with the spirit and letter of the Code of Practice in Civil Cases. The code abolished all forms of actions, and provides that there shall be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be called a civil action; and that the proceedings in a civil action may be of two kinds: First, at law, and second, in equity; that the plaintiff may prosecute his action by equitable proceedings in all cases where courts

of chancery, before the adoption of the code, had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive; and that in all other cases the plaintiff must prosecute his action by proceedings at law. It further provides: "An error of the plaintiff as to the kind of proceedings adopted *shall not cause the abatement or dismissal of the action*, but merely a change in the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket." Such error may be corrected at the instance of either party, but is waived by a failure to move for its correction. Mansfield's Digest, secs. 4914-4928. In this case the action was dismissed, because, in the opinion of the court, the remedy of the plaintiffs was at law. If legal and equitable remedies were required to be administered in separate forms of action this ruling would be correct. But under the code there is but one form of action for all kinds of civil remedies. All that the plaintiff is required to do in the statement of his cause of action is to state in his complaint facts to show that he is entitled to the relief demanded; and it is the duty of the court to treat his complaint as valid without stopping to speculate upon the name to be given to his action. If he states facts which entitle him to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. If an error in the kind of proceedings adopted be committed, it should not be dismissed on that account, but the issue in the action should be tried according to the principles involved, and the relief he is entitled to should be granted without regard to such error. *Trulock v. Taylor*, 26 Ark., 54.

2. SAME: Misjoinder: Waiver.

It is said that there is a misjoinder of causes of action in the complaint in this cause. This is true. But the defend-

ant failed to take advantage of it before defence, and thereby waived it. The code provides that the plaintiff may strike from his complaint any cause of action, at any time before the final submission of the case to the jury, or to the court, where the trial is by the court, but the defendant must take advantage of a misjoinder of causes of action before the defence is made, and failing to do so he cannot afterward take advantage of it. Mansf. Dig., secs. 5015, 5016, 5017; *Terry v. Rosell*, 32 Ark., 495; *Riley v. Norman*, 39 Ark., 158; *Sale v. Crutchfield*, 8 Bush., 636, 646.

3. SAME: Parties plaintiff: Action for damages to land of decedent.

Appellee insists that Vance, as executor of Winchester, alone had the right to bring an action for compensation or damages on account of the taking and appropriation of the land formerly owned by Winchester. But the complaint and the evidence show that Winchester died in 1856, and that thereafter Overton and the executor and devisees of Winchester held joint possession of the land in question until 1873, when it was divided and the heirs and devisees of Winchester thereafter held possession of the part of land set apart as Winchester's portion thereof. This suit was commenced in 1880. The taking and appropriation occurred seventeen or eighteen years, and the suit was commenced about twenty-four years after Winchester's death. According to the repeated decisions of this court the heirs and devisees of Winchester, under the circumstances stated, had the right to sue. *Mays v. Rogers*, 37 Ark., 155; *Stewart v. Smiley*, 46 Ark., 373; *Graves v. Pinchback*, 47 Ark., 470.

In using appellants' land as a right of way for a railroad the company taking it acted without the authority of law. It is conceded that the land for which appellants ask for compensation in their complaint was first taken and appropriated

to the use of the railroad company in 1859, and was afterwards abandoned, and was again taken and appropriated in 1873 or 1874. It is further conceded that no proceedings were ever instituted to condemn it for a right of way, and that no compensation has ever been made for it. There is no evidence that appellee, or either of its predecessors, ever obtained it by agreement from its owners. So it is clear that the company which appropriated it to its use in 1873 or 1874 acquired no right to it. But it is not clear which appropriated it in that year, for all the property of the Memphis and Little Rock Railroad Company was sold and conveyed on the 17th of March, 1873, and the Memphis and Little Rock Railway Company was organized on the 6th of December following, and became the owner of the railroad and other property of the Memphis and Little Rock Railroad Company. But be this as it may, if the first company appropriated it, the second acquired no better title or right to it than the first had. The second could only take what its predecessor had a right to convey; it took subject to the claims of the owners, and subject to their right to enforce them in the manner prescribed by law.

4. RAILROAD COMPANIES: Appropriating land for right of way.

But it is contended that the charter granted by the legislature on the 11th of January, 1853, under which the original company was organized, gave to the company, to which it was granted, the right to enter on lands, and to appropriate to its use for right of way, one hundred feet of land on each side of the center of its road, and limited the remedy of the owner for redress, in case of his non-acquiescence, to a period of five years next after the part of the road built on his land was finished. It is true that the charter gave to the owner the right to apply for an assessment of damages and limited it to the period of five years after the road was built

on his land. But the legislature could not authorize the company to take private property for public use without first providing for just compensation to be made to the owner. Moreover, the first company never secured the right of way on the land in question, and its successors could not do so under its charter. The manner in which they could do so was prescribed by the constitutions and laws under which they were organized, which prohibited them from appropriating any property or right of way to their own use until full compensation shall be first made to the owner in money, or secured to him by a deposit in money. *Cairo & Fulton R. R. Co. v. Turner*, 31 Ark., 494; *Martin, ex parte*, 13 Ark., 206; *Little Rock & Fort Smith Ry. Co. v. McGehee*, 41 Ark., 204; *Memphis & Little Rock R. R. Co. v. Railroad Commissioners*, 112 U. S., 609; *Memphis & Little Rock R. R. Co. v. Berry*, 41 Ark., 436; *Arkansas Midland R. R. Co. v. Berry*, 44 Ark., 17.

5. SAME. Same: Acts 1855 and 1873

It is further contended that so much of the act entitled "An act prescribing the mode of procedure in obtaining the right of way for railroads in this State," approved 22d of January, 1855, as authorizes the owner of lands taken for right of way for a railroad to make application for the assessment of damages, and limits the time for him to apply to the period of two years after the road is finished over his land, with exceptions in favor of persons laboring under disabilities, still remains in force; and that appellants are confined to the remedy thereby prescribed. But this is not true. On the 28th of April, 1873, the legislature passed an act "for the better regulation and efficiency of railroad companies," in which a mode of ascertaining damages, and compensating land owners for right of way is provided. In the latter act the legislature took up and legislated upon the

whole subject embraced in the act of 1855, and evidently intended that the act of 1873 should be a substitute for the former act. The manifest object of the act of 1873 was to carry into effect the requirements of the constitution of 1868 upon the subject, and, in lieu of so much of the act of 1855 as provides that the owner might apply for an assessment of damages, to prohibit railroad companies from appropriating land to their use as a right of way, without the consent of the owner until full compensation therefor should be first made, or secured to him by a deposit of money. It is a complete substitute for the act of 1855, and evidently was intended to, and does, repeal it. *Cairo & Fulton R. R. Co. v. Trout*, 32 Ark., 27; *Little Rock & Fort Smith Ry. Co. v. McGehee*, 41 Ark., 204; *Bentonville Railroad v. Baker*, 45 Ark., 252.

6. SAME: Same: Injunction to prevent wrongful appropriation.

The statutes of this State provide no remedy for the owner to obtain damages for land taken in the construction of railways. The railroad company alone can institute proceedings to have the land condemned to its use and the damages therefor assessed. But the owner is not without an adequate remedy. If a company proceeds to take his land without first making just compensation a court of equity will interfere for his protection. It will enjoin the company from taking possession, until proper compensation is ascertained and paid; and will restrain the continuous use of land by the operating a railway over it, on his timely application, "when the company has not taken the necessary proceedings to acquire title under the laws of the State, and when it has no grant from the owner and no right to the occupancy of the land." High on Injunctions, [2d Ed.] sec. 625, and cases cited; 2 Wood Railway Law, p. 794; Lewis on Eminent Domain, secs. 631–634, and cases cited; Pierce on

Railroads, p. 230; 1 Rorer on Railroads, p. 334; *Cairo and Fulton R. R. Co. v. Turner*, 31 Ark., 506; *Niemeyer v. Little Rock Junction Ry.*, 43 Ark., 119.

But the application for injunctive relief must be seasonably made. As said in *Midland Railway Company v. Smith*, 15 North Eastern Reporter, 257: "A land owner who 'stands by' and acquiesces until a railroad company has expended its money, and constructed its track across his land, so that the track at that point becomes a part of its line, will not thereafter be entitled to invoke the aid of a court of equity in arresting an enterprise in which the public, as well as the railroad company, have an interest. Upon considerations of public policy, as well as recognized principles of justice, courts of equity will refuse to interfere after a railroad corporation has entered upon land with the consent or by the license of the owner, and has expended money in the construction of its road upon the strength of such license or consent; or where the land owner has acquiesced in the use of his land by the railroad company until the public interest or convenience has become involved." High on Injunctions, sec. 643, and cases cited; *Hentz v. Long Island R. R. Co.*, 13 Barb., 655; *Erie R. R. Co. v. D., L. & W. and M. & E. R. R. Co.*, 21 N. J. Eq., 289; *Goodwin v. Cincinnati and Whitewater Canal Co.*, 18 Ohio St., 169; *Bassett v. Company*, 47 N. H., 439; *Traphagen v. Mayor and Aldermen of Jersey City*, 29 N. J. Eq., 206.

7. SAME: Same: Claim to compensation: Enforcement against land.

The owner may not be entitled to injunctive relief, but, nevertheless, entitled to compensation for the land taken from him and appropriated by the railway company. The right to the property taken can only be acquired by the company by purchase, by adverse possession for the statutory period, or by statutory proceedings for the assessment of damages.

The company can only acquire it through the right of eminent domain by making just compensation. Until then it remains in the original owner. The power to take and the obligation to indemnify for the taking are inseparable. But the owner may waive formal condemnation proceedings, and all formal modes of transfer, and elect to regard the action of the railroad company as taking the land under the right of eminent domain, and demand and recover just compensation. *United States v. Great Falls Mfg. Co.*, 112 U. S., 656; *Drury v. Midland R. R. Co.*, 127 Mass., 576; *Cohen v. The St. Louis, Fort Scott & Wichita R. R. Co.*, 34 Kan., 158; *Western Penn. R. R. Co. v. Johnston*, 59 Penn. St., 294; *Goodlin v. C. & W. Carroll Co.*, 18 Ohio St., 180; Mills on Eminent Domain, [2d Ed.] secs. 140–144.

The title acquired by a railroad company in land legally appropriated for right of way and paid for is denominated an easement, but it is an easement in the nature of a fee, and, under the statutes of this State, is practically a title to the fee in the land taken. Mansfield's Digest, sec. 5463; 2 Wood Railway Law, 770. In the assessment of damages the owner is entitled to the full value of his land. When, therefore, he elects to demand compensation for land necessarily used in the construction of a railroad he assumes a relation to the railroad company like unto that of a vendor who sells his land on time and retains the title and agrees to convey it when the purchase money is paid. He does not part with the title until the compensation is made. The amount to be paid for the land used as a right of way, though called damages or compensation, is in its nature the price of the land taken. If it had been sold to an individual on time the vendor would have a lien on it for the unpaid purchase money. Equity in that case would treat the unpaid purchase money as

a lien on the land sold and enforce it, on the ground it would be unconscionable to allow the vendee to retain the property voluntarily sold to him and not pay its price. This doctrine applies with greater force when the property is seized in *in vitum* by a corporation. It is strengthened by that "imperious constitutional mandate," which prohibits property from being taken without just compensation being first made. If equity, contrary to its general rule, when property is being taken by a railroad corporation without making just compensation, will interfere to protect him, it certainly would and does not withhold its hand in the enforcement of his claim upon the property for the unpaid purchase price, when his right to pay for it as a constitutional condition precedent to its becoming the property of the corporation still exists in all its original vigor. It is obvious that a court of equity will, in a proper proceeding, so long as the original owner holds the title in the soil, enforce the claim of the owner against the property taken as it does a vendor's lien. *Evans v. The M. I. & N. Ry. Co.*, 64 Mo., 453; *Provolt v. The C., R. I. & P. R. R. Co.*, 69 Mo., 640; *Same v. Same*, 57 Mo., 262–264; *Drury v. Midland R. R.*, 127 Mass., 576; *Mims v. M. V. & W. R. R. Co.*, 3 Kelly, 340–342; *Gillison v. S. & C. R. R. Co.*, 7 S. C., 180; *Kittell v. Railroad Co.*, 56 Vt., 109; *Adams v. Railroad Co.*, 57 Vt., 248; *Pfeifer v. The S. & F. L. R. R. Co.*, 18 Wis., 164; Mills on Eminent Domain, [2d Ed.] 140–144.

8. SAME: Same: Alienation of land wrongfully taken.

But it is insisted that appellee is not responsible for the debts of its predecessors. This is true. While it did not assume their personal liabilities, it could only take from them by purchase what they had a right to convey. As said in Lewis on Eminent Domain, sec. 621: "No rights can be acquired in private property under the power of eminent do-

main except subject to the duty of making just compensation therefor. Consequently, the party originally taking or occupying the property cannot transfer to another, by mortgage, lease or otherwise, any right in the property except subject to the same duty. In other words, the owner's claim for just compensation is paramount to any right which can be derived by or through the party making or seeking the condemnation." The appellee was not bound to accept property appropriated by its predecessor without right, and could only do so subject to the duty of making compensation, unless the owner was estopped from claiming it. *Drury v. Midland R. R.*, 127 Mass., 576; *Gilman v. The S. & F. L. R. R. Co.*, 40 Wis., 653; *Mims v. M. & W. R. R. Co.*, 3 Kelley, 340–342; *Kendall v. Railroad Co.*, 55 Vt., 438; *Gillison v. S. & C. R. R. Co.*, 7 S. C., 180; *Adams v. Railroad Co.*, 57 Vt., 250; *Pfeifer* v. *The S. & F. L. R. R. Co.*, 18 Wis., 166.

In the *Western Pennsylvania Railroad Company v. Johnston*, 59 Penn. St., 295, the Northwestern Railroad Company appropriated the property of one Johnston for the purposes of its road. For the taking and occupying his land Johnston recovered five hundred dollars. Under a mortgage of its whole road and all its rights, all its property was sold and purchased by one Hirst in trust for its bondholders. The bondholders were incorporated under the name of the Western Pennsylvania Railroad Company, under an act of the assembly; and Hirst conveyed the property and franchises of the Northwestern Pennsylvania Railroad Company to the new company. The act incorporating the new company provided: "That all unpaid damages which have accrued to the land owners by reason of the original construction of said road, shall remain forever, until paid, a lien upon

said road." Mr. Justice Agnew, in discussing the liability of the new company for property taken by the old company, for the court said: "But this is not enough to determine the case, for it remains to be seen whether the damages can be recovered from the Western Pennsylvania Railroad Company. Perhaps it would be sufficient for this case to say that the Western Pennsylvania Railroad Company accepted a charter repealing the charter of the Northwestern Railroad Company, and providing that the damages of the land owners remaining unpaid should remain a lien on the road till paid, and, therefore, that the legislature clearly intended that they should be paid by the new company which, under the deed from Hirst and under its charter, is possessed of all the rights and interests of the old company. But the case rests upon other grounds. The plaintiff, who has never parted with his rights, *stands on the higher fundamental right of property*—that it shall be taken and used by no one for the public purpose of a railroad without just compensation being made to him. *Monongahela Nav. Co. v. Coons*, 6 W. & S., 114; Yost's Report, 5 Harris, 524; *Borough of Harrisburgh v. Crangle*, 3 W. & S., 460. This is a sacred constitutional right not to be spirited away by refinement. If, therefore, the original occupant has so managed its cards as to escape payment until it has divested itself of its interest by any form of alienation, its alienee, mediate or immediate, if it would enjoy the uncompensated right, must pay the price of it, unless it can show an equity growing out of the conduct of the owner of the soil which would estop him. It must not be forgotten we are treating of a case where the owner has done nothing to divest his right by his own act or alienation, but where the alienee of the original actor stands upon a seizure at law,

which must be shown to have conformed to the law in all its steps, in order to deprive the owner of his title. The mortgage was but a mode of alienation of the estate of the mortgagor, but could not operate upon the paramount claim of the land owner over the mortgage interest. This, we have seen is not a mere lien, the judgment in the process of assessment not being the source of his right, but the means only of ascertaining the amount of his claim and of enforcing its payment. It could be extinguished only by payment or release. When the alienees of the Northwestern Railroad Company came into possession, therefore, under their purchase, if at all, they took the interest acquired *cum onere*. If possession never had been obtained, then clearly they could get it only by payment or security. In law and equity neither they nor any one claiming the interest of the Northwestern Railroad by an act of eminent domain, subordinated by the law and the constitution to payment as the condition of its exercise, can hold and use the interests thus acquired without compensation. *Borough of Harrisburgh v. Crangle*, 3 W. & S., 460."

9. SAME: Same: Statute of limitations: When action of land owner barred

Another question arises as to when an action to enforce the claim of the owner against the land taken, or to enjoin the railroad company from using it until compensation is made, is barred by the statute of limitations. Both of these remedies are based entirely upon the right of the original owner to the estate in the land taken, appropriated and converted by the railroad into its right of way. As in the case of a vendor who sells his land on time, and retains the title until the purchase money is paid, he has by virtue of the legal title such an interest in the estate so taken, appropriated and converted as gives him the right to proceed against it for the purpose of producing the sum of money he is en-

titled to by reason of the appropriation. As in other cases, however, the right to this estate may be divested by adverse possession. The possession of the railroad company, although wrong in the beginning, may ripen into a right by virtue of the continuance of the wrong for the requisite statutory period. As seven years adverse possession, under the statutes of this State, will bar an action to recover lands, it will be sufficient to bar the action to enforce the claim of the owner against the land or to enjoin the railroad company from using it until just compensation is made, as in that time the right necessary to support the action will be divested, and there will be no basis upon which it can be maintained.

In *Howard v. State*, 47 Ark., 431, and *Patton v. State*, 50 Ark., 53, it was held by this court, that "a road becomes established as a public highway, by prescription, when 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." In the Patton case it was said, "the right to a public highway acquired in this manner is based upon adverse possession for the full statutory period of limitation." The same doctrine applies with equal force to railroads. In both cases the land is taken and appropriated and used as a highway for the public benefit. We know of no reason why the same limitation should not prevail in both cases.

10. SAME: Same: Damage to riparian rights.

Appellants say that appellee has infringed upon their riparian rights. Their land borders upon the Mississippi river, a navigable stream. They are, therefore, entitled to certain rights as riparian proprietors. "Among these rights are access to the navigable part of the river from the front part of their land, the right to make a landing, wharf or pier for

their own use or for the use of the public," and to the privilege of keeping a public ferry over or across the Mississippi river, "subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." These rights of the appellants are property, and are "valuable, and though they must be enjoyed in due subjection to the rights of the public, they cannot be arbitrarily or capriciously destroyed or impaired. They are rights of which, when once vested, the owners can only be deprived in accordance with established law, and if necessary that they be taken for the public good, upon due compensation." *Yates v. Milwaukee*, 10 Wall., 497; *Little Rock & Fort Smith Ry. v. McGehee*, 41 Ark., 202; *L. R. Junction Ry. v. Woodruff*, 49 Ark., 381.

Appellants further insist that they have been damaged by appellee running a transfer boat across the river; and attempt to show that it sometimes transported persons across the river for pay, who were not passengers on its trains. But there is no evidence that appellants, or any of them, ever had a license to keep a public ferry. If they did not, they had no right to keep a ferry so as to charge a compensation for transporting persons or property over the river; and could not have been injured by the running of the transfer boat, and can claim nothing on that account. They are, however, entitled to the damages they have suffered by reason of their riparian rights having become less valuable by reason of appellee's tracks, buildings, structures, and other improvements, as held in *Little Rock & Fort Smith Ry. v. McGehee*, 41 Ark., 202; Mansfield's Digest, sec. 3311.

But appellee contends "that, after lands are partitioned, or conveyed in separate parcels, riparian rights cannot re-

main in common; because these are a part of the land itself, and each parcel of land bounded by water must necessarily have its riparian rights attached to it as an essential part of its very being," and that the land in question having been divided between appellants, they cannot claim and hold the riparian rights pertaining thereto in common, and bring a joint action on account of an infringement of the same, or jointly maintain this action in respect to the infringement of such rights. On the other hand appellants say that the land was divided between them, without reference to the riparian rights pertaining to the land, and it was agreed that these rights should remain undivided and be held in common as if the land had not been divided, and that they had ever remained and were their joint property. If they wish to treat these rights as their common property we see no reason why appellee can complain. It cannot be injured thereby, and it is a matter which concerns appellants and no one else.

II. SAME: Same: Personal responsibility of company.

Since the commencement of this action the bank of the river has caved to such an extent that not one of the railroad tracks, or buildings, or structures of any kind of appellee on the land of appellants remain now where they were then. As the bank washed into the river, appellee moved them back on the land adjacent to the river. It is evident, therefore, that as to so much of appellants' land as has been washed into the river no action can be maintained to enforce a claim against it or to enjoin the use of it until compensation is made. But for the appropriation of such land to its use appellee is personally responsible, and upon that personal responsibility appellants can only rely for recovery.

Under the agreement of appellants and appellee, both parties are entitled to the benefit of the facts as to the caving of the banks of the river and the removal of appellee's

tracks and buildings on account thereof. Appellants are entitled to damages or compensation for their land, which appellee has appropriated since the commencement of this action, and for so much of the land as it has taken during the pendancy of this cause and now uses in the operation of its railroad, they are entitled to an order of injunction restraining appellee from using it until compensation therefor is made. We think appellants are entitled to this order because of the pendancy of this action. While it has been pending and appellants have been asking for an injunction restraining appellee from using their land for railroad purposes until compensation should be made, it cannot be said that they stood by and acquiesced in the use of it. Before the enforcement of the order, however, appellee should be allowed a reasonable time after the damages are assessed in which to make the compensation.

Under the agreement of the parties appellee is entitled to the benefit of the statute of limitations in all cases where the recovery of the relief sought by appellants is barred thereby. On account of the numerous appellants and because this cause will have to be remanded we will not attempt to ascertain whether any or how many of them are barred.

It is impossible to ascertain from the evidence before us what damages or compensation the appellants are entitled to. It is evident that they are entitled to some. It was agreed between the parties that the taking of the testimony as to damages of all kinds might be deferred until the final hearing, and that it might be thereafter taken, if desired, upon reference to a master. For this reason, doubtless, it was not taken.

The court erred in dismissing the appellants' complaint. The judgment of the circuit court is, therefore, reversed, and this cause is remanded for further proceedings not inconsistent with this opinion.

SHEPHERD V. JERNIGAN.

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1. TENANT IN COMMON: *Conveyance of interest in separate lots.*

Where a single tract of land is held in common by two or more persons, they may by agreement lay it off into town lots, and after thus becoming co-tenants of each lot, each may convey his interest in any of the several lots.

2. BETTERMENT ACT: *Constructive notice of title.*

The constructive notice of title which is implied from the registry of a deed, is not in itself sufficient to preclude a defendant who has improved land in good faith, under the belief that he is the owner, from recovering for his improvements under the betterment act.

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

Crump & Watkins, for appellant.

1. The case of *Beard v. Dansby*, 48 Ark., 183, settles the law in favor of the appellant on the question of betterments.

2. The conveyance by metes and bounds of a portion of a common estate by one tenant in common, is void and not merely voidable, at the election of the co-tenant. 9 Vt., 138; 9 Mass., 34; 4 Conn., 495; 1 Ib., 363; 2 Ib., 243; 5 Ib., 363; 12 Mass., 348; 19 Mich., 127; 3 Yerger, 492.

The Appellee, pro se.

1. By common consent the land had been laid off into town lots, and the conveyance by one tenant in common, carried his entire interest in the lot so conveyed. 6 Ohio, 391; 2 Harr. & J., 421; 50 Mo., 597; 9 R. I., 505; 47 N. H., 347; 19 N. J. Eq., 394; 28 Tex., 34; 39 Ind., 95; 120 Mass., 162.

2. If the decision in *Dansby v. Beard*, 48 Ark., 183, is adhered to, it would seem to settle the question of betterments.

COCKRILL, C. J.

This is an action of ejectment. The plaintiff and defend-

ant were each the grantee of different tenants in common of the town lot in controversy, though the title deed of each purported to convey the entire estate. The lot was a part of an eighty acre tract which had been patented to one Evans, who sold an undivided interest in it to D. B. Jernigan. It was then laid off into town lots by Evans and D. B. Jernigan, when the latter conveyed his interest in the lot in suit by deed as mentioned above to the plaintiff, J. M. Jernigan, who is the appellee here. The Eureka Improvement Company afterwards obtained a conveyance from D. B. Jernigan and the other grantees of Evans to the entire interest in the eighty acres. The defendant, Shepherd, is the grantee of the Eureka Improvement Company. The plaintiff's deed was recorded when D. B. Jernigan made the second transfer. The cause was submitted to the court without a jury. The defendant asked the court to declare the deed of D. B. Jernigan to the plaintiff of no effect, upon the ground that it was an attempt by one tenant to convey a part of a larger tract owned in common by him and others, but the court refused the request and ruled that the common estate having been divided into lots by the consent of the owners, a conveyance by one tenant of any lot carried the title to his interest therein.

The evidence tended to show that the defendant had entered into possession and made valuable improvements upon the land under the belief that he was the sole owner, but the court refused to allow him the benefit of the betterment act, upon the ground that the plaintiff's deed was of record when the defendant's grantor obtained its title. These two propositions present the questions raised by the appeal. The judgment was for the plaintiff for an undivided one-fifth of the lot.

Whether one tenant in common can convey his share of a specific portion of a larger joint estate is a question upon which the authorities are not harmonious. See Freeman on Cotenancy, sec. 199 *et seq.;* 3 Washburn on Real Property, * p. 565, sec. 25 *a.;* 1 Ib.,* p. 417; Tiedeman on Real Prop., sec. 258.

1. TENANT IN COMMON: Conveyance of interest in separate lots.

But where several parcels of land are held in common by the same parties, the rule is that either may convey his interest in a separate parcel. This is true even in jurisdictions which deny the right of the tenant to make a valid conveyance to a several part of a larger joint estate. And where the subject of the tenancy is a single tract of land, the co-tenants may by agreement convert it into several smaller tracts, as by laying it off into town lots, and so become co-tenants of each lot; and each is thereafter capable of conveying his interest in any of the several parcels. Freeman on Cotenancy, sec. 208. The authorities are reviewed, the question ably presented and the conclusion we have stated, reached in the case of *Butler v. Roys*, 25 Mich., 54. See also *Primm v. Walker*, 38 Mo., 99; *Barnhart v. Campbell*, 50 Ib., 597; *Markoe v. Wakeman*, 107 Ill., 262; *Green v. Arnold*, 11 R. I., 364.

The objection urged to the legality of the conveyance in this class of cases is that it impairs the right of the other co-tenant in respect to partition; that instead of giving him his share in one parcel as he might have if there had been no conveyance by his co-tenant, it may require him to take it in many distinct parcels. No question of partition arises in this cause, and whether partition would be directed in favor of the tenant whose interest remains intact without reference to his co-tenant's conveyances, or whether those conveyances are in contemplation of law no prejudice to the co-tenant, are questions not germane to our inquiry. See authorities *supra*

and *Stark v. Barrett*, 15 Cal., 361; *Gates v. Salmon*, 35 Ib., 588; *Sutter v. San Francisco*, 36 Ib., 116; *Robinett v. Preston's Heirs*, 2 Rob. (Va.), 278.

If the plaintiff's grantor, who was co-tenant of the entire tract, had been excluded from the participation in the possession of the particular parcel in suit, he might have maintained his action of ejectment for that parcel alone. But as to the possession of that parcel the plaintiff's attitude is as good as his grantor's, and it is no prejudice to the defendant to permit the grantee of his co-tenant to enjoy the fruits of a parcel of the undivided properiy.

2. BETTERMENT ACT: Constructive notice of title.

If, however, the defendant has improved the land in good faith under the belief that he was the sole owner, he is entitled to pay for his improvements by the terms of the betterment act. Constructive notice of title, such as is implied from the registry of a deed, is not in itself sufficient to preclude an occupant from its benefits. *Beard v. Dansby*, 48 Ark., 186. The plaintiff must, therefore, pay one-fifth of the value of the improvements before he can be let into possession of the undivided interest to that extent. The judgment refusing to allow the defendant for improvements is reversed and the cause will be remanded for further proceedings in that regard. The judgment of recovery is affirmed, but shall not be executed until the further order of the Carroll circuit court.

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KANSAS CITY, SPRINGFIELD & MEMPHIS RAILROAD COMPANY V. OYLER.

1. BILL OF EXCEPTIONS: *Certificate of judge.*

Pursuant to an order of the court made during the term at which a cause was tried, a bill of exceptions taken therein by the defendant was presented to the court at the next term, and the judge's certificate thereto

after referring to the order proceeds as follows: "No counsel appearing for the plaintiff, I am unable to remember the testimony as given upon the hearing, but I have no reason to doubt it is correctly set forth in the foregoing bill of exceptions. Therefore, the said bill of exceptions is now by me signed and made part of the record in this cause with this explanation." *Held:* That since the judge was unwilling to accept the bill as true and did not sign it for the purpose of evidencing the fact of its correctness, it was not sufficient to bring the defendant's exceptions upon the record.

2. SAME: *Allowing time to prepare.*

The practice of allowing time in which to prepare a bill of exceptions is provided for by the statute, Mansf. Dig., sec. 5157, to prevent delay or a failure of justice and is intended to apply only to cases of necessity.

APPEAL from *Sharp* Circuit Court.

R. H. POWELL, Judge.

C. H. Trimble and *Newman Erb*, for appellants.

The bill of exceptions was properly prepared, presented, signed and made a part of the record.

Argue on the merits.

S. H. Davidson and *J. B. McCaleb*, for appellees.

The record in this cause is not truly, properly and legally presented to this court. Unless it is shown by the bill of exceptions, in some way, that the grounds of objection are true, they cannot be made a part of the record in a cause in this court. Mansf. Dig., sec. 5160.

The certificate of the judge should have been without qualification, and should have stated that the exceptions to the testimony, rulings, etc., were saved, and that it contains all the evidence. Mansf. Dig., sec. 5160; 33 Ark., 569; 37 Ark., 370; 38 Ark., 284.

If the judge does not remember the testimony, he should refuse to sign, and the parties should pursue the method pointed out by statute.

Argue upon the merits.

COCKRILL, C. J.

The question raised by the appellees on the threshold of this appeal, goes to the validity of the bill of exceptions. The certificate of the circuit judge, who tried the cause, to the bill of exceptions is as follows: "The foregoing bill of exceptions is presented to me this first day of the April term of the circuit court of Sharp county by counsel for defendant as prepared by him, pursuant to an order of court entered of record herein at the last term of this court. No counsel appearing for the plaintiffs, I am unable to remember the testimony as given upon the hearing, but I have no reason to doubt it is correctly set forth in the foregoing bill of exceptions. Therefore, the said bill of exceptions is now by me signed and made part of the record in this cause with this explanation."

1. BILL OF EXCEPTIONS: Certificate of judge.

The object of the statute in requiring the circuit judge to sign a bill of exceptions is to furnish a certain test of its accuracy. When he allows the bill and affixes his signature to it as a witness of the fact, we take its contents as conclusive evidence of those proceedings which do not otherwise appear of record. If the bill of exceptions is not allowed by the judge and not otherwise proved as the statute permits, the benefit of the exceptions that are required to be preserved in that way, is lost. Now the only questions that can be seriously urged for a reversal of the judgment in this cause arise upon the evidence. But the circuit judge refuses to certify that the transcript contains all or indeed any of the evidence that was heard by the jury. The circumstance that he has no reason to doubt that the bill as prepared by the attorney for the appellant, is correct, goes only to show his confidence in the attorney's probity; but as he was unwilling to accept the bill as a true narrative of the proceedings and sign it for the purpose of evidencing that fact, it did not

serve the office of bringing the exceptions upon the record.

2. SAME. Allowing time to prepare.

The appellant's condition comes of the unfortunate practice of postponing the presentation of a bill of exceptions to a time remote from the trial. The statute permits it, to prevent delay or a failure of justice, but it is intended to be applied only in cases of necessity. *Carroll v. Pryor*, 38 Ark., 283. It was to prevent such a contingency as is now presented that the exceptions were formerly required to be reduced to writing, signed and made a part of the record at the trial. In *Wright v. Sharp*, Salk., 288, Holt, C. J., predicted just the result we have here: "If this practice should prevail," said he, "the judge would be in a strange condition; he forgets the exception and refuses to sign the bill, so an action must be brought." But since the practice does prevail, "it is to be presumed," as was said by the Supreme Court of Kentucky, "that an application for an extension must be shown to be absolutely indispensable before the judge will grant it, and, therefore, that such a case will seldom occur." *Meux v. Meux*, 79 Ky., 477. But the appellant asked and obtained the extension, and when the court refused to attest the accuracy of the bill, took no other step to bring the matters now complained of upon the record.

The judgment is affirmed.

PETTY V. DUCKER.

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WILLS: *Jurisdiction to take probate of, in common form.*

The clerk of a probate court received the probate of a will and admitted it to record. At the next term of the court the will, together with the depositions of the subscribing witnesses which were taken by the clerk, was presented to the court, which found from the evidence contained in the depositions that the will was "duly witnessed and regular in all things" and declared it to be the last will of the testator. The court also con-

firmed the action of the clerk. *Held:* That the probate court having jurisdiction to take the probate of wills in common form without summoning any of the parties in interest, its judgment, which goes beyond the mere confirmation of the clerk's act, and admits the will to record on proofs submitted, is not void, and if there is error in it, the same can be corrected only by appeal.

APPEAL from *Carroll* Circuit Court, Western District.

J. M. PITTMAN, Judge.

Crump and Watkins, for appellant.

When the inferior court was without jurisdiction, its judgment may be quashed by *certiorari*. 39 Ark., 347; Mansf. Dig., sec. 1368. If the clerk had no power to take the probate of a will in vacation, the court had no jurisdiction. Wells on Jur. of Courts, sec. 271; Ib., sec. 46; 4 Foster (N. H.,) 124.

The clerk, in taking the proof of the will, acted without authority of law and his act is void, and the court could not get jurisdiction by confirming his void acts. 30 Ark., 487.

The probate of a will is a judicial act, and cannot be performed by the clerk. 19 Penn. St., 485; 24 Id., 332; 5 Ark., 385; Freeman on Judg., secs. 608, 319.

The probate court is the only tribunal that can take the probate of a will. 2 Ark., 229. Review the legislation on the subject of probate of wills, citing sec. 16, ch. 180, Gould's Dig.; Civil Code, ch. 9; 46 Ark., 438; Acts of 1873, p. 121; Art. 7, sec. 1, Const. 1874; Wells Jur., sec. 43; 5 Ark., 385, and contend the Act of 1873 is repealed, and that only the probate court (not the clerk,) can take the probate of wills.

U. M. & G. B. Rose and *J. D. Walker*, for appellants.

The probating of a will by the clerk is only provisional, and even if the clerk had no authority, the *court certainly*

had. After the confirmation *by the court*, it is too late to question its action by *certiorari.*

But it is held that the probate of wills is a ministerial act, like the grant of letters of administration, etc., which may be confided to a clerk. 2 Gilin, (Ill.,) 657; 38 Ind., 78; 3 Wash. C. C., 481.

BATTLE, J.

Mary D. Foster died at Eureka Springs, in Carroll county in this State, leaving a last will and testament, which was presented to the clerk of the Carroll probate court, in vacation, for probate. The clerk, thereupon, proceeded to take the depositions of the three subscribing witnesses to the will. Each of them testified that Mary D. Foster signed the will in the presence of the subscribing witnesses, and declared it to be her last will and testament, and that each of them, at her request, in her presence and in the presence of each other, signed the will at the end thereof, as witnesses, and that she was at the time of making the will, of sound mind and disposing memory; and the clerk admitted the same to record as duly probated. At the next term of the probate court the will and depositions were presented to the court. The court found that it was "duly witnessed and regular in all things," declared it to be the last will and testament of Mary D. Foster, deceased, and confirmed the action of the clerk. To set aside the action of the clerk and the judgment of the probate court appellants petitioned to the Carroll circuit court for a writ of *certiorari.* No excuse was offered for not prosecuting an appeal from the judgment of the probate court. On final hearing the circuit court dismissed the petition; and plaintiffs appealed.

It is contended by appellants that the act of the clerk in

taking proof of the will and admitting it to record was void, because the probating of a will is a judicial act which can only be done by a court having competent authority; and that it being void the judgment of the probate court confirming it is void. The reason assigned does not support the contention. There is no question about the jurisdiction of the probate court to receive the probate of the will and admit it to record. It could do so in common form, without summoning any party, or cause all parties interested to be summoned on a certain day. (Mansf. Dig., secs. 6519, 6522.) It took the probate of the will in this case without causing the parties interested to be summoned. In doing so it did not stop with the confirmation of the action of the clerk, but found that it was "duly witnessed and regular in all things," and that it was the last will and testament of Mary D. Foster, deceased. In arriving at this conclusion it acted upon the depositions taken by the clerk. They were sufficient, if properly taken, to prove that the will was legally executed and attested and that the testator was of sound and disposing mind. So the only error committed, if any, and we do not undertake to say there was, was in the failure of the court to receive the testimony of the witnesses and cause it to be reduced to writing in open court. A writ of *certiorari* does not lie to correct such an error. The judgment is not void. If there was any error in it, it could have been corrected by an appeal. *Ludlow v. Flournoy*, 34 Ark., 451; *Baskin v. Wylds*, 39 Ark., 347; *Pettigrew v. Washington County*, 43 Ark., 33; *Moore v. Turner*, Ib., 243; *Haynes v. Semmes*, 39 Ark., 399; *Phelps v. Buck*, 40 Ark., 219; *Hickey v. Matthews*, 43 Ark., 341; *Pearce, ex parte*, 44 Ark., 509; *Carolan v. Carolan*, 47 Ark., 511.

Judgment affirmed.

SPRINGFIELD AND MEMPHIS RAILROAD CO. V. STEWART.

VENDORS EQUITABLE LIEN: *How waived: Accepting note of third party.*

The vendor of land waives his equitable lien for the unpaid purchase money when he accepts therefor the obligation of a third parfy, intending to rely for payment solely on such obligation, and that his vendee shall take the land unincumbered.

APPEAL from *Crittenden* Circuit Court in Chancery.

J. E. RIDDICK, Judge.

Newman Erb and *C. H. Trimble*, for appellant.

1. No sufficient grounds for rescission were shown. Bish. Eq., sec. 190–1; Ib., 230–1.

2. A vendor has an equitable lien for the unpaid purchase price of land, but he may waive it expressly or impliedly. In this case the conduct of the vendor amounted to a waiver. The intention was to rely on the obligation of the citizens, and the lien is waived. 30 Ark., 172; 33 Id., 240; 35 Id., 100; 46 Id., 267.

O. P. Lyles, for appellee.

1. There was in fact no contract with appellee. 1 Wait's Ac. and Def., p. 83.

2. The deed was not fairly made, understood and delivered. 6 Ib., 512–518, pp. 535–6–7; 2 Ib., 502–504.

3. The railroad occupied her land, knowing it had not been paid for, and appellee had the right to enforce her lien instead of looking to the citizens.

BATTLE, J.

In the course of the construction of its road appellant proposed to certain citizens of Marion, in this State, that it would build its road to Marion and locate a depot there, on certain ground, if they would procure and cause to be conveyed to it, free of charge, certain land for right of way and station purposes, a part of which belonged to appellee. The

citizens referred to accepted the proposition and caused appellee to convey so much of the land as belonged to her to the appellant, and executed to her their obligation to pay her fifty dollars an acre for the land so conveyed, when the right of way and depot grounds of appellant should be laid off and established as proposed. The road and depot were established according to agreement. Afterwards, appellee brought this suit against appellant to have her deed set aside on the ground of fraud and undue influence practiced on her in its procurement, and for damages sustained by her by reason of the building of appellant's road. Appellee answered denying that the deed was obtained through fraud and undue influence, and setting up the agreement with the citizens of Marion and the purchase of the land, and the obligation to pay the purchase money, in defence. The court refused to set aside the deed and assess damages, but held that the obligation for the purchase money had not been paid, and that the appellee had a lien on the land conveyed by her for the unpaid purchase money, and ordered it to be sold to pay the same; and defendant appealed.

The evidence before the court was not sufficient to show the deed executed by appellee was obtained through fraud and undue influence. The only question in the case is, has appellee a lien on the land conveyed by her, for the unpaid purchase money? A vendor of real estate has an equitable lien thereon for the unpaid purchase money, although he conveyed it to the purchaser by an absolute deed. He may, however, waive the lien, expressly, or by any act which manifests an intention to do so. The acceptance of personal security for the purchase money other than the note of the vendee is *prima facie* evidence of such intention. *Lavender v. Abbott*, 30 Ark., 172; *Mayes v. Hendry*, 33 Ark.,

VENDOR'S EQUITABLE LIEN: How waived.

240; *Stroud v. Pace*, 35 Ark., 100; *Richardson v. Green*, 46 Ark., 270.

Accepting note of third party.

In this case the evidence shows that it was understood that the land was to be conveyed to appellant on the condition that the right of way and depot would be located as before stated. Appellant was to do or give nothing more in the purchase of the land. To relieve it of any further obligation, certain citizens undertook to pay the purchase money, and to carry into effect this undertaking executed their obligation and appellee accepted it. A part of the purchase money was paid by one of the citizens. We think it is clear that the intention of all parties concerned was, that the appellant should take the land unencumbered by any lien and that appellee would rely solely on the obligation given to her for the collection of the purchase money.

The judgment of the circuit court is, therefore, reversed, and appellee's complaint is dismissed without prejudice to her right to bring an action for damages suffered by reason of the unskillful construction of appellant's road and the appropriation, or the partial or total destruction of property by appellant which was not conveyed to it by appellee.

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CRANE V. CRANE.

1. REVIVOR OF JUDGMENTS: *By scire facias: Parties.*

An administrator died pending a proceeding by *scire facias* instituted by him to revive a judgment for a debt due the estate of his intestate. At the time of his death the estate had been fully settled and all the debts against it paid. *Held:* That the distributees of the estate being the real parties in interest, the proceeding by *scire facias* was properly revived in their names, and one of them having assigned his interest in the judgment, it was not error in the order of revivor to make his assignee a co-plaintiff, as the defendant was not thereby prejudiced.

2. SAME: *Same: Amendment.*

A judgment recovered before a justice of the peace by B, the administrator of C, for a debt due to the latter, was entered on the justice's docket in favor of "B, administrator," instead of "B, as administrator of C, deceased." A transcript of the judgment having been filed with the clerk of the circuit court and entered on the docket of that court for judgments, a *scire facias* was sued out to revive it. *Held:* That it was not error in the proceedings by *scire facias* to cause the judgment to be amended according to the fact.

3. SAME: *Same: Statute of limitations.*

The statute of limitations will not bar a proceeding by *scire facias* to revive a judgment.

APPEAL from *Bradley* Circuit Court.

C. D. WOOD, Judge.

W. P. Stephens, for appellant.

1. The plea of the statute of limitations of ten years was a good answer to the writ of *scire facias*.

It is true the writ is founded on the antecedent judgment, and is but a continuance of a former action. Freeman Judg., secs. 442–4; 10 Ark., 534. And in view of our statutes at the time the judgments in question were rendered, it was held that the plea of the statute was no answer to the writ. 10 Ark., 534; 11 Id., 480; 12 Id., 133; 23 Id., 322; Ib., 174; 12 Id., 743. It is also true that by the common law the *presumption* of payment does not arise until the lapse of twenty years. 23 Ark., 174; 16 Id., 213; 15 Id., 145; but in view of sec. 30, ch. 91, Rev. St.; Mansf. Dig., secs. 4487, 2979, the statute was against all judgments. Bacon's Abr. "Limitations of Actions," vol. 6, 375; Ib., note (b), 376; Angell on Lim., sec. 83, *et seq*; 38 Ark., 470.

2. The only object of *scire facias* is to obtain execution of the judgment as it was, and it was error to allow the amendments made. 14 Ark., 601; 3 Id., 532; Freeman

Judg., secs. 524–443. There must be an exact coincidence of the name of the party even. Ib., sec. 447.

No notice was given in this case that amendment would be asked. 34 Ark., 300; 9 Ib., 188; Freeman on Judg., sec. 72.

See, also, 11 Me., 377; 24 Ark., 283; Freeman on Judg., sec. 70; 77 Am. Dec., 452; 79 Ib., 797; 6 Whart., 649.

3. The revivor in the names of the heirs at law and the assignee of one of them was error. 43 Ark., 241. The action survived to the administrator and not to the heirs. Mansf. Dig., secs. 2980–4; 3928–9, 3921, 5242; 41 Ark., 315; 43 Id., 241.

The assignee, Bond, was not a proper party. 6 Eng., 748; Ib., 736; 13 Id., 503.

4. The judgment is a nullity. It does not fix the amount for which execution shall issue. Freeman on Judg., 443; 51 Am. Dec., 563.

W. S. McCain, for appellees.

1. The statute of limitations cannot be pleaded in bar of a *scire facias* to revive a judgment. 10 Ark., 534; 14 Id., 524; 11 Id., 480; 12 Id., 133; 23 Id., 170; Ib., 322.

2. A judgment is not *presumed* to be paid until after twenty years. 15 Ark., 145; 16 Id., 212; 38 Id., 469.

3. The court properly amended the judgment. When the transcript was filed in the circuit court, it became a judgment of that court. Mansf. Dig., sec. 4102, and could be amended to speak the truth as any other judgment. 119 U. S., 587; 9 Ark., 188; 33 Ark., 475; 40 Id., 224.

4. The suit was properly revived in the names of the heirs. The administrator had no interest in the matter, the estate had been settled, the debts paid and the administrator

discharged. Mansf. Dig., sec. 2522; Ib., 6348; 31 Miss., 211; 20 S. C., 347; *Henderson v. Clark*, 37 Miss.; 30 Ind., 218; 46 Id., 544; 53 Id., 110; 58 Id., 169–516; 61 Id., 339; 86 Id., 522; 31 Ark., 268. The heirs were the only real parties in interest. Mansf. Dig., sec. 4933.

BATTLE, J.

On the 23d of July, 1870, John M. Bradley, as administrator of W. H. Crane, deceased, recovered a judgment for three hundred and twenty dollars against Warren Crane, before a justice of the peace of Bradley county. The judgment was entered on the docket of the justice of the peace in favor of "John M. Bradley, administrator," instead of John M. Bradley, as administrator of W. H. Crane, deceased. On the 24th of April, 1871, an execution was issued on this judgment, "and returned that the defendant had no goods or chattels whereon to levy the same." On the 9th of January, 1874, Bradley, as such administrator, filed a certified copy of the judgment with the clerk of the Bradley circuit court, who forthwith entered it in the docket of the Bradley circuit court for judgments and decrees, and noted therein the time of the filing of the transcript. On the 9th of March, 1887, Bradley, as administrator, sued out a *scire facias* to revive the judgment so recovered by him. During the pendency of this writ the death of Bradley was suggested, and A. B. Crane, J. E. Crane, Mary E. Batey and A. N. Bond, as assignee of A. B. Crane, filed a motion asking that the proceeding be revived in their names as plaintiffs. The defendant, Warren Crane, admitted that A. B. Crane, J. E. Crane and Mary E. Batey were adults and sole heirs of W. H. Crane, deceased; that A. N. Bond was the assignee of the interest of A. B. Crane in the judgment, and that the estate of W. H. Crane, deceased, had been

fully settled and all the debts against it had been paid and the administrator discharged, but resisted the motion on the ground that those who filed it were not proper parties. The motion was sustained and the proceeding was revived according to the prayer thereof. The defendant, thereupon, answered:

1st. *Nul tiel* record.

2d. That the judgment was rendered more than ten years before the writ was issued.

3d. Payment.

During the pendency of this cause, plaintiffs filed a motion asking that the entry of the judgment on the docket of the justice of the peace and the docket of the circuit court, be amended so as to show that the judgment was recovered by John M. Bradley, as administrator of W. H. Crane, deceased, and the defendant resisted it. Evidence was introduced showing that the judgment was rendered in favor of Bradley, as administrator of W. H. Crane, deceased, and that the justice who rendered it was no longer in office. The court, thereupon, ordered his successor to amend the entry of the justice of the peace and the certified copy of the judgment according to the fact, which was done in open court, and ordered the clerk to amend the entry on the docket of the circuit court accordingly, which was done.

A jury being waived, the issues were tried by the court. In the trial the certified copy of the judgment and the entry on the docket of the circuit court, as amended, were read in evidence. Evidence was also adduced showing that an execution was issued by the clerk of the Bradley circuit court on the judgment, on the 4th of December, 1882, returnable within sixty days, and that it was returned on January 17, 1883, unsatisfied, because no property could be found where-

on to levy the same: One witness testified that he had known the defendant for twenty-five years, and that he had no property, was insolvent, and that no money could be collected from him by execution. The defendant admitted that Bradley died on the 16th of March, 1887. The court found that the judgment was recovered as before stated, and had never been paid; and the defendant, after filing a motion for a new trial, which was overruled, and a bill of exceptions, appealed.

Appellant now insists that the judgment of the circuit court should be reversed, (1) because the court erred in reviving this cause in the names of the heirs of W. H. Crane, deceased, and the assignee of one of them; (2) because the court erred in permitting the entry of the judgment by the justice of the peace and the certified copy thereof, and the entry of the same by the clerk on the docket of the circuit court, to be amended; and (3) because the revivor of the judgment by *scire facias* was barred by the statute of limitations.

1. The general rule is, that the executor or administrator of a deceased person is alone competent to maintain an action for the recovery of a debt owing to such person at the time of his death. But there are exceptions to this rule. In *Hargraves v. Thompson*, 31 Miss., 211, it was held that "if an infant die at so early an age that he could not have possibly contracted any debts, his heir may recover, without letters of administration being granted on his estate, the distributive share of the infant in the estate of his ancestor." And in *Westerfield v. Spencer*, 61 Ind., 339, the appellee sued one of the appellants on a note and to foreclose a mortgage given to secure its payment. It was alleged in the complaint that the payee in the note and the owner thereof

had died intestate, leaving appellee and others his heirs; that they being of full age had made an amicable settlement of decedent's estate, and that such note had been set apart in the division to appellee as her distributive share; that an administrator of such decedent's estate had been appointed, and that he had fully settled the estate, and had been discharged, after reporting the settlement to the proper court, which had approved the same. The court "held, on demurrer, that the complaint showed a good cause of action in favor of appellee, and the administrator was neither a necessary nor a proper party to the action."

Smith v. Allen, 31 Ark., 268, was an action instituted by Allen before a justice of the peace on an open account for one hundred and one dollars. During the pendency of the suit Allen died intestate, leaving an infant daughter her sole heir and distributee at law, and an estate, which, including the account sued on, was worth less than $300. On these facts being made to appear to the court, the suit was revived in the name of the infant daughter, by her next friend, as plaintiff. This court on appeal, held that she, by her next friend, was properly substituted as plaintiff.

1. REVIVOR OF JUDGMENT: *Scire facias:* Parties.

The plaintiff in the judgment in question being dead and the estate of W. H. Crane, deceased, having been fully settled, and all the debts against it paid, and his heirs being entitled to the judgment and being in fact the owners of it, the proceeding by *scire facias* in this case was properly revived in their names. They were the real parties in interest.

It has been held by this court that an assignee of a judgment has no right to have such judgment revived by *scire facias* in his name. *Calhoun v. Adams*, 43 Ark., 238; *Brearly v. Peay*, 23 Ark., 172. The judgment in this case was revived in the names of the distributees of W. H. Crane,

deceased, and an assignee of one of them. But we cannot see how appellant was or can be prejudiced thereby.

2. SAME: *Same:* Amendment.

2. In *Marlow v. Robins*, 14 Ark., 602, it was held that when a certified copy of a judgment obtained before a justice of the peace is filed with the clerk of a circuit court, as was done in this case, it had the force and effect of a judgment of the circuit court, and could be revived by *scire facias* and executed as a judgment of the circuit court. This being true, it follows that as an incident to its power, the circuit court had a right to cause the judgment in this case to be amended according to the fact, as it can do in reviving and executing its own judgments. *Adams v. Thompson*, 12 Ark., 670; *Gates v. Bennett*, 33 Ark., 475–489.

3. SAME: *Same:* Statute of limitations.

3. It has often been held by this court that the statute of limitations cannot be properly pleaded to a *scire facias* to revive a judgment in bar of a revivor of a judgment by *scire facias*, "because it is not the commencement of an action within the meaning of the statute, but a continuance of the original suit." Following these decisions we hold that the *scire facias* was not barred in this cause. *Brown v. Byrd*, 10 Ark., 533; *Hanley v. Carnell*, 14 Ark., 524; *Bettison v. Byrd*, 11 Ark., 480; *Evans v. White*, 12 Ark., 133; *Brearley v. Peay*, 23 Ark., 172; *Montgomery v. Brittin*, Ib., 322.

The judgment of revivor in this cause is informal and incomplete, but appellant is not prejudiced thereby and appellees are satisfied with it; and it is affirmed.

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STULL V. HARRIS.

1. INFANT: *Conveyance of: Disaffirmance: Coverture.*

Where an infant wife joins her husband in the execution of a deed to her lands, she may in the absence of any act on her part sufficient to ratify the conveyance, disaffirm it at any time during coverture.

2. SAME: *Same.*

The mere passive acquiescence of a married woman in a deed executed by her while she was an infant and covert, will not, though extending through many years, be sufficient during coverture to ratify the contract.

3. SAME: *Same: Return of consideration.*

An infant may in general disaffirm his contract without restoring the consideration received by him; but if it remains in his hands in specie at the time of disaffirmance, he must offer to restore it or its value as a condition to disaffirmance.

4. SAME: *Same.*

The plaintiff joined her husband in the execution of a deed conveying to the defendant lands which belonged to her, but in which her husband had an interest acquired by his marriage. In part payment of the price of the lands the defendant released $400 of a debt due to him from the plaintiff for necessaries furnished her during her minority and before her marriage. The residue of the purchase money was paid to the husband. On a bill to cancel the plaintiff's conveyance on the ground that it was executed during her infancy, *held:* That the plaintiff as a condition of obtaining the relief sought, must pay the defendant the $400 released on her debt to him, with legal interest from the date of the deed. But she will not be required to refund any part of the purchase money paid to her husband.

APPEAL from *Crittenden* Circuit Court in Chancery.

W. H. CATE, Judge.

Mrs. Mary A. Harris filed her complaint in equity against G. T. Stull, her brother-in-law, and John W. Harris, her husband, to cancel a deed executed by her and her husband in 1867, conveying to Stull her interest in certain real estate. She charged that at the time of making the deed she was a *feme covert* and a minor. The answer of Stull denies that the plaintiff was a minor when the conveyance was executed and denies her right to disaffirm it after the lapse of so many years, during which he alleges that she knew he was improving the lands at great expense and yet was silent as to any desire on her part to avoid the deed. He also insists that the action is barred by the statute of limitation—more than seven years having elapsed since the minority of the plain-

tiff ceased—and submits that if the deed is cancelled plaintiff should be required to pay him the full amount of a debt which was due to him at the time of the sale for necessaries furnished her during her minority and $400 of which was released by him in part payment of the purehase price of the lands, the residue of the price having been paid to the husband in money. He also claimed the value of his improvements and to be reimbursed for the taxes he had paid. The court below found that the deed was executed during the minority of the plaintiff and cancelled it as to her, without disturbing it as between John W. Harris and the defendant Stull. The court also decreed that during the life of John W. Harris the defendant Stull should retain the lands and that no account should be taken of purchase money, improvements or taxes. The defendant Stull appealed.

O. P. Lyles, for appellant.

The action is premature, from the fact that the rights of the husband, a life estate, passed by the deed to Stull. 42 Ark., 357, 360.

Mrs. Harris has fully ratified the sale by affirmative acts and delay. She waited seventeen or eighteen years after her majority before suit. She saw her vendee spending money improving the land, yet remained silent. 20 Ark., 608; 1 Parsons on Cont., 295; 40 Ind., 148; 4 Chand. (Miss.), 39; 56 Me., 102; 5 Wait Ac. and Def., 61; 8 Me., 405; 6 Conn., 494; 7 Blackf., 442; 5 Ind., 300; 4 Harr. (Del.), 75; 2 Kent's Com., 236; 7 Wait's Ac. and Def., 144, 138-9, 141-2; 6 Ib., 687; 1 Gray, 455.

If she is allowed to rescind she ought to be required to refund the consideration and pay for the improvements. 46 Ark., 118; 33 Id., 490; 63 Penn. St., 406; 2 Ran., 6.

W. G. Weatherford and *J. C. Boals*, for appellee.

The cases of *Harrod v. Myers*, 21 Ark., 592, and *Bagley v. Fletcher*, 44 Id., 156, leave no doubt that plaintiff may of right, at any time during coverture elect to disaffirm her minority conveyance, and that this is a proper proceeding for that purpose.

An infant may disaffirm without returning the consideration. 44 Ark., 293.

COCKRILL, C. J.

Where there has been no act on the part of the *quandam* infant from which a ratification of the contract after his majority may be inferred, his right to avoid a conveyance of his lands on account of his minority is not lost until his right of entry is barred by the statute of limitations. *Bozeman v. Browning*, 31 Ark., 364; *Kountz v. Davis* 34 Ib., 590. See *Chandler v. Neighbors*, 44 Ib., 479.

1. INFANT: Conveyance of: Disaffirmance: Coverture:

In the case of a minor who is also a married woman at the time the conveyance was executed, the right of disaffimance will exist as long as she remains covert, unless legislation has swept away the disability of coverture. Or, as Mr. Bishop expresses it, "If the infant is also a married woman, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended." 2 Bishop on Married Women, sec. 516. Such a party labors under a double disability—infancy and coverture—and it is the statutory rule in this State that when there are two co-existing disabilities when the action accrues, the party is not bound to act until the last is removed. Mansf. Dig., sec. 4503. In this case the right of entry has never accrued to Mrs. Harris. She was married before any of the married women's enabling acts were passed, except that which em-

powered the wife to sell her land by joining her husband in the conveyance. By the marriage the husband acquired a freehold interest in the land and became entitled to the rents and profits. It was an interest capable of sale. When, therefore, he and his wife joined in the execution of a deed to Stull, in 1867, Stull took the husband's right to the possession and enjoyment of the rents and also the wife's interest in the land subject to her right of disaffirmance. That she can file her bill to disaffirm during her husband's life was determined in *Harrod v. Myers*, 21 Ark., 592. She cannot, however, disturb the possession of her husband's vendee. The most that she could do during coverture was to give notice to her vendee of her intention to disaffirm or sue for that purpose, as she has done. Was it necessary that she should have done so earlier? Acquiescence in the possession where the right of entry exists does not bar the suit of a married woman under our statute. *Hershy v. Latham*, 42 Ark., 305. Where the right of entry does not exist, but the possession is rightful against her, by reason of the husband's conveyance of his estate, the statute does not run against her until coverture is ended. The statute of limitations has never been set in motion, therefore, in this case. The wife has done nothing to ratify the deed. Indeed, it was intimated in *Bagley v. Fletcher*, 44 Ark., 158, that a deed executed by a married woman who was under age at the time could not be confirmed during coverture except by deed. It is not necessary to determine the point in this case. The only argument for a ratification is based upon the assumption that Mrs. Harris stood by and permitted Stull to improve the land upon the faith of her conveyance. But that is not true. She has always resided in Tennessee and it is not shown that she had notice that the defendant was making improvements upon

2. SAME: Same.

the land. Moreover, the defendant was the absolute owner of an undivided two-thirds interest in the land, as well as the husband's life interest in the other third; and even if it was her duty to have inquired and learned what Stull was doing with the land, she might well have referred his improvements to his absolute estate. The proof shows nothing more than a passive acquiescence on the part of Mrs. Harris, and we have found no decision denying her right to disaffirm under such circumstances, at any time during coverture.

In *Sims v. Everhardt*, 102 U. S., 300, the privilege was exercised by the wife twenty-three years after her deed was executed and twenty-one years after she came of age; and in *Sims v. Bardoner*, 86 Ind., where the bill was filed during coverture as in this case, the disaffirmance was allowed twenty-seven years after the execution of the deed. S. C. 44 Am. Rep., 263. See too *Harrod v. Myers*, *supra; Watson v. Billings*, 38 Ark., 278; *Vaughan v. Parr*, 20 Ib., 600; *McMorris v. Webb*, 17 S. C., 558; *Wilson v. Branch*, 77 Va., 65; *Williams v. Baker*, 71 Penn. St., 476; *Youse v. Narcoms*, 12 Mo., 549; *Dodd v. Benthal*, 4 Heisk., 601; Schouler on Dom. Rel., sec. 96.

3. SAME: Same: Return of consideration.

2. It is argued that the plaintiff should be required to refund the consideration paid by the vendee before rescinding.

While it is a somewhat controverted point, it is settled here that an infant may disaffirm his contract without restoring the consideration. *Railway v. Higgins*, 44 Ark., 293. The rule is subject to the qualification that if the consideration received by the infant remains in his hands after he becomes of age, he at least becomes liable for its value on disaffirming the contract. *Railway v. Higgins*, *supra; Price v. Furman* and note, Ewell's Lead. Cases, 119, and cases collected in Field's Law of Infants, sec. 15.

If he appeals to equity to avoid his contract, that court may impose upon him the duty of returning the consideration he has in hand as a condition upon which relief shall be granted. *Hillyer v. Bennett*, 3 Edw. Chy., 222; *Eureka Co. v. Edwards*, 71 Ala., 248.

Now, the consideration which was paid to the husband in this case, not only did not come into the hands of the wife, but we may presume was paid to him for his interest in the land. There is, therefore, no obligation to refund it.

4. SAME: Same.

But Mrs. Harris was legally bound to Stull for necessaries furnished her during her minority. Upon her marriage her husband also became liable therefor and executed a note to Stull for the amount thus due; but that did not extinguish the wife's liability, for it is the rule that the execution of a note by one of several joint obligors is not payment of the prior indebtedness unless it is agreed that it shall be taken as such. *Henry v. Conley*, 48 Ark., 267. There was no agreement of that kind in this case. But Stull released $400 of the wife's indebtedness to him as a part consideration of her conveyance, and he has been prevented thereby from collecting that amount of her as he has done the residue of that indebtedness. Now, to the extent that this indebtedness was discharged by the conveyance, to that extent does Mrs. Harris still hold the consideration. It is a benefit *in esse* and still enjoyed by her. It is inequitable to permit her to retain it and retake the land. She must pay this debt to Stull, with legal interest from the date of her conveyance as a condition of recovery.

The cause will be remanded with directions to modify the decree in accordance with this opinion.

LESSER V. NORMAN.

REPLEVIN: *Damages recoverable in.*

In an action of replevin the plaintiff may recover not only the damages sustained by the detention of the property before the suit is commenced, but also such as accrue thereafter and to the date of the verdict.

APPEAL from *Lee* Circuit Court.

M. T. SANDERS, Judge.

McCulloch & McCulloch and *James P. Brown*, for appellant.

In the absence of a supplemental or amended complaint, a plaintiff in replevin is entitled to recover only such damages as were the subject of a valid subsisting claim *at the time of the institution of the suit*, and not such as may thereafter accrue pending the litigation. Such is the law in all manner of suits, in the absence of statutory provisions. Mansf. Dig., secs. 5145, 5181, 5084; ch. 128, acts 1885, p. 17. See 37 Ark., 544.

H. N. Hutton, for appellee.

Plaintiff was entitled to damages, that is, the usable value from the time of the taking to the rendition of the verdict. 34 Ark., 188; 36 Ib., 260; 39 Ib., 438.

COCKRILL, C. J.

In an action of replevin the damages recoverable for the detention of the property are not limited to such as have accrued when the suit is instituted, but may be estimated to the date of the verdict. *Hanf v. Ford*, 37 Ark., 544; *Kelly v. Altemus*, 34 Ib., 184; *Dunnahoe v. Williams*, 24 Ib., 264. Such damages follow the recovery as interest does the principal or as rent the recovery of real estate.

That is the plain meaning of the statute, for it is provided that when the plaintiff recovers judgment for the property which the defendant retains by virtue of a retaining bond,

he may also recover "all damages sustained by the detention" of the property; and when the recovery is by the defendant from a plaintiff who holds the property by virtue of possession obtained under an order of delivery, damages for the detention may be assessed. Mansf. Dig., secs. 5145, 5181, and acts of 1885, p. 16. In the latter case, when the defendant recovers, damages have accrued only after suit is brought, because the detention by the plaintiff does not antedate the action; while in the other case the plaintiff would not recover "all the damages for the detention," unless he was permitted to recover for the entire period of the detention, whether after or before suit.

Affirm.

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BUCKLEY V. TAYLOR.

1. MECHANIC'S LIEN: *Right of sub-contractor.*

One who labors for a "contractor," in the erection of a building, is a "sub-contractor" within the meaning of the mechanic's lien act. [Mansf. Dig., secs. 4402–4424]; and where his labor is performed after notice to the owner of the improvement, as provided for in the statute, his lien therefor will not be defeated by the subsequent payment of his wages to the contractor.

2. SAME: *Proceedings to enforce: Construction of statute.*

Where a claim has been established which comes clearly within the purview of the mechanic's lien act, the provisions of the statute regulating proceedings to preserve the lien, will be liberally construed in order to prevent a failure of the remedy.

3 SAME: *Same: Stating account.*

In a proceeding by a sub-contractor against the owner of a building, to enforce a mechanic's lien for labor, the fact that the plaintiff's account on which the claim is based, is erroneously stated, as if it were for services rendered under a contract with the owner, will not defeat the lien, where there is a substantial compliance with the statute in other respects, and it appears that the error has not misled the defendant to his prejudice.

4. SAME: *Same: Waiver.*

The account of a sub-contractor, presented to the owner of a building with the view of asserting a mechanic's lien for labor, as provided for in sec. 4404, Mansf. Dig., should properly be stated in writing. But where it is presented orally, the owner waives a written statement by placing his rejection of the account solely on the ground that payment for the labor has been made to the contractor.

APPEAL from *Sebastian* Circuit Court, Fort Smith District.

JOHN S. LITTLE, Judge.

This was an action to enforce a mechanic's lien for labor performed by the plaintiff, on a building erected on the defendant's lot. The work for which the lien was claimed, was done by the plaintiff as the employee of one Stultz, who was the principal contractor. Stultz abandoned the work and disappeared before the building was completed. The defendant, by his answer, denies that he was notified of the plaintiff's intention to work on the building. He also denies that a copy of the plaintiff's account was filed with the circuit clerk or presented to him as required by the statute. The answer also in effect alleged that the defendant had paid Stultz for all the labor which the latter performed, or caused to be performed, on the house, including the work done by the plaintiff. The statement of account exhibited with the complaint is a copy of one previously filed in the office of the circuit clerk. It is made out against the defendant and verified by an affidavit which states that the work was done under a contract made by the plaintiff with the defendant. But the testimony on the part of the plaintiff shows that the work charged for was done by him under a contract with Stultz and that it was done after he had notified the defendant that he was at work on the building at $2.25 per day and "would look to him" for his wages. No written statement

of the account was presented to the defendant as provided by sec. 4404 Mansf. Dig. But before filing the account in the clerk's office, the plaintiff made to the defendant an oral statement of the amount due for his labor and demanded of him its payment, which was refused on the ground that payment for the work had already been made to Stultz. The court, against the objection of the defendant, permitted a copy of the account as filed in the clerk's office and exhibited with the complaint to be read in evidenee.

The verdict and judgment were for the plaintiff and the defendant appealed.

Sec. 4403 Mansf. Dig. provides that every sub-contractor * * * shall give notice to the owner of his intention to labor on an improvement and that after the labor is done he shall settle with the contractor therefor and present the settlement in writing, certified by the contractor, to the owner, and shall, within sixty days from the time the labor shall have been performed, file a copy of such settlement with the clerk of the circuit court. * * * Secs. 4404 and 4422 of the Digest are as follows:

Sec. 4404: In case the contractor shall for any reason fail or refuse to make and sign such settlement in writing with the sub-contractor when the same is demanded, then the sub-contractor shall make a just and true statement of work and labor done or things furnished by him, giving all credits, which he shall present to the owner or proprietor, his agent or trustee, and shall also file a copy of the same, verified by affidavit, with the circuit clerk, as provided in sec. 4403.

Sec. 4422: All persons furnishing things or doing work provided for by this act, shall be considered sub-contractors, except such as have contracts therefor directly with the owner, proprietor, his agent or trustee.

J. B. McDonough, for appellant.

1. To support the lien of a sub-contractor, there must be a contract between the owner and contractor and between the latter and the laborer or material-man. Both are necessary to the lien. Phillips Mech. Liens, sec. 58; Mansf. Dig., sec. 4403–4.

2. The account filed in this case was one between the sub-contractor and the owner, between whom there is no privity. But this created no lien because sec. 4406 of Mansf. Dig. was not complied with. The account filed being made out to enforce the lien of a principal contractor, cannot be made the basis of a sub-contractor's lien. Sec. 4403, Ib.; Phillips Mech. Liens, secs. 342-3-5, 354; 43 Wis., 551; 29 Ind., 291.

3. No statement *in writing* was ever furnished the owner of the land. Mansf. Dig., sec. 4404; 53 Mo., 423; Phillips Mech. Liens, sec. 343; 29 Cal., 283; 29 Iowa, 262; 38 Mo., 188; 49 Iowa, 250; 2 Swan, (Tenn.) 313.

4. The acts being in derogation of the common law, should be strictly complied with. 5 Dutcher, 475; Phillips Mech. Liens, secs. 14-15-18-19; Houck on Liens, sec. 73, and note (v); 16 Cal., 127.

5. There has been even no *substantial* compliance with the law. Mansf. Dig., sec. 4403-4; 43 Wis., 551; 52 Ala., ——; 24 Ill., 110; Phillips Mech. Liens, sec. 338; 20 Ark., 458; 29 Cal., 283.

The notice must be in writing. 48 Miss., 360; 38 Mich., 587; 54 Penn., 192; 2 Greene, (Iowa) 508; 8 S. & R., 58; 35 N. Y., 96; Phillips Mech. Liens, sec. 338, 63 *a*; 45 Iowa, 675; 55 Ib., 489; 54 Ga., 571; 1 E. D. Smith, 654; 77 N. C., 78; 38 Mo., 24.

6. The contractor was not made a party. Phillips Mech. Liens, sec. 397-8; 2 Minn., 286; Mansf. Dig., 4415-4424.

E. E. Bryant, for appellee.

1. The appellee substantially complied with the requirements of the statute, and that is sufficient. 30 Ark., 573; Phillips Mech. Liens, sec. 16.

2. Appellant had notice, and he paid the contractor at his own risk, and it would be unjust to allow him to defeat the lien by mere irregularities, or for want of a literal compliance with the statute. Phillips Mech. Liens, secs. 16-17-18 and 57,

COCKRILL, C. J.

Every person entitled to a mechanic's lien is a contractor or a sub-contractor within the meaning of these terms as used in the mechanic's lien act. One who performs labor for a contractor is a sub-contractor, [Mansf. Dig., sec. 4422], and is entitled to the benefits of the act on complying with its provisions in reference to sub-contractors. If his labor has been done upon the improvement after notice to the owner or proprietor of his intention so to labor and of the probable value thereof as contemplated by sec. 4403 of Mansfield's Digest, subsequent payment therefor by the owner to the contractor will not defeat the lien of the laborer.

1. MECHANIC'S LIEN: Right of sub-contractor.

In the case under consideration, the plaintiff was a laborer employed by one who had contracted with the owner, who is the defendant, to construct a building for him. There was sufficient testimony to sustain the verdict, to the effect that the plaintiff had notified the owner that he was at work on the building at a given sum per day, and that he would continue his labor, but would hold him responsible for his pay. The lien claimed was for payment of wages due for a part of

the week immediately succeeding the notice. The owner paid the contractor therefor, after the notice had been given and the labor performed. But that did not displace the laborer's right to a lien as before stated. It is argued that his claim should fail because (1) the plaintiff's statement of account having been made out as though to enforce the lien of a principal contractor, cannot be made the basis of a subcontractor's lien; and (2) because no statement *in writing* of the account was ever furnished to the owner of the premises sought to be charged.

2. SAME: Proceedings to enforce: Construction of statute.

When a claim is established which comes plainly within the purview of the mechanic's lien law, the policy adopted by this court is to give a liberal construction to the provisions of the act regulating the proceeding to preserve the lien, in order to prevent a failure of the remedy. The cases of *Murray v. Rapley*, 30 Ark., 568, and *Anderson v. Seamans*, 49 Ib., 475, are instances.. The reason given for the rule is well stated by Judge Smith in the latter case to be because "the lien springs out of the appropriation and use of the mechanic's labor and furnisher's materials, and not from the taking of the formal steps which the statute enjoins for the preservation and assertion of the lien and for giving notice to others of its existence and extent." "When the controversy is between the holder of the lien and the proprietor of the land," continues the opinion, "an exact compliance with the statute at all points is not indispensable." A substantial compliance is all that can be reasonably demanded, and that is had when no mandatory provision of the statute for the benefit of the land owner has been violated. In this case the circumstance that the account and affidavit upon which the claim for a lien is based, states that the services were rendered under a contract with the land owner, has not

3. SAME: Stating account.

misled him into taking any step to his prejudice; and it contains all that the statute requires to preserve a lien. It should not, therefore, defeat the lien.

4. SAME: Waiver.

As to the second point, the statute evidently contemplates that the statement of account to be rendered to the land owner by the sub-contractor shall be in writing, though it does not in terms demand it. It is not required to be presented until the labor is performed, and when not approved by the contractor, and the lien is asserted under secs. 4403-4 Mansfield's Digest, it can be used by the land owner only as a guide to the amount he should withhold from the contractor. It is only an *ex parte* statement and cannot of itself operate as a bar to the contractor's right to recover of the land owner. Writing adds nothing to its efficiency in that respect. It is the fact of the contractor's indebtedness to the sub-contractor that the land owner must rely upon for his protection in paying the latter what he has contracted to pay the former. If he is satisfied with the sub-contractor's oral statement of the account, no one else can complain. He may, therefore, waive the *ex parte* statement in writing. He did so in this instance by placing his rejection of the account, when payment was demanded, solely upon the ground that he had already paid the contractor.

The contractor ought regularly to have been made a party to the action in order that the judgment might operate as a bar to a suit by him against the defendant for the same claim. But no objection has been made on that score.

Affirm.

BASHAM V. TOORS.

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1. MECHANIC'S LIEN: *Construction of Act of 1885: Right of sub-contractor.*

Under the Act of 1885, entitled "An act for the better protection of mechanics, artisans, material men and other sub-contractors," where the landowner fails to reserve a fund for the benefit of sub-contractors, by withholding from the contractor one-third of the cost of the improvement, or of the amount agreed to be paid therefor as required by the act, the property improved will be bound to a sub-contractor only for the market value of materials furnished the contractor and not for the price the latter has agreed to pay.

2. SAME: *Same: When claim to be presented.*

Under the provision of the Act of 1885 which requires that a sub-contractor in order to assert a mechanic's lien, must present his claim to the landowner within ten days after the "job or contract" let by the owner "shall have been fully completed," the time allowed for presenting such claim must be computed from the completion of the work to be done under the contract of the owner with the principal contractor, although the contemplated improvement may not then be completed. And where the principal contractor abandons his contract after having done work under it, his sub-contractors must present their claims within ten days after such abandonment and cannot postpone the presentation until the work is completed under a new contract with a stranger to the first one, or is completed by the owner himself.

APPEAL from *Pulaski* Circuit Court.

J. W. MARTIN, Judge.

T. B. Martin, *Robert J. Lea* and *C. T. Coffman*, for appellant.

1. The act of March 17, 1885, will be strictly construed, and all persons claiming rights thereunder will be held to a strict compliance with the terms of the same.

While we admit that as between the owner, who contracts, and the mechanic with whom he contracts, statutes of this character will be liberally construed, and a substantial compliance with the terms thereof be held sufficient, yet all the courts hold that a statute which authorizes property to be

encumbered without resort to legal process, and by one with whom the owner has no privity of contract, must not only be strictly construed, but that there must be a strict compliance with the terms of the same. See Phillips on Mechanics' Liens, secs. 18 and 19, and cases cited. 50 N. Y., 360; 30 Ark., 568.

In this case the account was not certified as correct by the contractor as required by statute, and there was no evidence to explain the meaning of the cabalistic letters, "O. K."

2. This claim, if enforceable at all, could only be enforced for the *actual value* of the material furnished. 66 Penn. St., 336; 74 Mo., 37; Phillips Mech. Liens, secs. 79, 202, 212; 1 Phil., 285; 65 Mo., 598.

3. The account should have been presented within ten days from the time the contract was abandoned by Moyer, the contractor. It was then the work or job was completed as far as the contractor was concerned.

Ratcliffe & Fletcher, for appellee.

1. The time the *building is completed* is the proper time from which to reckon the ten days for presentation, not the time the contract was abandoned. Acts 1885, p. 74, sec. 1; Houck on Liens, sec. 184.

The statute (Acts of 1885, p. 74, sec. 1,) makes it the imperative duty of the property owner to retain one-third of the contract price and "to promptly pay the *bills and accounts* of all such persons which may be presented to him in ten days," etc. The duty becomes personal and necessarily involves a *personal liability;* his liability is fixed to the extent of one-third the contract price which is to be discharged by paying the *bills and accounts* in the order of their presentation. No discretion or option is given him in the matter. Section 4 provides that the lien shall have the same effect, force and

extent and be filed, sued for and enforced as in case of persons doing work or furnishing things under contracts therefor *directly with the owner*, etc. This statute brings our case clearly within the principle enunciated in the case of *Young v. Lyman*, 9 Barr, Penn., 449,

The cases referred to by appellant are based on statutes different from ours and are clearly distinguishable from this case.

The bills which appellant claims were presented before Toors' bill was presented were all made by Basham and charged directly to him, and as between him and Moyer stood in the attitude of bills "paid during the progress of the work;" these bills are positively excluded from payment out of the "reserve fund" by sec. 3, of the act; if it were otherwise the statute could be easily evaded and rendered of no avail to parties doing work or furnishing material.

COCKRILL, C. J.

This is a suit by Toors against Basham to enforce a mechanic's lien. Basham, who was the owner of certain town lots, let a contract to one Moyer to improve a house situated thereon for a stipulated compensation. Moyer got Toors to furnish materials for the purpose. Moyer had not proceeded far with the work when he discovered that he would lose money by complying with the contract and abandoned it. He and Basham then agreed to divide the loss equally between them and Basham took up the work where Moyer left it and completed the improvement. Toors presented to Basham an account for the materials furnished to Moyer and used by him in repairing the house. Three several presentations of the account were made—one, before Basham and Moyer adjusted their dispute, another within ten days after

the adjustment, and the third within ten days after the work was completed by Basham. The exact time of the first presentation is not shown and the testimony is conflicting as to whether the account was certified by Moyer when first presented, as it should have been.

The court instructed the jury that the presentation was in time if made within ten days after Basham had completed the work; refused to permit Basham to show that the market value of the materials was less than the amount certified to by Moyer; and after a verdict for the plaintiff, condemned the property to be sold to satisfy the lien. Basham appeals.

The appeal involves the construction of the Act of March 17th, 1885, under which the lien is asserted. The act is unnecessarily prolix and some of its provisions fall under the imputation contained in the observation of Blackburn, J., in *Regina v. Scott*, 4 Best & Smith, 374, in respect to an act passed in 1746, to the effect that "the statute though not drawn in modern times is somewhat obscure." It is supplemental to the mechanic's lien law as found in chapter 96 subdivision 11 of Mansfield's Digest, and when read in connection with the provisions found there, its true intent and meaning are more apparent. It was intended, as its terms and title show, for the better protection of sub-contractors—a term which includes according to the statutory definition, all persons who are entitled to the lien except those who have contracted with the owner or proprietor of the land to be charged. Mansf. Dig., sec. 4422.

The last section of the act states that it was not intended to repeal any part of the prior law. An absolute right to a lien was already provided for the sub-contractor by virtue of sections 4403–4 of Mansfield's Digest, in every case where he had given notice to the owner or proprietor of his inten-

tion to look to the premises for security before performing labor or furnishing materials for the contractor, and the amount of his security was regulated by the value of the services rendered or of the materials furnished without regard to the contract between the owner and the first contractor, or the amount due thereunder. If notice was not given to the owner in advance of furnishing materials or performing labor, the sub-contractor's security was limited to the amount due from the owner to the first contractor; if nothing was due no lien could be acquired in the absence of a previous notification. Mansf. Dig., sec, 4421. Where, therefore, the statutory notice had not been given, the owner could defeat the sub-contractor's right to a lien by paying the contractor what his contract called for. It was to supply, in a measure, that supposed defect in the law that the Act of March 17th, 1885, was enacted. To accomplish that end the act makes it the owner's duty to withhold from his contractor one-third of the cost of the improvement or of the amount agreed to be paid therefor, for a period of ten days after the work under the contract is completed; and to the extent of the sum thus required to be reserved, sub-contractors may establish liens upon the property that is improved by them, upon complying with the terms of the act, although the notice required by section 4403, *supra*, has not been given, and notwithstanding the owner has paid the contractor in full. To perfect the lien the act requires the sub-contractor to present his claim to the owner with the contractor's certificate that it is correct within the ten days named. If the contractor refuses to certify the account, the act points out the course to be pursued, but that is not material to the determination of this cause. The owner is required to pay the sub-contractors who present their certified claims within the pre-

1. MECHANIC'S LIEN: Construction of act of 1885: Right of sub-contractor.

scribed period out of this reserved fund. The first question that arises here is, shall he pay the material man the amount agreed upon between the latter and the contractor, or only the fair market value of the materials? So long as the reserved fund is actually held by the land-owner for the benefit of the sub-contractors, the law is plain. It is then a debt due from him to the contractor and the act provides the means of appropriating it to the payment of what the contractor owes to the laborers and material-men who have contributed to the performance of the contract under which the fund was earned; and in doing so a beneficent end is worked out without injustice to any one. But where the land-owner has failed, as Basham did, to reserve the fund and owes the contractor nothing, is his property bound to the sub-contractor only for the value of the materials, or for the price agreed to by the contractor? The former act in favor of material-men limits their right of recovery against the property to the value of the materials used whether the owner was indebted to the contractor or not; and the question is, does the act of 1885 change the rule? As we have seen, the act declares it was not the intention to repeal any provision of the former law. Was it then the intention to fix different rules for the measure of recovery, to be determined only by the act under which the sub-contractor asserts his claim? Or, to put the question differently, was it intended to allow a recovery of only the value of the materials if proceedings were had under section 4403 of Mansfield's Digest, but to allow the price agreed to by the contractor, if the claim was under the act of 1885? The double rule would be productive of uncertainty and confusion in many cases; and where both laws had been complied with and the claim of the sub-contractor was greater than the fund required to be reserved, we should

have to apply each of the standards to the several parts of the same claim in one suit. We should be slow to conclude that such was the legislative intent. If the design to punish the owner for a failure to reserve the required fund by holding him and his property liable for the contractor's agreed price, clearly appeared, effect would be given to it as was done in the case of *Bullock v. Horn*, 44 Ohio St., 420. But the rule for the construction of statutes which create charges against individuals or against their property without their assent is this: The burden shall not be extended beyond the plain meaning of the terms creating it (*Flournoy v. Shelton*, 43 Ark., 168; *Peay v. Field*, 30 Ib., 600; *Dana v. Ry.*, 27 Ib., 564); but when the legislative intent to create the charge is clearly ascertained, the remedy shall not be frittered away by a too close adherence to those requirements of the statute which are designed to regulate the procedure for enforcing the charge. *Buckley v. Taylor, ante; Anderson v. Seamans*, 49 Ark., 475.

Now the only provision of the statute prescribing the rights of the sub-contractors in case the land-owner fails to reserve the fund for his benefit, is found in section 4 of the act. It gives him a lien for "work or labor done, or materials, machinery or fixtures furnished." Where the statute gives a lien for "materials," without saying more, and they are not furnished under a contract with the owner, the extent of the lien is commonly held to be the market value of the materials when furnished. 2 Jones on Liens, sec. 1306; *Deardroff v. Everhartt*, 74 Mo., 37; *Laird v. Moonan*, 32 Minn., 358; *Lee v. Burke*, 66 Penn. St., 336; *Cattanach v. Ingersoll*, 1 Phil. R., 285.

The other provisions of the section relate only to the effect of the lien and the mode of enforcing it, and have no bear-

ing on the extent or amount of it. It is not plain, therefore, that it was intended to preclude the owner by the agreement as to value between the contractor and material-man, and we should not make a judicial extension of the terms of the act. The court erred in holding that the value of the materials was not open to enquiry.

2. SAME: When claim to be presented.

The only remaining question presented by counsel, which we deem essential to determine, is as to the correctness of the court's charge to the effect that a presentation of the certified account within ten days after Basham had completed the work, was in time. The time of presentation is material.

The language of the statute is that it must be within ten days "after such job or contract (that is the job or contract previously mentioned as having been let by the owner to a contractor,) as originally made or amended shall have been fully completed." Section 1, Act of March 17th, 1885. Now as there is no contract and no privity of contract between the owner and the sub-contractor, the completion of the work under the contract mentioned in the statute must mean the contract of the owner with the person through whom the sub-contractor's lien must be worked out, *i. e.*, the contractor; and the completion of that contract is the period from which the sub-contractor must begin to compute the time allowed for the presentation of his account. The completion of the work under the contract need not be the completion of the contemplated improvement. It may be that only a part of the work has been let, or the completion of the structure may not be in present contemplation. And so, when the contractor abandons his contract, the work under it must be regarded as completed within the meaning of the statute, else the sub-contractor could not enforce his lien at all when the owner has seen fit to pay off the contractor.

As was said in *Cattin v. Douglass*, 33 Fed. Rep., 569, "It would be inequitable and unreasonable and contrary to the spirit of the law, to hold that parties are absolutely barred of all rights to the lien where the work is prematurely stopped or abandoned without fault of such parties. Such a construction would place the material-men and laborers at the mercy, dishonesty, fickleness or misfortune of the owner or contractor." But if the work is completed for the purpose of enabling the sub-contractor to enforce his lien, it is completed so as to allow the owner to settle with the contractor after ten days have elapsed, and so bar the right to a lien. A change in the contract, or an "amendment" of it, as the statute has it, or a suspension of the work for a short period, will not affect the lien; but when the contractor abandons his contract after having done work under it, and the owner makes a new and independent contract with a stranger to the first one, or completes the work himself, the material-men and laborers under the first contractor cannot postpone the presentation of their claims to the completion of the improvement under the new contract, but must act within the prescribed period after the abandonment of the contract under which they have acquired their rights. 2 Jones on Liens, secs. 1438, 1440; see *Bertrand v. Byrd*, 5 Ark., 651. The court erred in instructing the jury otherwise.

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

LEVY V. FERGUSON LUMBER COMPANY.

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1. LABORER'S LIEN: *Judgment of justice enforcing: Notice.*

The judgment of a justice of the peace in an action to enforce a laborer's lien, under the act of 1868, [Mansf. Dig., secs. 4425–4440] is void,

where the proceedings fail to show that notice thereof was given to the defendant or that he waived notice.

2. JUSTICE'S DOCKET: *Amendment of.*

Although a justice of the peace may amend his docket so as to make it speak the truth in a proceeding previously had before him, he must do so on proper application and after notice to the party legally interested. And where it does not affirmatively appear that notice of such application was given the amendment is void.

APPEAL from *Pulaski* Circuit Court.

J. W. MARTIN Judge.

Cohn & Cohn, for appellant.

The justice had no jurisdiction. No summons was issued and no showing of service, actual or constructive. The docket should have shown such facts as were essential to jurisdiction. 5 Ark., 27-358; 1 Eng., 41; Ib,, 182; 3 Ark., 494; 9 Ib., 480; 10 Ib., 316.

No presumption will supply the omission of the record to state a jurisdictional fact. 9 Ark., 480; 10 Ib., 316.

The laborers had no liens; there was no writing, and the statement filed failed to show any. 44 Ark., 90.

The proceedings being void, the sale was void. Freeman on Ex., sec. 16, note 2, and sec. 20; Freeman on Judg., secs. 117-120; Rorer Jud. Sales, sec. 474, 1st ed.; 48 Ark., 151.

The justice had no authority to amend his record, so as to affect Levy's rights, especially after this suit was instituted. 21 Mich., 507; 13 How. Pr., 43-6.

Defendant, if a resident, should have been summoned. Mansf. Dig., sec. 4428; 78 Ky., 11. If a non-resident, by posting notices, etc. Mansf. Dig., sec. 4428. Non-residence must be shown. Ib., 4989; 60 Ill., 329-341; 46 Iowa, 68-73.

See also 65 Me., 559; 26 Ala., 39; 2 Yerg., 493; 11 Ark., 120.

Service should have been had as in other suits at law. Mansf. Dig., secs. 4124-4989 to 4993 and 4356 to 4363.

Blackwood & Williams, for appellee.

The judgments were not void, but for the purposes of this case valid. 14 Ark., 12; 10 Ark., 541; 11 Id., 536; 47 Id., 142.

Posting notices was sufficient. Cooley Con. Lim, p. 504-5; Mansf. Dig., secs. 5201-4425.

A judgment cannot be attacked collaterally. A J. P. may amend his docket. 33 Ark., 475.

Cohn & Cohn in reply.

On the day the judgment was rendered by the justice of the peace, on the day the lumber was sold, in fact up to the day preceding the day this cause was tried, this record fails to show any jurisdiction over the matter he attempted to adjudge.

No presumptions could be indulged in to sustain his judgment. *Butler v. Wilson*, 10 Ark., 316; *Everett v. Clements*, 9 Ark., 480-489; *Levy v. Shuman*, 6 Ark., 182; Freeman on Judg., sec. 527.

Nor could it be supplied by parol evidence. See case in 33 Ark., referred to by appellee, page 489.

Then when the lumber was bought the sale was a nullity, and such was the condition of things when this suit was brought. Freeman on Judg., sec. 117.

Our court does not say, either in 33 Ark., 475, nor in 40 Ark., 163-166, that the justice could give validity to nothing, to a pretended judgment he has undertaken to render, by a later attempted amendment, without notice to us, in a case of constructive service.

BATTLE, J.

The Ferguson Lumber Company sued Levy for damages sustained by it through his failure to perform a contract to deliver 500,000 feet of lumber. Levy answered, denying the damage, and in a counter claim or set-off, sought to recover the value of 250,000 feet of lumber received by the company. Plaintiff admitted that it received 180,000 feet of the lumber which had belonged to Levy, but proved it purchased the same at a sale made by the sheriff under and pursuant to orders or judgments of a justice of the peace The defendant insisted that these orders or judgments were void, because the justice who made or rendered them did not have jurisdiction. The court refused to allow him anything on account of his set-off, but rendered judgment for damages against him; and, after filing a motion for a new trial, which was overruled, and a bill of exceptions, he appealed.

The judgments under which the sale of the 180,000 feet of lumber was made, were rendered in divers suits instituted by laborers for the purpose of foreclosing a lien for labor performed by them, at the instance of Levy, in the manufacture of the lumber sold by the sheriff. They were rendered about the 29th of January, 1887. Up to this time the docket of the justice fails to show that Levy had actual or constructive notice of the pendency of the suits against him. Long after the judgments were rendered and the sale was made, and sometime after the commencement of this action, an amendment was entered upon the docket of the justice of the peace, in which it is stated that Levy was notified of the pendency of the suits against him by the posting of three notices directing him to appear on the day of the trial, and show cause why judgments should not be rendered against him, and the property levied on sold to satisfy

the claims of plaintiffs, fifteen days before the trial of the causes, one at the county clerk's office in the county, and the other two at two of the most public places in the township where the property was found, and by accompanying the same with a copy of the sworn statement of the plaintiff in each case. The docket fails to disclose that he was a non-resident, or that he had notice that a motion or application would be made to amend the docket. But the evidence shows that he was a non-resident of the State during the pendency of the suits before the justice.

1. LABORER'S LIEN: Judgment of justice enforcing: Notice.

The manner of enforcing laborer's liens before justices of the peace is prescribed by two separate acts—by the act of July 23, 1868, and by the act of March 21, 1883. To commence an action under the act of 1868 the laborer must make a sworn statement of the amount due him after all just credits are given, of the kind of service and for whom rendered, of the materials furnished and of the property, crops, or other productions of his labor charged, and file the same with the justice; and the justice must then cause notice to be given to the defendant in the usual way, or, if the defendant is a non-resident, notify him "by at least two insertions in a newspaper, as prescribed by law, or by posting three notices—two in the most public places in the township where the property is, and the other at the county clerk's office—to appear and show cause why judgment should not be rendered against him and the property sold." The notice must be given at least ten days before the day of trial and be accompanied by a copy of the sworn statement of the plaintiff. At the time it is given the sheriff or constable serving it is required by the act to take charge of the property described in the sworn statement, and hold it subject to the decision of the justice, as in cases of attachment.

The other act requires that such actions shall be commenced and prosecuted according to the laws regulating attachments before justices. Mansf. Dig., secs. 4425, 4428, 4430, 4450. Whether the latter act repeals the former or not is not necessary for us to determine. The suits before the justice in this case were commenced under the act of 1868. To acquire jurisdiction under that act the sworn statement must be filed, and notice, unless waived, must be given.

It has often been held by this court that "a justice's court is a court of the lowest grade known to our constitution and laws;" that "it possessed only a special, limited and inferior jurisdiction;" and that, "therefore, the proceedings therein, according to the principle almost universally admitted, must show or set forth such facts as constitute a case within its jurisdiction; otherwise the law regards the whole proceeding as *coram non judice* and absolutely void." *Reeves v. Clark*, 5 Ark., 27; *Anthony, ex parte*, 5 Ark., 358; *Pendleton v. Fowler*, 6 Ark., 41; *Levy v. Shurman*, 6 Ark., 182; *Latham v. Jones*, 6 Ark., 371; *Heflin v. Owens*, 10 Ark., 265; *Butler v. Wilson*, 10 Ark., 315; *Everett v. Thompson*, 9 Ark., 478; *Boothe v. Estes*, 16 Ark., 109; *McLure v. Hill*, 36 Ark., 268.

Jurisdiction of inferior courts cannot be intended, but must be shown. But it has been held that "the rule that jurisdiction must be apparent on the face of the proceedings was limited to those jurisdictional facts which the law directs the court to set forth on its record;" and that "any other fact essential to jurisdiction may be established by evidence *aliunde*." *Visart v. Bush*, 46 Ark., 153; *Jolly v. Fritzi*, 31 Cal., 321; *Van Deusen v. Sweet*, 51 N. Y., 381; Freeman on Judg., [3d ed.] sec. 518. But it is not necessary for us to decide whether this can be done or not. If the amendment of the

docket entries in the suits before the justice was void no other question remains to be decided in this action.

2. Amendment of justice's docket.

It has been held by this court that a justice of the peace has the authority to so amend his docket as to make it speak the truth. *Adams v. Thompson*, 12 Ark., 670; *Gates v. Bennett*, 33 Ark., 489. The ends of justice require this. But it should be done on proper application, and notice to parties legally interested. *Martin v. State Bank*, 20 Ark., 636; *Alexander v. Stewart*, 23 Ark., 18; *King v. Clay*, 34 Ark., 300. Where the amendment is made by a justice of the peace it must be affirmatively shown that the notice was given before it can appear that the amendment is valid. Unless it can be so shown, the amendment must be regarded as void.

It does not appear that Levy had notice that an application would be made to amend the docket entries in the suits before the justice of the peace, and, aside from the amendment, it does not appear that he had notice of the pendency of the suits against him. Consequently, the amendment and judgments of the justice, in the absence of a better showing, must be treated as void. Being void, they are in legal effect nullities. "By them no rights are divested; from them no rights can be obtained;" and the sale under them is void, and Levy is entitled to recover the value of the lumber sold. *McLure v. Hill*, 36 Ark., 268; *Campbell v. McCahan*, 41 Ill., 45; *Hoes v. Buntin*, 47 Ill., 397; *Hollingsworth v. Bagley*, 35 Tex., 345; *Roberts v. Stowers*, 7 Bush., 295; *Morton v. Root*, 2 Dillon, C. C., 312; Freeman on Judg., [3d ed.] sec. 117.

Reversed and remanded for a new trial.

RAILWAY V. COMBS.

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1. RAILROADS: *Damages for right of way: Frightening teams.*

Where a railroad is located through the lands of a farm, the frightening of teams used on the farm by the running of trains has a tendency to depreciate the value of the lands and is proper to be considered as an element of damages in proceedings to condemn the right of way.

2. SAME: *Same: Instruction.*

In a proceeding instituted by a railroad company to condemn a right of way, a witness based his estimate of damages to the land in part upon the fact that pools of water had been allowed to accumulate in excavations made in constructing the road-bed. The ditching of the road-bed was not then completed and the court refused to instruct the jury that they should indulge the presumption that the road-bed would be properly drained when completed. *Held:* That the company was not injured by the refusal, as the charge of the court did not include the supposed damage from the pools in the elements of damage to the land enumerated for the jury's consideration and directed them to consider no element not specified in the charge.

3. SAME: *Same:*

Although a railroad company acquires only an easement in land taken for a right of way, the owner is entitled to the full value of the land actually condemned.

4. SAME: *Same: Opinion of witness.*

The opinion of a witness being admissible to prove the value of a tract of land before and after the construction of a railroad through it, he may also state to what extent in his judgment the land is damaged by the right of way, since the amount of damages recoverable by the land owner is the difference between the two values and this is arrived at by mere computation.

5. PRACTICE IN SUPREME COURT: *Misconduct of counsel.*

Where a party makes no effort to prevent opposing counsel from making an improper statement in the hearing of the jury, and asks no ruling of the trial court with reference to such conduct, he is in no attitude to complain of it on appeal.

6. SAME: *New trial in proceedings to condemn right of way.*

In statutory proceedings by a railroad company to condemn a right of way, as in suits at common law, a verdict sustained by competent evidence will not be disturbed by the supreme court.

APPEAL from *Washington* Circuit Court.

J. M. PITTMAN, Judge.

B. R. Davidson and *E. D. Kenna*, for appellant.

1. The damages were excessive. The verdict is evidently based upon the evidence of witnesses who based their opinions upon fanciful and purely speculative damages, and not upon the difference in the market value before and after the taking.

2. "Liability to frighten teams or stock" is not an element of damage to be considered. 41 Ark., 435; Mills Em. Dom., sec. 166; 103 Mass., 7; 24 Kas., 745; 14 A. & E. R. cases, 172; Ib., 198–202.

The opinions of witnesses not admissible. The extent of damage is to be proven by facts, and estimated by the jury. 49 Ind., 493; 35 Id., 54; 36 Ia., 323; 42 Ala., 83; 14 A. & E. R. cases, 184; 23 Wend., 430; 4 R. I., 221; 10 Ind., 120; 20 Wis., 262.

3. Where an assessment of damages precedes the building of a railroad, the presumption is that it will be built with skill and properly constructed. 44 Ark., 262; 20 Gratt., 355; 4 Foster (N. H.,) 179; 52 Me., 208; 30 Vt., 610; 14 A. & E. R. cases, 239.

It was error to assume that the fee in the strip of land was taken. Mansf. Dig., secs. 54–63; 22 Kas., 285; Mills Em. Dom., secs. 56–57; 23 Conn., 100.

4. The judgment should be reversed for misconduct of appellee's counsel in offering to prove an offer of compromise. Mansf. Dig., secs. 5215; 5221; 44 Ark., 107; Hayne New Trial, sec. 26; 41 N. H., 317, 325; 66 Me., 564; 11 Ga., 633; 10 Ib., 522; 44 Wis., 282; 61 Ia., 559; 19 Mo. App., 134; 36 Oh. St., 201.

J. D. Walker, for appellee.

The elements of damage proved were competent. 41 Ark., 435. No injury occurred to appellant by the offer to prove the offer of compromise. The court excluded it, and the jury did not consider it. The verdict is within the evidence. The law was fully and clearly charged, and no errors appear to the damage of appellant and the judgment should be affirmed.

COCKRILL, C. J.

This is an appeal from a judgment awarding damages assessed by a jury as compensation to a land-owner in a statutory proceeding instituted by the railway for condemnation of a right of way. The road had been constructed diagonally across the cultivated lands of Combs' farm. The questions raised by the company's appeal relate mainly to the measure of damages.

The court's charge definitely confined the jury to the consideration of the difference in value of the tract through which the right of way was condemned before and after the construction of the road, in accordance with the ruling in *Railway v. Anderson*, 39 Ark., 167. As elements which might be considered as disadvantages impairing the value of the remaining property, the charge recites, "the frightening of teams, but not of loose stock;" and the danger of injuries to stock, or in lieu thereof the cost of fencing made necessary by the construction of the road. This part of the charge was limited by a direction to the jury to consider nothing as an element of damage except as it was peculiar to the defendant's land.

On cross-examination, witnesses who had given opinions as to the amount of the depreciation of the value of the

farm, stated that the frightening of teams in farm use and the danger to stock on the farm, entered into their calculation; and that part of the charge to which attention is directed, is based upon that testimony.

1. RAILROADS: Damages for right of way: Frightening teams.

In the case of the *Railway v. Allen*, 41 Ark., 431, it was held that the exposure of a dwelling to fire by close proximity to a railroad; the annoyance from the sounding of whistles and bells and the running of trains, as well as the increased danger to members of the family and *live stock*, were elements of damage to be considered in a condemnation proceeding, because they tended to diminish the vendible value of property. In so far as the railway enhances the danger to live stock upon a farm, to that extent may it be said to conduce to depreciate the value of the land for farming purposes, and for that reason it has a direct bearing upon the fact to be established by the condemnation proceedings—that is the injury to the land, or what is the same thing, its depreciation in value by the construction of the road. The frightening of teams employed in the use of the land has the same tendency, and although its influence upon the value cannot be considered great, it is not too remote to be taken into account in ascertaining the extent of the injury. *Railway v. Hill*, 56 Penn. St., 460; *Snyder v. Railway*, 25 Wis., 60; *Weyer v. Ry.* 68 Ill., 180; 2 Wood's Railway Law, sec. 257, p. 919; 1 Hare's Const. Law, pp. 351–2.

The inconvenience in such cases is not such as is common to the community in general, but is in the nature of an interruption of the business to which the land is appropriated.

2. SAME. Same: Instruction.

II. On cross-examination, one of the witnesses based his estimate of damages to the land in part upon the fact that pools of water had been allowed to accumulate on the right of way in excavations made in constructing the road-bed,

which he thought would produce sickness. The ditching for the road-bed had not been completed when the damages were assessed, and the company urges that the court erred in refusing to instruct the jury that they should indulge the presumption that the road-bed would be properly drained when completed. But the appellant was not injured by the refusal, for the court charged the jury that they should consider no element of damages to the land except such as was specified in the charge; and the supposed damage from the pools was not included in the elements enumerated for the jury's consideration.

3. SAME: Same.

III. It is argued that the land-owner should not be allowed the full value of the land actually taken for the right of way because the company acquires not the fee, but an easement only. But the theory of the condemnation is that the easement is to be a perpetual right, and the determination of all the previous cases in this State has been based upon the idea that there must be compensation in the full value of the land actually condemned. The company has the right to the exclusive occupancy of the land condemned when it is necessary to the proper operation of the road, and the presumption is that it needs and intends to use all it takes, leaving nothing of appreciable value to the owner. *Clayton v. Ry.* 67 Iowa, 238; *Hollingsworth v. Ry.* 63 Ib., 443. The company's remedy in such cases is to condemn no more than it needs.

4. Opinion of witness.

IV. It is insisted that the court erred in permitting witnesses to state to what extent, in their judgment, the land had been damaged.

Opinions as to the amount of indemnity one should receive for an injury are not admissible, except in cases where the amount is capable of being reached by computation. *Rail-*

way v. Hames, 47 Ark., 497. The class of cases under consideration comes within the exception. Opinions are confessedly admissible to prove the value of the land before and after the construction of the railway; but the extent of the injury is the difference between these values, and that difference is the result reached by the answer to the single question, what damage has the land sustained? It is only a question whether the witness or the jury shall perform the mental process of substraction, and that can be of no judicial importance so long as the witness is required to show, in advance, such knowledge of the facts as to satisfy the judge that his opinion may be of value, and may be made to disclose the facts upon which it is based. *Kirby v. Ry.*, 44 Ark., 103; Lewis on Eminent Domain, sec. 436, and cases cited.

5. PRACTICE: Misconduct of counsel.

V. It is argued that the judgment should be reversed because the land-owner's counsel made an effort to put in evidence an offer of compromise which he stated had been made by the company, following it with a statement in the jury's hearing of the details of the time, manner and amount of the offer. The appellant does not appear to have made any attempt to check or prevent the objectionable statement, nor does it appear that it would have been impracticable to do so. The court, without waiting to be moved, rejected the offer, and the company made its first effort to repair the supposed injury by moving for a new trial on that ground after the issue was determined against it. It was its duty to act promptly notwithstanding the statement made in connection with the offer of the incompetent evidence may have been a reprehensible effort to influence the jury illegally; and if it could have prevented it and did not, it is not in an attitude to complain. *Railway v. Cavaness*, 48 Ark., 106; *Green v. State*, 38 Ark., 319. The court was not asked to make any

ruling in that behalf and cannot be said to have committed error. Judgments are reversed not as a punishment to the prevailing party, but because of error prejudicial to the opposing party in regard to which he himself is not at fault.

6. New trials. VI. It is argued that the damages are excessive. But the verdict is sustained by competent proof and was satisfactory to the circuit judge, whose province it was to check the jury if they went beyond the bounds of reason, by granting a new trial or causing the land-owner to remit the excess of the award notwithstanding the verdict might technically be justified by evidence. The same principles obtain in these statutory proceedings as in common law suits in regard to new trials. When the verdict is sustained by competent evidence we do not interfere.

Other objections to the judgment are urged, but they fall within rules well settled by this court, or are clearly not prejudicial and need not be discussed.

Affirm.

RAILWAY V. HUNT.

RAILROADS: *Condemning right of way: Damage to farm.*

In a proceeding by a railroad company to condemn a right of way, the assessment of damages is not necessarily restricted to the injury done to the legal sub-division of land described in the petition. If the tract described is part of a larger connected body of land, the owner may recover for the injury done to the tract as a whole. And where the tract traversed by the road is part of a farm, its use as such is notice to the company that an injury to it impairs the value of the whole farm, and therefore no answer claiming compensation for damage to the residue of the farm is necessary in order to apprise the company of what it is expected to pay for.

APPEAL from *Washington* Circuit Court.

J. M. PITTMAN, Judge.

The Fayetteville and Little Rock Railway Company filed its petition against Thomas J. Hunt to condemn as a right of way a strip of ground one hundred feet in width through a forty acre tract of Hunt's lands. The defendant filed no answer. The tract described in the plaintiff's petition was unfenced timbered land, but it was one of several adjoining tracts belonging to the defendant, embracing a farm on which he resided, and the court below admitted evidence to show the damages to the entire property which would result from the construction and operation of the road through the tract across which it was located.

B. R. Davidson, *E. D. Kenna* and *E. C. O'Day*, for appellant.

1. It was error to allow an assessment of damages for injury to lands not embraced in the petition. If defendant desired to claim damages to land not so described, he should have filed an answer setting up such claim. 90 Ill., 316; Wood Ry. Law, 934; Mills Em. Dom., p. 167; 44 Ark., 261; 45 Id., 278; 41 Id., 433.

2. No damages should have been allowed for injury to lands other than the tract through which the railway ran. See 15 Minn., 230; 6 Hun., (N. Y.) 146; Wood on Railroads, p. 934; 103 Mass., 10; Mills on Em. Dom., sec. 167.

3. Extra fencing is not an element of damages when condemning unfenced woodland. Wood on Railroads, p. 917; 74 N. C., 220.

J. D. Walker, for appellee.

COCKRILL, C. J.

In a proceeding by a railway to condemn a right of way, the assessment of damages is not necessarily restricted to the injury done to the legal sub-division of land described in the

RAILROADS: Right of way: Damage to farm.

petition. If the tract described is a part of a larger connected body of land, the owner may recover for the injury done to the tract as a whole. If the tract traversed by the road is part of a farm, its use as such is notice to the company that an injury to a part impairs the value of the whole, for the farm is a unit. It is not necessary, therefore, in such a case, that the owner should file an answer claiming compensation for the damages done to the residue of the tract in order to apprise the company what it is expected to pay for. *Railway v. Doran*, 15 Minn., 235; *Hartshorn v. Ry.*, 63 Ia., 397. It is incumbent upon the company to pay for the direct injury caused by the building of the road; the statute imposes upon it the duty of filing a petition to adjust the damages, and when it inaugurates the statutory proceeding, the presumption is that it will perform its whole duty, and there is no necessity for an answer by the land owner, unless for the purpose of claiming special damages which were not in contemplation on filing the petition. *Railway v. Stroud*, 45 Ark., 278.

In this case the tract over which the road was located and which alone was described in the complaint, was unfenced woodland, but the proof shows that it adjoined and was a part of the owner's farm, and there was no pretence at the trial that the company was taken by surprise at the claim for damages to the residue of the tract, and no specific objection was made on that account. It cannot avail now.

The court's charge limited the jury to the consideration of such elements of damage as it has been frequently determined by this court, may be taken into account, and is not as broad as counsel for the appellant appear to apprehend.

The verdict appears to be a liberal award for the injury sustained, but it is within the range of the proof, and was

satisfactory to the trial judge, whose opportunities for determining its fairness were better than ours. We will not disturb it.

Affirm.

McCONNELL v. LITTLE.

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VENDOR AND VENDEE: *Action for purchase money: Failure to make title.*

The plaintiff sold the defendant certain town lots and received from him all the purchase money except $100, the payment of which was by agreement deferred until after the execution of a deed for the lots which the plaintiff undertook to procure from M., who owned the property and had authorized the sale. Before the residue of the purchase money was due the plaintiff obtained a deed executed by M., and delivered it to the defendant who received it without objection, but on examination made sometime after its delivery, discovered that it did not convey any part of either of the lots he had purchased. When payment of the $100 was demanded the defendant refused to make it until he received a conveyance for the lots he had purchased. *Held:* That the plaintiffs were not entitled to recover the $100 until they procured according to their agreemeet, the conveyance of the lots purchased, which was a condition precedent to its payment.

APPEAL from *Sebastian* Circuit Court, Greenwood District.

JAMES F. READ, Special Judge.

The Appellant pro se.

A good and sufficient deed for the land purchased should have been tendered before suit and brought into court. 39 Ark., 309; 21 Id., 237; 23 Id., 586; 44 Id., 150, 196; 28 Id., 32–180; 37 Ark., 626.

Clayton & Forrester, for appellees.

The appellees were not the vendors of McConnell and had no interest in the lots sold. Appellant accepted the deed from McMillan, and if he discovered a mistake, he should

have returned it and asked for its correction. The mistake was mutual and appellant must look to McMillan to correct the description. 37 Ark., 629; Pom. Eq. Jur., sec. 1376; 32 Ark., 346; 19 Cal., 672.

BATTLE, J.

One McMillan was the owner of certain lots in Greenwood in Sebastian county and was indebted to Little & Gaines. They agreed to sell the lots for him and appropriate the purchase money to the payment of his indebtedness to them; and sold to McConnell. McConnell paid all the purchase money except one hundred dollars, and Little & Gaines agreed to procure from McMillan a deed to McConnell for the lots. McConnell took possession and Little & Gaines procured a deed from McMillan to McConnell and delivered it to him, and he received it without objection. The one hundred dollars were to be paid several months after the deed was delivered. On an examination of the deed, made sometime after its delivery, McConnell discovered that it did not convey the lots he had purchased or any part of either of them. When Little & Gaines demanded the one hundred dollars he refused to pay it until they conveyed or caused to be conveyed to him the lots he had purchased. They failed to do so, but sued him before a justice of the peace and recovered judgment and he appealed to the circuit court. In the circuit court he filed an amended answer, saying that the lots had not been conveyed according to agreement and that he had always been ready and willing to pay the one hundred dollars when they were conveyed to him by a deed containing covenants of warranty; and deposited in court the one hundred dollars and demanded a deed to the lots. They again recovered judgment and he appealed.

Appellees undertook to procure the conveyance of the lots

to appellant before the payment of the one hundred dollars was to be made. The conveyance was a condition precedent to the payment of the money. There was no evidence that appellant accepted the property described in the deed in lieu of the lots. The consequence is, appellees are not entitled to recover the one hundred dollars until they cause the lots to be conveyed according to their agreement. 1 Wharton on Contracts, sec. 581; 2 Parsons on Contracts, (5th ed.) pp., 528, 675–677; *Atkinson v. Hudson*, 44 Ark., 196; *Rudd v. Savelli*, Ib., 150; *Price v. Sanders*, 39 Ark., 306. If they will do so during the pendency of this cause, they will be entitled to the one hundred dollars deposited in court.

Reversed and remanded for a new trial.

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WINTERS V. DAVIS.

HOMESTEAD: *Minor's right to share rents and profits.*

Where the widow of a decedent holds his homestead to the exclusion of his minor children, who are entitled to share it with her under article ix, sec. 6 of the constitution, she connot defeat an action brought by them to recover their share of the rents and profits, by showing that no dower has been assigned to her in the lands embraced by the homestead. Sec. 2588 Mansf. Dig., which provides that the widow shall possess the chief dwelling-house of her deceased husband together with the farm thereto attached, free of rent until her dower is assigned, has no application to her use of the homestead and is inoperative as against the homestead right of the minor.

APPEAL from *Lee* Circuit Court in Chancery.

M. T. SANDERS, Judge.

H. N. Hutton, for appellants.

The appellant as a widow was entitled to the chief dwelling-house and farm attached free of all rent, no dower having been assigned her. Mansf. Dig., sec. 2588; 40 Ark., 393; 34 Ark., 63. The dower right vests on marriage by way of lien and can only be lost by alienation by her or laches. 5 Ark., 608. The homestead right is in addition and not in lieu of dower, and a widow is entitled to both. 44 Ark., 490; 40 Id., 393; 34 Id., 63.

E. D. Robertson, for appellee.

Article ix, sec. 6, const. 1874, is plain and unmistakable and creates in the widow and minor heirs not only an exemption but an *estate* in the homestead. See 29 Ark., 292. The constitutional provision is superior to the law of dower (sec. 2588 Mansf. Dig.), and repeals it so far as the homestead is concerned. The right to dower arises only upon the death of the husband; it is a mere privilege, under sec. 2588, to hold free of rent the mansion, etc., which was repealed by the constitution so far as it affects homesteads.

BATTLE, J.

W. T. Davis died on the 7th of October, 1880, intestate, leaving him surviving Martha Davis, his widow (who has since intermarried with D. A. Winters) and five minor children. At the time of his death he was the owner of a homestead in the country containing one hundred and sixteen acres of land. He had no other land. When he died his widow remained in possession and thereafter held exclusive possession of it as the chief dwelling-house of her late husband and the farm thereto attached, and denied to the minor children the right to hold possession and share the rents and profits thereof with her. For a part of the time she rented it and collected the rents. Three of the minor children bring

this action against her and her present husband for their share of the rents and profits. The defence to the action is, no dower has been assigned to Martha Winters, the late widow of W. T. Davis, and that she is entitled to hold the homestead and to use and enjoy the same and the entire rents and profits arising therefrom, until her dower shall be assigned.

Section 2588, Mansfield's Digest, provides that, "If the dower of any widow is not assigned or laid off to her within two months after the death of her husband, she shall remain and possess the mansion or chief dwelling-house of her late husband, together with the farm thereto attached, free of all rent until her dower shall be laid off and assigned to her." Subsequent to the enactment of this statute the constitution of 1874 was adopted. It ordains: "If the owner of a homestead die, leaving a widow but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life; *provided*, that if the owner leaves children, one or more, said child or children shall share with said widow, and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's rights to cease at twenty-one years of age—and the shares to go to the younger children; and then all go to the widow; and provided that said widow or children may reside on the homestead or not."

The object of section 2588 is to coerce the heir to assign dower at the earliest day practicable. During the husband's life it does not vest in the wife any right to a future interest in the husband's homestead. Under it she has, during the life of her husband, a mere expectation of occupying the chief dwelling-house and the farm thereto attached, after the death

of her husband and until her dower shall be assigned, free of rent. Prior to the act of March 18th, 1887, he could, without her consent, alienate it and deprive her of every right therein, except her right to dower. This being true, the effect of the constitution upon the rights of the parties in this case, the widow having no separate homestead in her own right, and her husband having left minor children, was to give her one-half of the homestead and of the rents and profits thereof for her natural life, and the other half to the minor children till each of them arrives at twenty-one years of age, each child's right ceasing as he or she reaches the age of twenty-one and going to the younger children until they all become twenty-one years old, when the entire homestead and the rents and profits vest in the widow during her life, or until she adandons it. Cooley's Con. Lim. (5th ed.) * pages 359, 361, and authorities cited.

Decree affirmed.

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CURRIE V. FRANKLIN.

GUARDIAN'S SALE: *Presumption as to order for.*

An order of the probate court for the sale of a minor's lands will be presumed to have been regularly made, where nothing to the contrary appears in the record, and its validity cannot be questioned in a collateral proceeding. *Redmond v. Anderson*, 18 Ark., 449.

APPEAL from *Jefferson* Circuit Court.

JOHN A. WILLIAMS, Judge.

In 1872 the title to the lands in controversy in this suit was in the plaintiffs, subject to a life estate in their mother, Mrs. Martha A. Mathis. On the 5th day of March of that year, the mother conveyed her life estate to the defendant.

She was subsequently duly appointed guardian of plaintiffs, and as such applied to the probate court by petition for an order to sell their interest in the lands, stating in her application that such sale was necessary to raise funds for their support and education. The probate court granted the petition, and pursuant to its order the interest of the plaintiffs in the lands was offered for sale on the 16th of September, 1872, and the defendant became the purchaser thereof. The sale was reported to and confirmed by the court, and the guardian thereupon conveyed the interest of the plaintiffs in the lands to the defendant, who had gone into possession under the conveyance of the life estate. The statutes in force at the date of the order under which the guardian's sale was made (Gould's Dig., chap. 4, secs. 180, 182), provided that an application to sell the real estate of a minor, should, when made under section 181, be verified by the affidavit of some disinterested person, and if made under section 182, that it should be supported by the testimony of two credible witnesses. The petition for the sale of the lands in controversy is not embraced in the record of this cause, and it does not appear from the order made upon it, whether the application was verified or supported in the manner required by the statute. It does, however, appear from the recitals of the order, that it was made upon the written application of the guardian and that the court found that a sale was necessary for the purpose stated in the petition. Mrs. Mathis died in 1884 and in 1886 the plaintiffs brought this action to recover possession of the lands. The defendant by his answer claimed title under the guardian's conveyance, and set out and exhibited therewith the order of sale, the report and the order of confirmation. The plaintiffs demurred to the answer and their demurrer having been overruled, they rested thereon and appealed.

Harrison & Harrison, for appellants.

It does not appear by the record of the probate court exhibited with defendant's answer, nor is it averred in the answer, that the affidavits required by the statute were made or filed. These were jurisdictional facts, and there can be no presumption of the existence of such. They must appear. Const. 1868, art. vii, sec. 5; chap. 4 Gould's Dig., p. 134; act Dec. 23d, 1846, secs. 180, 181, 182; 33 Ark., 428; 32 Ib., 97; 19 Ib., 499; 26 Ib., 421; 31 Id., 74; Hawes on Jur. 11 sec., 8; 60 Ill., 333; 62 Mo., 588; 11 Wend., 651; 25 N. H., 302; 35 Ib., 166; 12 Ohio St., 643; Freeman Void Jud. Sales, sec. 8; Freeman Judg., sec. 125; Hawes on Jur., 499, sec. 259; 496, sec. 257; 1 Ohio St., 372; 8 Ib., 613; 34 Cal., 391; 47 Ill., 25; 39 Conn., 199; 18 Wall., 364; 28 Grat., 879; 11 Mo. App., 34.

The court having no jurisdiction, the confirmation of the sale was inoperative and nugatory. Freeman Void Judicial Sales, sec. 44; 2 Wall., 609; 94 U. S., 74; 2 How. (U. S.), 57.

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

The probate court had jurisdiction. 45 Ark., 48. Presumably the law was complied with, and this presumption is conclusive. 47 Ark., 413. A remainder after a life estate is the subject of sale. Rorer Jud. Sales, 259, 261. The guardian, under the orders of the probate court, had the authority to sell. 4 Mass., 190; Schouler Dom. Rel., 367, 368.

The probate court had jurisdiction of the subject matter, and there being no fraud or irregularity the sale must stand. Schouler Dom. Rel., 336; L. R. 6 Chy., p. 850; L. R. 14 Eq., 251.

COCKRILL, C. J.

The judgment in this case is ruled by the decision in *Redmond as guardian v. Anderson*, 18 Ark., 449, which follows the leading case of *Borden v. State*, 11 Ark., 519. The principle governing the first case is affirmed in *George v. Norris*, 23 Ib., 129; *Fleming v. Johnson*, 26 Ib., 421; *Gwynn v. McGauley*, 32 Ib., 97; *Myrick v. Jacks*, 33 Ib., 428; *Adams v. Thomas*, 44 Ib., 267; and *Boyd v. Roan*, 49 Ib., 397.

Affirm.

WHITEHILL V. BUTLER.

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NEW TRIAL: *Bill for: When equity will grant.*

A bill for a new trial at law is not sufficient which merely shows that an accident has deprived the complainant of the benefit of a motion for a new trial based on technical errors, though they might be sufficient to warrant a reversal on appeal. The merits of the controversy must be disclosed by stating the substance of the evidence, and it must appear therefrom that such injustice has been done that it would be contrary to equity and good conscience to allow the judgment to be enforced.

APPEAL from *Jefferson* Circuit Court in Chancery.

JOHN A. WILLIAMS, Judge.

X. J. Pindall and *D. A. Gates*, for appellant.

Having lost the benefit of his motion for a new trial, without fault, appellant was entitled to relief in equity. 35 Ark., 123.

Oral proof was admitted, when the deed should have been produced. Gr. Ev., 1 vol., sec. 82, (14th ed.)

The court erred in its instructions to the jury, and the verdict was influenced by these erroneous instructions, and the incompetent parol testimony admitted. A new trial should have been granted. See 35 Ark., 123.

Appellant was made to pay a year's rent for a day or two's use, and for damages for cotton not affected by the suit, and for rent of land that did not belong to appellee, and it is inequitable for appellee to keep it. 40 Ark., 338.

Harrison & Harrison, for appellee.

The evidence is not set out in the complaint, nor what it tended to prove, and this court cannot determine the sufficiency of the motion for the new trial. See 2 Storey Eq. Jur., sec. 894. There is no showing that injustice has been done. Ib., sec. 896; 1 Sch. & Lef., 204; 7 Cr., 336-7; 1 John. Chy., 465; 4 Rand., 125.

The failure to obtain a new trial or appeal alone is not sufficient; injustice must appear; mere errors of the court not sufficient; if the judgment is not against conscience it will not be interfered with. *Johnson v. Branch*, 48 Ark.; 40 Ark., 338; Ib., 551.

No such case or showing is made as the courts require.

COCKRILL, C. J.

Whitehill sued Butler in the circuit court to recover an amount due on account. Butler admitted the amount claimed, but filed a set-off and asked for judgment over against Whitehill. There was a jury trial, which resulted in a verdict and judgment in favor of Butler. Whitehill moved for a new trial, but his motion, as the complaint alleges, was continued by the court, for action to a special adjourned term, which was never held, and so his remedy at law for relief against the judgment was lost. He brought this suit in equity for a new trial. In addition to the facts above stated his complaint set forth the pleadings in the action at law, the court's charge to the jury, and an allegation that the court had admitted in evidence at the trial certain oral proof

of the title to lands for the use and occupation of which Butler sought to recover against him. The history of the case is very meagerly set out and no statement of the evidence upon which the verdict was based is attempted. The appeal is from the judgment dismissing the complaint upon demurrer.

The loss of the remedy at law for relief against the judgment unmixed with laches upon the appellant's part, coupled with the admission of the evidence alluded to, and one or more inaccurate statements of the law in the chargeto the jury, are relied upon for a new trial in equity.

NEW TRIAL: When equity will grant.

But it is not enough to warrant the extraordinary interference of equity with a judgment at law, that an accident has prevented the losing party from pressing a motion for a new trial based upon technical errors occurring at the trial; even though they might be sufficient to warrant a reversal on appeal. *Johnson v. Branch*, 48 Ark., 535. A party who has obtained judgment after a full investigation of the controversy by a competent tribunal will not be forced by a court of equity to submit to a new trial unless justice imperatively demands it. It must clearly appear to that court that it would be contrary to equity and good conscience to allow the judgment to be enforced, else it declines to impose terms upon the prevailing party. *Johnson v, Branch, supra*, and cases cited therein. Note 3 to *Dugan v. Cureton*, 1 Ark. Annotated Report, * 44. *Crim v. Handly*, 94 U. S., 652.

In this case we are not put in possession of the merits of the controversy. We indulge the presumption that the judgment which is attacked is a fair and correct settlement of the matter in dispute until it is controverted by proof, or allegations, which on demurrer stands in lieu of proof. Conceding that error was committed upon the trial, it was certainly

Bill for new trial.

not of such a character as to stamp unfairness upon the judgment so as to demand the interference of equity. The substance of the evidence upon which the court and jury acted, should be presented to the chancellor, when the application for a new trial is made to him, in order that he may judge for himself of the fairness of the result reached. *McCabe v. Paine*, 37 Ark., 455. Upon consideration of the proof it may be apparent that the errors complained of are not prejudicial, and that the judgment upon the whole record is right. Every intendment to the contrary must be overcome before equity will interfere. A judgment at law will not be disturbed by equity when it does substantial justice between the parties, (*Gibson v. Armstrong*, 32 Ark., 438), even when the defendant has been prevented by unavoidable casualty from making his defence. *State v. Hill*, 50 Ark., 458. The appellant failed to make it appear that injustice had been done him, and the judgment is affirmed.

HEMPSTEAD COUNTY V. HOWARD COUNTY.

1. APPEAL: *From judgment of county court: Allowed without formal prayer.*

Under Mansf. Dig., sec. 1436, where the statutory affidavit for an appeal from the judgment of a county court is filed with the circuit clerk, he may act upon it and perfect the appeal without any formal prayer therefor.

2. SAME: *Same: Certifying transcript of record.*

Where an appeal is allowed from the judgment of a county court, the circuit court acquires jurisdiction of the proceedings on the filing there of the original papers, and may cause the clerk of the county court to certify a transcript of that court's record entries.

3. COUNTY INDEBTEDNESS: *When negotiable bonds become part of.*

In 1872 bonds of Hempstead county to the amount of $50,000 were prepared by the proper authorities and placed in the hands of commissioners to be

negotiated by them for the purpose of raising a fund to build a court house and jail. The county of Howard was created by the act of April 17th, 1873, and part of the territory it embraces was taken from Hempstead. In a proceeding under that act instituted to determine what portion of the indebtedness of Hempstead county at the time Howard was formed, should be paid by the latter, *held:* That before the bonds were negotiated they constituted no part of the indebtedness of Hempstead county, and Howard was only liable for its proper proportion of the amount of such bonds as had been negotiated when the act creating it was passed. *Held, further:* That Howard county's proportion of the interest that had accrued on the bonds to the date of judgment, was properly adjudged against it.

CROSS-APPEAL from *Howard Circuit Court.*

GEO. P. SMOOTE, Special Judge.

W. P. Feazell, for appellant.

1. No prayer for appeal was made or filed with the affidavit, and no order granting the appeal by the county court or clerk of the circuit court, and the court had no jurisdiction. Mansf. Dig., 1436; 26 Ark., 414; 21 Ark., 93; 9 Ib., 128; 15 Ib., 169; 31 Ib., 725.

2. The transcript was not properly authenticated, the certificate was not tested with the seal of the county court. 6 Ark., 451; 6 Wall., 556; 6 Ohio, 11; 1 N. H., 139; 3 Hawks, 226; 3 Dev., 279; 22 How., 46; 9 Peck., 446; 15 Peck., 446; 30 Me., 170; 2 Gilen, (Ill.) 151; 10 Me., 204.

The transcript was a nullity and could not be amended. Freeman Ex., sec. 70; Bliss Plead., 249; Drake Att., sec. 174, *a*.

3. None of the bonds became a legal debt of Hempstead county until they were *sold* or *negotiated*, and the question arises, were any of these bonds disposed of before Howard county was created? If so, what amount? The burden is on Hempstead. Reviews the testimony and contends that

the evidence is not sufficient to sustain the findings of the court.

4. It was error to render judgment for 6 per cent. interest; this is in violation of Art. 16, sec. 1, Const. 1874; 36 Ark., 89.

D. W. Jones and *R. B. Williams*, for appellees.

1. No formal prayer for appeal in writing is *necessary*, or required by statute. The affidavit is all that is necessary, where the original papers and transcript of the record entries are transmitted as required by statute. See Mansf. Dig., secs. 1436, 1438.

2. The filing of the papers and record entries in the circuit court gave it jurisdiction. Mansf. Dig., secs. 1436–8; 35 Ark., 298, 302; 43 Ark., 33, 40, and it had the right to amend the transcript. Mansf. Dig., sec. 5081; 47 Ark., 373; 48 Ib., 94; Mansf. Dig., secs. 50, 86; 9 Ark., 469; Ib., 497.

On the cross-appeal of Hempstead, contend that the whole $50,000 of bonds was a part of the indebtedness of Hempstead county when Howard county was created, within the meaning of the 4th sec. of the act of April 17th, 1873. 34 Ark., 240. See, also, 36 Ib., 378; 37 Ib., 339; 44 Ib., 317.

COCKRILL, C. J.

This is a proceeding instituted under the act of April 17th, 1873, creating Howard county, for the purpose of determining what portion of the indebtedness of Hempstead, one of the counties which furnished territory for the formation of Howard, should be paid by the new county. The judgment of the county court where the proceeding originated awarded nothing to Hempstead county, and the latter pros-

ecuted an appeal to the circuit court by filing the statutory affidavit with the clerk of that court who caused the original papers and a transcript of the court's proceedings to be filed in his office within the time prescribed for prosecuting such appeals. Howard county moved to dismiss the appeal from the judgment of the county court, (1) because there was no formal prayer addressed to the circuit clerk for an appeal, and (2) because the county clerk, who is ex-officio circuit clerk, had affixed the seal of the latter court to his certificate of the proceedings in the county court. But the circuit court permitted Hempstead county to show by parol that an application in writing for an appeal had been made to the circuit clerk; caused the clerk to amend his certificate by affixing thereto the seal of the county court, and overruled the motion. It is seriously argued that the court erred in both particulars.

The repeated decisions of this court discountenancing irregularities of proceedure which do not affect the rights of parties upon the merits, and recognizing in the circuit court the power of amending its process and records as well as pleadings, to any extent short of impairing the substantial rights of the parties, leave no room for argument against the action of the court in this instance. See *Hall v. Lackmond*, 50 Ark., 113, and *Sannoner v. Jacobson*, 47 Ark., 31 and cases cited.

1. APPEAL: From judgment of county court: Allowed without formal prayer.

The prayer for an appeal contemplated by the statute, (Mansf. Dig., sec. 1436,) is addressed to the clerk for the purpose of apprising him that an appeal is desired. If the statutory affidavit for an appeal is presented to him without a formal prayer, and he acts upon it and causes the appeal to be perfected, the requirements of the statute have obviously been fulfilled, for the only end the prayer could effect has been attained. It was useless, therefore, for the circuit

court in this case, even to have required the showing that a prayer for an appeal had been lodged with the clerk. But Howard county was not prejudiced by the showing.

2. SAME: Same: Certifying transcript.

The other objection is only technical. Whatever else might be said of it, it is certain that the circuit court acquired jurisdiction of the proceeding upon the filing of the original papers in that court in pursuance of the appeal prosecuted by Hempstead county, (Mansf. Dig., sec. 1438,) and the court thereafter possessed the undoubted power to cause the county clerk to certify a transcript of the record entries of the county court had in the cause appealed.

The contention upon the merits of the cause was as to the amount of the indebtedness of Hempstead county at the time Howard was created; and that controversy is narrowed here to the question, what amount of court house and jail bonds were an outstanding indebtedness against Hempstead county on the 17th day of April, 1873, when the act creating Howard county became a law?

3. COUNTY INDEBTEDNESS. When negotiable bonds become part of.

In the autumn of 1872 the Hempstead county authorities caused $50,000 in negotiable bonds to be prepared for issue and placed them in the hands of county commissioners to be negotiated by them for the purpose of raising a fund to build a court house and jail. It is contended on the part of Hempstead county that the whole of this sum became a debt of that county prior to the formation of Howard, and that the latter county shall pay its pro rata of $50,000. But the commissioners were the county's agents, and as long as they held the bonds as such, they were held by the county and were no part of its indebtedness. Only upon negotiation of the bonds did the county become liable to pay them. The question is, therefore, how much was due upon bonds negotiated by Hempstead county when Howard was created? The circuit court

fixed the amount at $20,000 and gave judgment for Howard's proportion of that sum. Howard county contends that the court's finding of fact is not sustained by the evidence in so far at least as relates to the negotiation of bonds to pay for the construction of the jail. The evidence as to the dates of the negotiation of bonds for that purpose is not direct, but that they were negotiated before the existence of Howard county is a fair inference from the proof. It appears that at a term of the Hempstead county court held about two months after Howard county was formed, the commissioners reported that they had paid on account of the construction of the jail, which was then completed, the sum of $8,750, and that there was still due and unpaid thereon the sum of $2,600. Howard county's contention is that the whole amount may have been paid between the dates of the formation of that county and the filing of the report, and admitting Howards liability to pay her proportion of the amount Hempstead had agreed to pay the contractors for building the jail, the question is material, because the bonds having been sold at a discount the amount of the indebtedness evidenced by them is greater than that agreed to be paid for building the jail. But the county court had specifically directed the commissioners in advance to pay certain proportions of the contract price as the work progressed until the "walls were up, the roof on and the building enclosed," when they were to withhold the balance due until the completion of the building:—that is, nothing was to be paid by the commissioners after the house had reached the point of completion contemplated by the language above quoted, until it was accepted by the county. That the construction had progressed to that state of completion when Howard county was formed is sufficiently shown by the facts

stated by the commissioner, Bishop; the $2,600 reserved by the building commissioners after that time is the due proportion of the contract price directed by the court to be reserved; it is shown that the commissioners made their payments by negotiating the bonds as they were needed for that purpose, and as the presumption is that the contractor demanded and the commissioners paid, the installments as they fell due under the contract which was prior to April 17th, 1873, the evidence is sufficient to sustain the finding to the effect that the bonds were negotiated before that date. The circuit court was justified, therefore, in adjudging against Howard county, such part of Hempstead's indebtedness on that account as bears its proportion to the value of the territory taken for the benefit of the new county. *Phillips County v. Lee County*, 34 Ark., 240.

A judgment for interest was added to the principal of the debt found due from Howard to Hempstead, and complaint is made of that. The record shows that the $20,000 in bonds negotiated by Hempstead county bore interest from date. It was the duty of Howard county to relieve Hempstead of her proportion of the interest that had accrued upon these bonds to the date of the judgment adjusting the indebtedness; and as the amount of recovery is not more than Howard's proportion of the principal and interest of Hempstead's debt, no injury is sustained by Howard county. Hempstead county has pointed out no error prejudicial to her interest, and the judgment will be affirmed.

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HUMPHREYS V. BUTLER.

1. CONSTRUCTIVE TRUST: *On land bought with money wrongfully converted.*

Where one person wrongfully collects the money of another and invests it in real estate, taking the title in his own name, equity will create a trust on the property thus acquired, in favor of the person with whose means it was purchased, as against the wrong doer and his vendee having notice of the trust. And it is not necessary to the creation of such trust that a fiduciary relation should have existed between the parties.

2. SAME: *Same: Equitable lien.*

The defendant in paying the purchase money of a certain lot, conveyed to him in consideration of the sum of $400, wrongfully used the sum of $149.52 belonging to the plaintiff and of which he had obtained possession without her authority, knowledge or consent. *Held:* That the plaintiff's money used by the defendant in the purchase, being only a part of the price paid for the lot, she is entitled to an equitable lien thereon for the amount due her, including interest, and to a decree for the sale of the property in default of payment.

3. PRACTICE IN SUPREME COURT: *Failure to make issue below.*

In a chancery cause where the defendant fails to plead the staleness of the plaintiff's demand or that it is barred by the statute of limitations, such defence will not be available on appeal.

APPEAL from *Pulaski* Chancery Court.

D. W. CARROLL, Chancellor.

T. J. Oliphint, for appellant.

A trust will not result to one who pays a part only of the consideration of land conveyed to another, unless it be some definite part of the whole consideration. 2 Paige, 238; 15 Wend., 647. Under no circumstances will a resulting trust be greater than the part of the consideration paid. Hill on Trustees, 144; 7 B. Mon., 433; 9 Paige, Chy., 334; 4 J. J. Marsh., 590; 6 Cowen, 706; 35 Me., 41; 14 Ill., 505.

The claim is stale. 41 Ark., 301. Lapse of time and laches will bar a recovery. Courts do not enforce stale claims. Perry on Trusts, sec. 140; 6 Whart., 481; 1 Hare., 594; 2 Story Eq. Jur., secs. 15-20; 21 Ark., 9.

The court erred in divesting the title. Conceding appellee's claim, the most she could possibly recover would be the $149 and legal interest. The U. S. government having decided that appellant was entitled to the bounty money as the brother of the deceased soldier, that decision cannot be attacked in a collateral proceeding.

The testimony was clearly insufficient to show that appellee was the wife of the deceased soldier.

Certainly there was no trust beyond the $149 used by appellant in the purchase of the lot. Hill Trustees, 4th Am. ed., 149; 2 John. Chy., 416.

Blackwood & Williams, for appellee.

That appellant was a trustee is beyond doubt. By representing himself to the government as the heir, he put himself in a fiduciary or trust relation to the rightful person. This was a fraud and he became a trustee *ex maleficio*. Bispham Eq., sec. 218; Hill on Trustees, 144.

If appellant mingled trust funds with his own and failed to keep account of the rents and profits, so they could be separated, it was proper for the chancellor to divest him of the whole. The burden was on him to separate the trust fund and its increase from his own. Bisp. Eq., sec. 86, [3d. ed.]; 1 Perry Trusts, sec. 128; 14 Ill., 505; 34 L. J. Ch., 301; 4 De G. M. & G., 372; L. R. 11 Chy. Div., 772; L. R. 13 Ch. Div., 128; 10 John., 65; 51 Me., 402; 1 Story Eq., sec. 468; 2 Kent, 364.

The statute of limitations was not pleaded.

The widow was entitled to the bounty. Act July 4, 1864, XIII. St. at Large, 379; Rapps. Dig. Bounty Laws, sec. 469.

BATTLE, J.

Edward Johnigan enlisted in the army of the United

States during the late war between the States, and died in the service, and before the close of the war. At the time he enlisted he had a wife, Clarissa by name, and when he died he left her surviving. He also had a brother Jacob, who survived him. In 1871 Jacob, without the knowledge, consent or authority of his brother's widow, collected from the United States $149.52 as bounty due his brother Edward, and invested it in a certain lot in Little Rock, which he purchased, and which cost him $400. Clarissa married one Butler. Having discovered Jacob's collection and investment, they brought this action to divest him of the title to the lot, and to vest it in Clarissa, or to recover a decree for the amount collected in favor of Clarissa, and to have it decreed a lien on the lot and the lot sold to satisfy the same.

1. CONSTRUCTIVE TRUST: On land bought with money wrongfully converted.

The amount due Edward as bounty at the time of his death rightfully belonged to his widow. There is no controversy about Jacob having collected it, or the amount collected; and we think that the evidence clearly shows that he invested it in the lot. But it is insisted that he stood in no fiduciary relation to Clarissa, and that when he collected the money due her, and invested it in the town lot, no trust resulted to her. It is true that he stood in no relation of confidence or trust to her. But it is not necessary that such a relation should have existed to entitle her to relief against the lot. Equity created a trust *in invitum* out of the collection and the investment of her money in the lot, with the view of subjecting the lot to the purposes of indemnity and recompence.

"One of the most common cases," says Judge Story, "in which a court of equity acts upon the ground of implied trust *in invitum*, is where a party receives money which he cannot conscientiously withhold from another party." And

he states it to be a general principle that "whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or the *cestui que trust.*" Story's Eq. Jur., secs. 1255, 1258.

In 2 Pomeroy's Equity Jurisprudence, the author says: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments or through undue influence, duress, taking advantage of one's necessities or weakness, or through any other similar means or under any other similar circumstances, which render it inconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary, for the obtaining of complete justice, although the law may also give the remedy of damages against the wrong-doer." Sec. 1053.

It has been held that equity will charge land paid for in part with the proceeds of stolen property with a trust in favor of the owner of the property for the amount so used. *National Mahanoe Bank v. Barry*, 125 Mass., 20; *Newton v. Porter*, 69 N. Y., 133; *Bank of America v. Pollock*, [4th ed.] ch. 215.

There is no good reason why the owner of property taken and converted by one who has no right to its possession, should be less favorably situated in a court of equity, "in respect to his remedy to recover it, or the property into which it has been converted, than one who by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided." "'The beautiful character, pervading excellence, if one may say so, of equity jurisprudence," says Judge Story, "is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case, in all its complex habitudes." While in the former case no relation of confidence or trust exists, it impresses a constructive trust upon the property obtained by the conversion for the benefit of the party whose effects have been used in obtaining it; and, when such effects or the proceeds thereof, were a part of the price paid, it makes the property so obtained chargeable with an equitable lien in favor of such party and entitles him to a "judgment for the sale of the property as upon foreclosure in default of payment within a time named." *Bresnihan v. Shehan*, 125 Mass., 11, and cases cited; *Wallace v. Duffield*, 2 S. & R., 521; *Day v. Roth*, 18 N. Y., 448.

2. SAME. Same: Equitable lien.

Appellant insists that the demand of appellees is *stale* and that a court of equity will not enforce it. But this issue was not raised in the court below. The defendant failed to plead the statute of limitations or that the demand was stale in the chancery court, and the evidence shows that this suit was brought within a reasonable time after the discovery of the collection by Jacob.

3. PRACTICE IN SUPREME COURT: Failure to make issue below.

Appellee, Clarissa Butler, is entitled to judgment for the $149.52, and six per cent. per annum interest thereon. In-

asmuch as the evidence does not show when the money was actually received, and does show that it was invested in the lot on the 14th day of October, 1871, the interest should be computed from that date. The $149.52 being only a part of the price paid for the lot, she should have a lien thereon for the amount due her, and a decree for the sale of the lot to satisfy the lien in default of payment, within a specified time. 2 Perry on Trusts, [3d ed.] sec. 842; *Scale v. Baker*, 28 Bravan, 91; *Price v. Blackmore*, 6 Beavar, 507; *Lewis v. Maddocks*, 17 Vesy, 48.

The decree of the chancery court is reversed, and this cause is remanded, with an instruction to the court below to enter a decree in conformity with this opinion, and for other proceedings.

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GUISE V. OLIVER.

LIEN: *On land, for digging well.*

A well is not an improvement within the meaning of the mechanic's lien law, (Mansf. Dig., secs. 4402-4409,) and neither that statute or the act of 1868, (Mansf. Dig., secs., 4425-4440,) providing for laborer's liens, gives a lien on land for labor performed in digging a well, although the work is done under a contract with the owner of the land.

APPEAL from *White* Circuit Court.

M. T. SANDERS, Judge.

The appellants, *pro sese*.

Contend that laborers have a lien for digging a well under sec. 4402, Mansf. Dig.; 27 Ark., 568; 29 Ib., 597; Act July 25th, 1873; Mansf. Dig., secs. 4406–7; 32 Ark., 59. laborer's lien laws are liberally construed.

J. N. Cypert, for appellee.

Sec. 4409, Mansf. Dig., limits the lien to a *building, ten-*

ement or *edifice*. A well is neither one or the other. This section limits and qualifies, sec. 4402.

These statutes are strictly construed. See authorities cited by appellants.

HUGHES, J.

Appellants filed their complaint in the White circuit court to assert a lien upon land owned in fee by appellee—the SE¼ of the SE¼ of sec 25, T. 8 N., R. 10 W., in said county—for work and labor performed by appellants by digging a well thereon, under contract with appellee, and for which appellee had executed, payable to the order of appellants, on or before the 1st of Nov., 1886, his promissory note for $50.35, on the face of which it is expressed that it was given "for labor on one well."

For a balance of forty dollars and thirty-five cents due upon the note, appellants sought to enforce a lien upon and sale of the land. Appellee interposed his demurrer to the complaint because, 1st, "The same does not state facts sufficient to constitute a cause of action."

2nd. "The complaint does not state facts sufficient to entitle plaintiff to a mechanic's lien."

This action was brought to fix a lien under the mechanic's lien law, the first section of which as embodied in Mansfield's Digest, being section 4402, provides that "Every mechanic, builder, artisan, workman, laborer or other person, who shall do or perform any work or labor upon or furnish any materials, machinery, or fixtures for any building, erection or other improvement upon land, including contractors, sub-contractors, material furnishers, mechanics and laborers, under or by virtue of any contract, express or implied, with the owner or proprietor thereof, or his agent, trustee, contractor, or sub-contractor, upon complying with the provis-

ions of this act, shall have for his work or labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor on which the same is situated, to secure the payment of such work or labor done, or materials, machinery or fixtures furnished."

If, standing alone, this section could be construed to be broad enough to give a right to establish a lien upon land, and enforce the sale thereof for the satisfaction of a debt due for labor performed in digging a well upon the land, it is certainly limited and qualified by section 4409 of the same act, (act of April 25th, 1873) which provides that "all the right and title of the defendant to the land on which any building, tenement or edifice shall be erected, as well as to a convenient space around the same not exceeding two acres clear of the building, tenement or edifice, shall be subject to the liens filed by virtue of the provisions of this act, and such right and title shall be sold with the building, tenement or edifice as part of the property charged with the lien."

LIEN: For digging well.

It seems that the statute has given no lien upon land to secure payment for labor performed, save that character of labor coming strictly within its provisions, and that labor performed in digging a well does not come within the provisions of this act. A well is not an improvement that will warrant the assertion of a lien upon land to pay for digging it. The right to a lien on real estate ought not to be extended beyond the clear intention of the statute creating it. "There is no common law lien of any kind upon real property." 2 Jones on Liens, sec. 1184.

Are appellants entitled to enforce a lien for their labor under the act of July 23d, 1868, which provides "that laborers who perform work and labor for any person under a

written or verbal contract, if unpaid for the same, shall have an absolute lien on the production of their labor for such work and labor." This act was partly construed in *Dano v. M. O.* and *R. R. R. R. Co.*, 27 Ark., 564, and also in *Taylor, Bradford & Co. v. Hathaway*, 29 Ark., 597.

In the former of these cases the action was brought to assert a lien for labor performed in grading a railroad, or roadbed. It was held in this case, that the word laborer, as used in this act, "was intended to be understood according to its common acceptation," and to mean "a man who does work that requires little skill, as distinguished from an artisan." It is also said in this case that "this word 'all,' as it is used in this act is not to be construed literally as giving to every laborer a lien for his labor." And further that "the appellant was a laborer on a railroad, and as such, is not and does not come within the class of laborers described in the law as being entitled to 'a lien on the production of their labor.'" * * * The tenth section of the act of July 23rd, 1868, reads as follows: "When any real estate is to be sold under a lien for labor such as ditching, building levees, etc., the justice of the peace shall file a copy of the judgment rendered, in the county clerk's office immediately, and the county clerk shall place it in his judgment docket and cause the sheriff to sell such real estate, having given thirty day's notice of the same in the way the same is herein provided." This language looks like it was intended by the legislature that the real estate might be sold for the payment of a laborer's lien given by the statute now under consideration. The language used in the section just quoted, imports that it was the intention of the legislature to give to persons employed to do ditching, or employed in the building of levees a lien on real estate for their labor."* * *

A railroad is neither a drain nor a levee in the common acceptation of the word. There is nothing in this act which intimates that the legislature intended it to be extended unless it is in the abbreviation "etc." * * * "The remedy afforded by this act is summary in its character, and to some extent, remedial, and at the same time contrary to the course of the common law. Remedial statutes should be construed liberally; not so, however, with summary statutes. This being true, we do not feel disposed to construe the abbreviation 'etc.,' to mean and include railroads."

Same.

In *Taylor, Bradfield & Co. v. Hathaway*, 29 Ark., 597, which was an action to assert a laborer's lien upon land for labor performed in clearing, improving, cultivating and building fences thereon or for like labor performed thereon, it was held, (Chief Justice English delivering the opinion of the court) that the lien did not exist under the statute, and an instruction, "that a lien only lies against the land for ditching and building levees and this only when the party works under a special contract for that purpose with the owner of the land," was held to be correct and proper to have been given by the trial court. A laborer seeking to assert a lien upon land for work and labor performed by him must bring his case strictly within the statute under which he claims the lien. There being no liens at common law upon real estate, statutes creating them are strictly construed.

Under our statutes, a laborer has no lien upon land for pay for a well dug by him thereon, though under contract with the owner of the land.

Affirmed.

MEREDITH V. SCALLION.

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1. EXECUTION: *On judgment against administrator.*

After the removal of an administrator, execution on a judgment recovered against him in his fiduciary capacity, and to be levied of the goods and chattels or lands of his intestate, as provided in ch. 60, sec. 8 of the Revised Statutes, could not be legally issued until the judgment had been revived against a new administrator or against the party in interest in the property of the intestate: and where an execution issued without such revivor, a sale under it passed no title.

2. SAME: *Same: Repeal of statute.*

The statute which recognized the right to issue an execution against an administrator in his fiduciary capacity [Rev. Stat. chap. 60, sec. 8], was repealed by the provisions of the constitution of 1874, conferring exclusive jurisdiction over the assets of deceased persons on the probate courts. Since the adoption of that instrument, although courts of law still have jurisdiction to maintain an action against an administrator, the power to execute a judgment recovered therein belongs alone to the probate court, to be exercised in the course of administration. An execution issued on such judgment is, therefore, without authority of law and a sale made under it is void.

APPEAL from *Perry* Circuit Court.

J. B. WOOD, Judge.

Cos. Altenberg, for appellant.

1. A demurrer to an answer relates back to the complaint, and if the complaint is insufficient the demurrer to the answer should have been overruled. 31 Ark., 301.

2. The judgment under which appellee claims being rendered by the circuit court against an administrator, the execution and sale under it are void, and nothing passed by it. Under our laws no execution can issue on a judgment of the circuit court against an administrator in his fiduciary character. 22 Ark., 572; 27 Id., 252; 40 Ark., 541. The facts in 10 Ark., 541, were different and the law has been changed since then by our constitution. The question of innocent purchaser does not arise. 33 Ark., 621.

3. There was no administrator of Gibbons' estate when execution issued; no one to represent the estate. There was no lien and no power to award execution against an estate. Cases supra. The jurisdiction of the probate court is exclusive. 36 Ark., 529; 40 Id., 541.

A court of law has no jurisdiction to enforce a judgment against an estate after it has been closed by the probate court. Equity alone has jurisdiction. 14 Ark., 253; 31 Id., 229; 32 Id., 716; 40 Ark., 434.

J. F. Sellers, for appellee.

1. A sale of property under circumstances similar to these, except that the administration had not closed, was held to be only an irregularity in 10 Ark., 541, 552. See also 22 Ark., 572, 588-9. Reviews 27 Ark., 252, and 40 Ark., 541, and distinguishes them.

2. If the sale was irregular appellee should be protected as an innocent purchaser. 14 Ark., 69; 1 Story Eq. (5th ed.) 381; Ib., 409, 434; 5 Sneed (Tenn.), 704; 10 Ark., 545.

3. No motion was made to correct the alleged errors in the circuit court. Mansf. Dig., sec. 1310; 32 Ark, 151; 22 Am. Law Rev., 424,

4. In favor of the regularity of the proceedings, this court will presume that the demurrer was abandoned. 17 Ark., 530.

C. Altenberg in reply.

1. The act of March 3d, 1838, secs. 1 to 8, was excluded from Gantt's Digest, see ch. 56, p. 504; also in Mansfield's Dig., see ch. 60, because repealed by act July 22d, 1868; see Code, title 14, p. 200 and secs. 672-3 to 690, and Const. 1874.

2. Neither the common law nor statutes permit an execution against an administrator in his official capacity. 4 T. R., 621; 32 Mo., 431; 5 Eng. 541; 18 Ark., 414; 22 Ark 573; 4 How. (U. S.), 76; 40 Ark., 544.

3. A purchaser at his own execution sale is not an innocent purchaser. 33 Ark., 621.

J. F. Sellers, supplemental brief.

1. The statute (Eng. Dig. ch. 67, sec. 8) has not been repealed. None of the cases (22 Ark., 572; 27 Id., 252; 40 Id., 541) make any reference to any change in the statute. It has not been expressly repealed and repeals by implication are not favored. Sedg. St. and Const. Law, p. 97 *et seq;* Dwarris on Stat., p. 113, n. 9; 10 Ark., 589; 23 Ark., 304. The statute does not conflict with the civil code nor the constitution of 1874.

2. At common law an execution could be issued on a judgment against an administrator. 2 Tidd. Pr., p. 1025; Williams on Ex'rs', vol. 3, p. 2097; 2 Gif. Chy., 226-9; 1 Dall., 481-4; 1 Yeates, 238; 4 Allen, 421; 4 Cowen (N. Y.), 445; 38 N. H., 100; 1 Brevard, 234; 1 B. Mon., 54; 5 Id., 297; 14 Me., 320: 6 Sm. & M. (Miss.), 440, etc., etc.

As to the distinction between void and voidable sales, see 14 W. P. S. Bush, 498; 9 Ark., 139; 2 Ark., 218; 22 Id., 19; 21 Id., 22; 24 Id., 399.

COCKRILL, C. J.

The appellee, who was plaintiff in this action of ejectment, recovered judgment relying solely upon a sheriff's execution deed. The appellant, who was the defendant in possession, defended upon the theory that the deed was void and conferred no title upon the plaintiff, and relied also upon title by

adverse possession for the statutory period, but the latter feature of the defence passes out of the case for want of a bill of exceptions. The court sustained a demurrer to the paragraph of the answer setting forth the facts which it was claimed avoided the sheriff's deed. The complaint contained a detailed history of the execution title, and if it stated no cause of action, the demurrer to the answer should have been allowed to reach that defect, and thus ended the controversy *in limine*, unless the plaintiff could otherwise show a good title. In sustaining the demurrer to the answer, the court, in effect, ruled that the title to the land vested in the plaintiff by virtue of the sheriff's deed, and that the complaint therefore, stated a cause of action.

The facts as alleged in reference to the plaintiff's title are as follows: John Gibbons, who was owner in fee of the land in controversy, died leaving an unpaid debt due to one McLaren and another. These creditors sued the administrator of Gibbons' estate and recovered judgment against him for the amount due them by his intestate. The judgment was recovered in the circuit court in 1883. It was never presented to the probate court for classification, and the administrator was discharged by that court after making his final settlement, without having paid anything upon the judgment. After the discharge of the administrator, execution issued upon the judgment against him in his fiduciary capacity, and was levied upon the land in suit, which according to the allegations of the complaint, was still the property of the estate. It was duly sold by the sheriff and was purchased by the plaintiffs in execution. The certificate of purchase was assigned to the plaintiff in this suit, and after the period allowed for redemption had expired, a deed was executed to him by the sheriff. It does not clearly appear how or from

whom the defendant derived his claim of title, but he was in peaceable possession of the lands holding under color of title when the suit was brought. He contends that the sale was absolutely void and that the deed conferred no title upon the plaintiff. The contention of the latter is that the execution was, at most, irregular only; and he relies upon the case of *Adamson v. Cummins*, as administrator, 10 Ark., 541, to sustain his position. In that case it was determined that the sale of personal property under an execution issued upon a judgment recovered in the circuit court, against an administrator for a debt due by his intestate, was irregular but not void, and that a sale under it conferred title upon an innocent purchaser, notwithstanding the estate was in course of administration at the time of the levy and sale. And the case of *Hornor v. Hanks*, 22 Ark., 583, where lands of an estate were sold under execution against the administrator, seems to recognize the same principle.

1. EXECUTION: On judgment against administrator.

If the doctrine of these cases still prevails, an execution *de bonis testatoris* is at most irregular and is not void. If we treat the defendant as a stranger to the execution, and not as claiming title through a party who is bound by the judgment, he will not be heard to raise objections that go to irregularities in process against others which do not render it void. Freeman on Ex., p. 75; *Sannoner v. Jacobson*, 47 Ark., 31. But in the cases relied upon the execution issued against subsisting administrators, who were capable of protecting the estate, while in this case there was no administrator or other party defendant in existence against whom the writ could run. The administrator, who was the sole defendant in the judgment, had been removed before the execution issued. If execution could legally have issued upon the judgment at all, it would have been only after a new admin-

istrator, or the party in interest in the property to be subjected to sale, had had his day in court on *scire facias* to revive the judgment, Mansf. Dig., secs. 3932, 3934; *State Bank v. Etter*, 15 Ark., 270–1. The discharge of the administrator by the probate court left the estate without a representative; and as far as the execution of its judgment, by ordinary process, was concerned, the circuit court stood in no better attitude than if the judgment defendant had been removed by death before levy. But in such a case there is no power to issue execution until the judgment has been revived; and a sale had under a writ issued without revivor carries no title and the purchaser takes nothing by the sheriff's deed. *Cunningham v. Burke*, 45 Ark., 267; Mansf. Dig. sec. 2983.

2. SAME: Repeal of statute.

But there is another and farther-reaching cause for refusing to maintain the plaintiff's title. When the case of *Adamson v. Cummings*, *supra*, was determined, the statute recognized the right to issue an execution against an "heir, devisee, executor or administrator," to be levied of the goods and chattels or lands which were of the ancestor, testator or intestate at the time of his death (Rev. St., ch. 60, sec. 8), and the judgment in that case rests upon the statute, although the common law authority to issue an execution *de bonis testatoris*, is recognized. But this provision of the statute was omitted from the revisions of 1874 and 1884. Whatever may have induced the learned digesters to make the omission, it is certain that the provision is inconsistent with the exclusive administration of the estate of deceased persons which has been conferred upon the probate courts.

Until the adoption of the constitution of 1874, jurisdiction over the estates of deceased persons was subject to legislative regulation, but that instrument unalterably fixed the ex-

clusive jurisdiction in such matters in separate probate courts. See *Hilliard v. Hilliard*, 50 Ark., 34, and cases cited. The jurisdiction which courts of equity formerly exercised concurrently with ecclesiastical courts, is taken from these tribunals by virtue of that exclusive grant to the probate courts. *Brice v. Taylor, ante; Turner v. Rogers*, 49 Ark., 51. The jurisdiction of courts of law to maintain an action against an executor or administrator is is not disturbed (*Turner v. Rogers, supra*), but the judgment recovered only establishes the existence of a valid claim against the estate, which must be executed by the probate court in the course of administration. Judgments against counties and municipal corporations are of the same nature or effect. Satisfaction must be sought in the manner provided by law. The grant of exclusive jurisdiction to the probate courts places the assets of a decedent beyond the reach of process from another tribunal. Another court cannot intervene even if the probate court has not assumed active jurisdiction of the estate of the deceased person by the appointment of an administrator (*Flash, Lewis & Co. v. Gresham*, 36 Ark., 529), and if the administraror is discharged before the trust is executed, it is within the power of the creditor to reinvoke the aid of that tribunal. And if he has obtained judgment at law against his debtor in his lifetime, there can be no revivor, as formerly, against the heirs; for as was said by C. J. English, in delivering the judgment of the court in *Powell v. Macon*, 40 Ark., 541, no execution can issue against them or the lands belonging to their ancestor, but the creditor must, under our administrative system, resort to the probate court for an order for the sale of the lands.

Execution of judgment against administrator.

There was no authority to issue execution upon the judgment, the sheriff's deed is void, and the judgment will be re-

versed and the cause remanded with instructions to sustain the demurrer to the complaint.

It is so ordered.

HEER DRY GOODS CO. V. SHAFFER.

1. SET-OFF: *Plaintiff must reply to without notice.*

It is not necessary to summon or warn a plaintiff to answer a set-off pleaded by the defendant. He must reply thereto without notice.

2. SAME: *In effect a cross-action.*

A set-off is in effect a cross-action brought by the defendant against the plaintiff, and an account on which it is based if not denied under oath by the plaintiff may be proved by the affidavit of the defendant, filed under sec. 2915 Mansf. Dig., which provides: "In suits upon accounts, the affidavit of the plaintiff, duly taken and certified according to law, that such account is just and correct, shall be sufficient to establish the same, unless the defendant shall, under oath, deny the correctness of the account, either in whole or in part, in which case the plaintiff shall be held to prove such part of his account as is thus denied by other evidence."

APPEAL from *Boone* Circuit Court.

R. H. POWELL, Judge.

Crump & Watkins, for appellant.

1. It was error to render judgment on the counter-claim on the affidavit of defendant.

Sec. 2915 Mansf. Dig., is derogatory of the common law and ought not to be extended further than its plain language. Defendant should have been required to prove his claim.

2. No service was had on plaintiff, or appearance entered.

W. F. Pace, for appellee.

1. The counter-claim was proven as required by Mansf. Dig., sec. 1529.

2. No summons or service was necessary. Sec. 5166. No reply was filed, sec. 5047, and no time asked. Sec. 5051, Ib.

BATTLE, J.

Appellant brought an action against appellee on a promissory note. Appellee denied that he was indebted to appellant and pleaded a set-off, which was an account showing a balance due appellee from appellant in the sum of $464.24, with an affidavit of appellee annexed to the effect that the account was just and correct. Appellant filed no reply, and failed to deny the correctness of the account, either in whole or in part. When the cause was called for trial he dismissed his action, and appellee demanded judgment for the amount of his set-off. The appellant having failed to ask further time in which to plead, the court rendered judgment against him in favor of appellee for the amount of the account, without any evidence to establish the same, except the affidavit.

Appellant contends that the court erred in rendering judgment against it before it was warned or summoned to answer the set-off, and without evidence of the account being correct, except the affidavit.

1. SET-OFF: Plaintiff must reply to without notice.

1. It is not necessary to summon or warn a plaintiff in an action to answer a set-off pleaded by the defendant. There is no reason why he should be. The set-off is pleaded in the answer to his complaint and he is bound to take notice of it. A summons or warning order could answer no useful purpose. The statute, without requiring notice in any form to be given to him, says he must file his reply to the set-off on or before the calling of the cause for trial. Mansf. Dig., secs. 5033, 5046, 5047; *Pillow v. Sentelle*, 49 Ark., 430.

2. Section 2915 of Mansfield's Digest, provides: "In suits upon accounts, the affidavit of the plaintiff, duly taken and certified according to law, that such account is just and correct, shall be sufficient to establish the same, unless the

defendant shall, under oath, deny the correctness of the account, either in whole or in part, in which case the plaintiff shall be held to prove such part of his account as is thus denied by other evidence."

2. A set-off is in effect a cross-action.

The pleading a set-off is, in effect, a cross-action brought by the defendant against the plaintiff. It is not a defence. "A defence goes to the plaintiff's right of action; it either goes to his cause of action, like the plea in bar, or to his right to recover in the present proceeding, like dilatory pleas; but in either case it is a negation, a denial of the facts, or some material facts, pleaded by the plaintiff, or a denial of his right to recover because of other facts not appearing in making out his case." But a set-off is a cross-claim for money by the defendant "and must be a cause of action arising upon contract or ascertained by the decision of a court." The answer which sets it up must state facts which constitute a cause of action against the plaintiff, "and its sufficiency is governed by the same rules that would apply to the complaint if the defendant had sued the plaintiff." The plaintiff can reply to it, denying each allegation setting up the set-off, and alleging any new matter not inconsistent with the complaint, constituting a defence. If he fails to do so, every material allegation of the answer constituting the set-off, except as to value or amount of damages, is taken as true. If he dismisses his action or fails to appear, the defendant can prosecute his set-off to judgment. So in every respect it is essentially a cross-action, in which the relation of the parties in the original action is reversed and the defendant is plaintiff and *vice versa;* and the account which may constitute the set-off may be proven in the manner prescribed by section 2915 of Mansfield's Digest.

Judgment affirmed.

LAZARUS V. FREIDHEIM.

1. JUDGMENTS: *Of justice's court: How pleaded.*

The plaintiff brought an action to enforce the lien of a judgment rendered by a justice of the peace and a transcript of which had been filed and docketed in the circuit court. The amount recovered by the judgment was $306.15, a sum above the justice's jurisdiction—and there was no showing that any part of it was for interest. But the complaint alleged that the judgment was obtained before the justice "in due course of proceedure," and this allegation was not denied by the defendant's answer. *Held:* That the jurisdiction of the justice was sufficiently shown by the complaint, since it is provided by section 5067 Mansf. Dig., that in pleading the judgment of a court of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but the judgment "may be stated to have been duly given," and if such allegation is not controverted it need not be proved.

2. APPROPRIATION OF PAYMENTS: *To items of running account.*

The ruling in *Kline v. Ragland*, 47 Ark., 111, that where a debtor fails to appropriate payments made by him and his creditor appropriates them to a running account, the law will apply them to the items of the account in the order of their dates, is approved.

3. SAME: *Right to make.*

After a controversy has arisen between a debtor and his creditor, neither of them has the right to make an appropriation of payments.

APPEAL from *Ouachita* Circuit Court in Chancery.

C. W. SMITH, Judge.

B. W. Johnson, for appellants.

1. Diver never made any appropriation of payments but agreed to it as made and all the debts were due at the time made. 28 Ark., 440; 44 Id., 90; 50 Ark., 775.

2. The justice's judgment was void, being for over $300 and the court had no jurisdiction. Sec. 40, Art. 7, Const. 1874.

H. G. Bunn, for appellee.

The question of the proper appropriation of payments is settled by *Hershy v. Bennett*, 41 Am. Rep.; 39 Ark., 248; 37 Am. Dec., 621; 9 Wheat, 720.

HUGHES, J.

The appellee, Aaron Freidheim, filed his complaint in chancery in the Ouachita circuit court on the 15th of April, 1887, against John Lazarus and Joe Levy as trustee, and Shadrach Diver, to subject to sale certain real estate of the latter, to-wit: W½ NE¼; E½ NW¼; NW¼ SE¼ and NE¼ of SW¼ of section 17, township 12 south, range 18 west, in Ouachita county, upon which he claimed a judgment lien. His judgment had been obtained against said Diver in the sum of $306.15 on the 17th of February, 1880, before a justice of the peace of said county; and after execution thereon had been returned *nulla bona*, a transcript of the same was filed in the office of the circuit clerk of Ouachita county on the 25th of February, 1880, and there docketed according to the directions of the statute. After several executions had been issued thereon by said clerk and returned *nulla bona*, the said judgment was duly revived on the 24th of May, 1883, and again on the 11th day of November, 1886, in said Ouachita circuit court.

Diver, it appears, had been trading on account with Jno. Lazarus, who was in the mercantile business, and furnished Diver, who seems to have been a farmer, with goods and supplies upon a credit. On the 17th of February, 1882, Diver executed to Lazarus his promissory note for $700, due 1st of November following, and carrying interest after maturity till paid at the rate of ten per centum per annum, and also on the same day executed his deed of trust to Joe Levy, as trustee to secure the payment of said note, conveying therein the land above described and certain mules, cows, calves and hogs, as also the crop of cotton and corn to be grown in that year by Diver in Ouachita county.

On the 10th of May, 1884, Diver executed his other

promissory note to Jno. Lazarus for $150, due November 1st, 1884, and a deed of trust to secure same to C. H. Terrell, trustee, on a crop of corn and cotton.

On the 6th of February, 1885, Diver executed his promissory note to Lazarus & Levy for $700, due 1st of November, 1885, and to secure the payment thereof, on the same day executed to A. Lazarus, as trustee, his deed of trust upon the mules, cows, calves and hogs included in the deed of trust of Jno. Lazarus in 1882, and also upon the crops of corn and cotton to be raised in that year in Ouachita county by Diver. In 1886 and in 1887 Diver executed his notes and deeds of trust to secure payment of same to Lazarus & Levy, on apparently the same stock substantially, and the crops to be raised by Diver in these years respectively, in said county of Ouachita.

Appellee (plaintiff below) avers that all the property of Diver is covered by these deeds of trust and cannot be reached by ordinary process of execution; that he is informed and believes that said notes and deeds of trust have been paid off and satisfied, except the last one; and prays that defendants answer separately and that John Lazarus file an itemized statement of account between him and Diver since the first of January, 1879; that the deeds and notes be set aside and held for naught and the property thereby conveyed be sold to satisfy his demands, and in the alternative that said deeds of trust, except the last, be foreclosed and the proceeds of the sale of the property be applied, first, to satisfy any debt found to be really due Lazarus, and the residue, if any, to the satisfaction of appellee's (plaintiff's) demand, as far as may be.

Appellants filed their answer and demurrer to the complaint, which demurrer was by the court overruled, where-

upon the appearance of the firm of Lazarus & Levy, composed of John Lazarus and Joe Levy, was entered, and they afterwards filed an itemized statement of their business with Shadrach Diver.

John Lazarus and Shadrach Diver, in their answer, deny that the deeds of trust to Jno. Lazarus made by Diver, were for the purpose of avoiding the payment of debts, and assert that they were given to secure *bona fide* debts of Diver. It appears from the answer and itemized statement of accounts between Diver and John Lazarus, and Lazarus & Levy, filed with the answer, that Diver began to trade with Jno. Lazarus in 1880, and continued to trade with him in 1881, 1882, 1883 and a part of 1884, and that in each of the years 1881, 1882 and 1883, he gave a deed of trust upon his property to secure payment for a balance of old indebtedness for the year previous, and advances to be made. That at the end of each year the balance due by Diver was carried forward and formed the first item on the next year's account. The account for each year is credited with proceeds of sale of cotton. In 1884 Diver opened an account with Lazarus & Levy, and the same course was pursued in giving credits on his account each year by proceeds of sale of cotton, striking balances and carrying it forward to form the first item of next year's account, in 1884, 1885 and 1886. Appellee excepted to the manner of stating said accounts and moved the court to appropriate the payments credited thereon according to law. The court below sustained the exceptions and decreed that the payments made by Diver in 1881 be applied first to balance of account of 1880, next to the balance of account of 1881 and lastly to the balance due at the close of the year 1882, and so on until said credits are exhausted, or said original balances shall be cancelled. At

this stage of the proceedings the solicitor for the answering defendants by leave of the court amended their answer by interlineation, at the end of second paragraph, of the words, "which said settlement was in all things ratified by said Diver;" and at the beginning of paragraph six by inserting the words, "both of these defendants would further state and answer that all of these said settlements and payments thereon were at the time approved of and ratified by Diver," to which the plaintiff at the time excepted and had his exceptions entered of record, which were sustained. The court found the facts, ascertained the balance due on the accounts at the close of each year, the amount of payments on each year's account, and decreed that the deed of trust held by defendant Lazarus against defendant Diver dated in 1881 be cancelled as far as it affected plaintiff, having been fully paid off by the appropriation of payments and that the real property included therein at the time belonging to Diver, to-wit: the SE¼ of NW¼ and NW¼ of SE¼ of section 17, T. 12 S., R. 17 W. was subject to the payment of plaintiff's demand.

That at the beginning of the year 1883 there was a balance of account in favor of defendant Lazarus against defendant Diver of $490.97, which was secured by the deed of trust of 1882, (in which was included the NE¼ of the SW¼ of sec. 17, township 12 south, range 18 west, not included in the prior mortgages,) and that at the end of 1883 defendant Diver paid on the account of that year $282.45, which is appropriated first, to said balance of $490.97, leaving a balance of $218.52, which is a prior lien upon said last named forty acre tract of land, and the personal property in the deed of trust of 1882.

That the remaining property included in the deeds of trust

held by the defendants Lazarus, and Lazarus & Levy, except the one given in 1887, is held to secure their debts first, and the residue is subject to the plaintiff's judgment herein," which was found by the court to amount, at the date of the rendition of the decree, including interest, to $440.60, besides cost of reviving the same.

That if the proceeds of sale of said personal property are not sufficient to settle said balance, the proceeds of sale of said forty acre tract of land should be applied to the remainder thereof, and if the personal property be sufficient, or should there remain any of the proceeds of the sale of said forty acre tract, then the whole or such part of said proceeds of said tract of land shall be applied to the balance remaining due upon plaintiff's judgment.

The court then made orders for sale of the property. To all which rulings, findings, judgments and decrees, defendants John Lazarus, Joe Levy and Lazarus & Levy, at the time excepted and prayed an appeal to this court, which was granted. Diver did not appeal. The court made no decree as to the W½ of NE¼ or the NE¼ of NW¼ of section 17, township 12 south, range 18 west, the appellants disclaiming ownership or claim upon the same, which the court below doubtless found correct. The court held that defendant Lazarus' deed of trust of the 17th of March, 1882, was a prior lien upon the NE¼ of the SW¼ of section 17, township 12 south, range 18 west, doubtless because it was given in part to secure the purchase money of same, advanced by Lazarus, though as to the first two of these three tracts the decree is silent.

1. JUDGMENT: Of justice's court, how pleaded.

Counsel for appellants raises the question of jurisdiction of the justice of the peace, whose judgment in favor of appellees appears to have been for $306.15, an amount over the

jurisdiction of the justice of the peace. There is no proof or showing that any part of the sum was for interest. It is true that it has been repeatedly held in this court that "a justice's court possesses only a special, limited and inferior jurisdiction. Its proceedings must consequently show such facts as constitute a case within its jurisdiction or the law regards the whole as *coram non judice* and void." 5 Ark., 27; Ib., 358; 6 Id., 41, 182, 371; 9 Id., 480; 10 Id., 316; 16 Id., 104. But it is alleged in appellee's complaint that his judgment was obtained before the justice "in due course of proceedure," and this is not denied in the answer.

Section 5067 of Mansfield's Digest provides that, "In pleading a judgment or other determination of the court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring such jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation is made in a complaint and is not controverted in the answer, or made in the answer in relation to a counter-claim or set-off, and is not controverted in the reply, it need not be proved on the trial."

2. APPROPRIATION OF PAYMENTS: To items of running account.

As to the appropriation of payments, there is no proof that the right of appropriation was exercised by either party at the time the payments were made, and the court below found that they were made generally, and appropriated them according to priority, the first payment to the first items on the accounts between the parties, which was the rule approved in *Kline v. Ragland*, 47 Ark., 111, where it is held that, "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." See, also, *Price v. Dowdy*, 34 Ark., 285. The latter case says "a different agreement may

be shown by evidence." The appellants' counsel, in amendments made to the answer, after motion made by appellee for an appropriation of payments, in the court below states, "that all of these said settlements and payments thereon were at the time approved of and ratified by Diver." To this amendment plaintiff excepted at the time, as the record shows. "After controversy has arisen neither debtor nor creditor has a right to make an appropriation of payments." *U. S. v. Kirkpatrick*, 9 Wheat, 720, 737; 12 Vt., 246; Ib., 249; 10 Conn., 183; 31 Vt., 706; 31 Me., 500.

Right to appropriate payments.

The judgment of the Ouachita circuit court in chancery is in all things affirmed.

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VAUGHT V. GREEN.

Opinion on motion to advance.

PRACTICE IN SUPREME COURT: *Motion to advance cause.*

To justify a motion to advance a cause upon the docket on the ground that the appeal is prosecuted for delay merely, the absence of error should be apparent upon a short and cursory examination of the record. Where the court cannot determine whether there is probable ground for the appeal without a minute investigation of the record requiring such time that it would operate to delay other causes having precedence on the docket, the motion will be denied.

COCKRILL, C. J.

To justify a motion to advance a cause upon the docket on the ground that the appeal is prosecuted for delay only, the absence of error should be apparent upon a short and cursory investigation of the record. An illustration is found in the not infrequent case of an appeal from a judgment at law where no exception was saved at the trial and the jury has settled the facts on conflicting testimony. Other instances both at law and in equity might be given, but whatever

they may be, it was never intended that the rule should have so wide a scope as to force the court into the minute investigation of any cause an appellee may procure to be certified as a delay case. All difficulties are easy when known, and so counsel who have become familiar with the details of a tedious case, seeing the right of the judgment clearly, sometimes expect the courts to reach their conclusion as by intuition. But judges can arrive at the result only as counsel have done—that is, by the expenditure of time and labor. But the statute which establishes the practice of hastening the determination of appeals prosecuted merely for delay, does not intend to require that of the court at the expense of parties whose causes have precedence upon the docket. A delay case must not delay litigants in other cases. If it were permitted to do so, the statute which was designed to prevent the law's delay would aggravate rather than remedy the evil, because it would afford relief to one party at the expense of many others who are equally meritorious.

The appeal in this cause has been recently prosecuted. The appellee has caused it to be certified as a delay case and seeks to have it advanced for affirmance at an early day. He has filed a brief statement of the case as a compliance with Rule II., from which it appears that it was a contested cause in equity which turned upon a question of fact alone. But in order to ascertain whether there is probable cause to justify the appeal, it will be necessary to examine the pleadings, and to digest and weigh the testimony *pro* and *con* in a somewhat voluminous transcript. For the reason given above we decline to investigate the controversy until the cause is reached in its turn on the docket.

Motion denied.

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GOODBAR V. LINDSLEY.

1. ATTACHMENTS: *Damages recoverable on discharge of.*

On the discharge of an attachment only such damages as are strictly compensatory, can be assessed against the plaintiff in that proceeding. The defendant can recover nothing on the ground that the attachment was maliciously sued out.

2. SAME: *Same: Precipitating process of other creditors.*

A plaintiff in attachment is not liable for an injury resulting from the sale of the defendant's property under executions sued out by other creditors and levied upon it simultaneously with the order of attachment, although the issue of the executions may have been precipitated by the example of the plaintiff.

3. SAME: *Same: Levy upon books of account.*

A debtor's credits can only be levied upon by garnishment or judicial proceedings; and the seizure of his books of accounts under an order of attachment—being a levy only upon the materials of which the books are composed—will not render the plaintiff in attachment liable for the loss of debts through a supposed inability to collect them while the books were held by the sheriff.

4. SAME: *Same: Expense of attending trial.*

The personal expenses of a defendant in attachment, incurred, not in resisting the attachment, but in prosecuting his suit for the injury it has caused, cannot be included in the amount of damages to be assessed on the bond of the plaintiff.

APPEAL from *Mississippi* Circuit Court.

J. E. RIDDICK, Judge.

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

Appellants were liable only for nominal damages. The goods were not sold under their attachment, but under the executions. The judgment creditors had a right to issue executions when they saw proper. No man can be held liable for inducing another to do a lawful act. 34 Ark., 710; 37 Id., 620. But even if appellants were liable, there must be a separate action. 34 Ark., 710.

O. P. Lyles, also for appellants.

No damages actually resulted from the levy of the attach-

ment. The property was already levied on under executions and was sold to satisfy same. 37 Ark., 605. An attachment is not a lien until actually levied. Mansf. Dig., sec. 325; 29 Ark., 85. So the lien of the attachment was subsequent to the lien of the executions, and nothing further being done under the attachment, no valid lien was created and no damages accrued.

Damages claimed for precipitating the levy and sale under execution, are too remote. The verdict was not sustained by any competent evidence and is excessive.

E. F. Adams, for appellee.

The appellants admitted that the attachment was wrongfully sued out, and the law presumes Lindsley was damaged thereby. 35 Ark., 492. How much, was properly left to the jury. The proof shows that the damages were caused directly by the wrongful attachment.

The evidence is conflicting as to the amount of damages, and this court will not disturb the verdict. 39 Ark., 387; 42 Id., 527; 44 Id., 258.

H. M. McVeigh, for appellee.

The remittitur has eliminated the question of excessive damages. The only question then is, is the verdict supported by the evidence? This court will not reverse upon the mere weight of evidence. There must be a total want of evidence. 21 Ark., 306; 19 Id., 559; Ib., 117, etc., etc.; 23 Ark., 215, review the evidence in detail, and contend that the damages resulted from the wrongful suing out of the attachment, and consisted of losses as follows: Loss on sale of goods; salary lost; expenses attending court; loss on stock; loss of book accounts; loss on cotton in the field.

COCKRILL, C. J.

Goodbar & Co. sued out an attachment against Lindsley in an action at law, but failing to sustain their cause in that behalf, damages were assessed in the same proceeding as authorized by the statute, against them and their sureties in the attachment bond, for the wrongful issue of the attachment. The question presented by the appeal is, does the evidence sustain the assessment of damages?

The attachment went into the hands of the sheriff, simultaneously with two executions which had been issued upon judgments recovered by other creditors against the attachment defendant. The three writs were levied together upon a stock of merchandise and some live stock, the defendant's books of account and some ungathered cotton in the field. The merchandise and live stock were sold under the execution, but failed to bring enough to pay them off. The defendant in the attachment testified in a general way that they were sold under the attachment, but that was merely a matter of opinion on his part, and was obviously an incorrect statement, for the sheriff who held the order of attachment was not authorized by it to do more than perfect a levy upon the property, and the record shows that the order was returned and filed in the clerk's office by the sheriff before the sale; and it fails to show any further action under it by the officer, who specifically testified that the sale was made under the executions only.

1. ATTACHMENTS: Damages recoverable on discharge of.

1. It is argued that the attachment was maliciously sued out and that the defendant may recover on that score. But the recovery in proceedings of this nature is confined strictly to compensatory damages, and cannot go beyond. *Holliday v. Cohen*, 34 Ark., 710, *et seq; Patton v. Garrett*, 37 Ark., 612-13; *Boatright v. Stewart*, Ib., 619-21.

2. But it is urged that the proof shows that the issue of the attachment precipitated the levy of the executions; that those writs would not have issued at all if the plaintiff's wrongful process had not been sued out; that it was the cause of the injury, and that the verdict is therefore justified. But the recovery against the Goodbars and their sureties must be based on the injury that was done by their writ, without regard to what another creditor may have been induced by their example to do. If another person acting without privity or concert with them has been guilty of an injurious act, he, and not they, is responsible therefor; for the two are independent actors. The rule that consecutive wrongs done by independent agents cannot be joined together to increase the responsibility of one of the wrong doers, has been applied with apparent correctness, in a case where the issuing of one wrongful attachment was the occasion of the issuing of others. *Marqueze v. Southheimer*, 59 Miss., 430. But the executions in this case were not wrongfully issued. It was lawful for Lindsley's creditors to issue process upon their judgments, and to cause his property to be seized and sold for their satisfaction, and the levies and sales did not become unlawful because they were precipitated by the bad example of the appellants. It is not an actionable wrong to induce a man to assert his legal rights. Bishop's Non-Contract Law, sec. 489.

2. Precipitating process of other creditors.

The only injury proved to the merchandise and live stock was the loss by reason of the sale which we have seen was made by virtue of the executions alone; but there is no liability upon the bond of the attaching creditors for that injury. As there was no proof of actual injury to the live stock or merchandise by the wrongful attachment, only nominal damages could be assessed on that account.

3. Levy upon books of account.

3. The defendant laid his damages at $500 because of the levy upon his books of account. These books showed who his debtors were, and the levy upon them seems to have been regarded by the parties as a levy upon the debts, which, it is said, were lost by reason of the levy. But a levy upon a debtor's credits can only be reached by garnishment or judicial proceedings. A levy upon his books is a levy only upon the materials which compose them, or the property represented by the books themselves—nothing more—(2d Freeman on Executions, sec. 262,) and does not prevent the person to whom the debts are due from pursuing any of his remedies for collection against his debtor. It was only by the supposed suspension or deprivation of the right to collect the debts, that any damages were claimed on that behalf. It was said that the debts were secured by mortgages on cotton by insolvent debtors, who shipped the cotton while the sheriff held the books. But that fact showed no legal injury traceable to the attachment.

4. Expense of attending trial.

4. The defendant's personal expenses incurred in attending the trial of the case were laid at $75. It was not shown that any part of that amount was expended in resisting the wrongful attachment. But it is on account of the attachment alone that a recovery can be had on the attachment bond. Expenses incurred by a defendant in attachment in prosecuting his own suit for damages must be borne by himself the same as expenses are borne by others who become actors in the courts to right their wrongs.

5. The items enumerated embrace the only elements of damages claimed upon the trial, except an inconsiderable loss to cotton in the field. No argument has been made in reference to it by either side and we leave it as connsel has done, without comment.

The verdict was for $1485, which the court reduced to $750. But that amount is grossly in excess of the damages shown by the proof to be legally assessable in the proceeding, and there must be a new trial.

Reverse the judgment and remand the cause.

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WINNINGHAM V. HOLLOWAY.

1. JUDGMENTS: *Recovered by administrator: Assignment.*

Mansf. Dig., sec. 76, provides that the sale of a decedent's choses in action shall be pursuant to an order of court and at public sale. The assignment by an administrator of a judgment belonging to the estate of his intestate, made privately and without an order of court, is therefore void.

2. SAME: *Same.*

A judgment recovered by an administrator belongs to the distributees of his intestate, subject to the payment of debts and expenses of administration; and where they assign it during the administration their assignee acquires such interest therein as they will be entitled to when the estate is fully settled and the administrator discharged.

3. SAME: *Same: Probating.*

After the death of H. a judgment which had been obtained against him by the administrator of E. was assigned by the latter's distributees to W. After the estate of E. had been fully settled and his administrator discharged, W. presented the judgment for allowance as a claim in his favor, against the estate of H. It was not authenticated by the oath of the administrator or distributees. Sec. 106, Mansf. Dig., is as follows: "If the debt be assigned, after the debtor's death, affidavit shall be made by the person who held the debt at the death of the debtor, as well as the assignee." *Held:* That W. was entitled to probate the judgment and it was not necessary that it should be authenticated by the affidavit of E.'s dis-distributees who, as they were not authorized to collect the judgment, are are not, therefore, such assignors as are referred to by the statute. *Held*, further, that the administrator was not required to make the affidavit because he was not the assignor of the claimant, and that in such case the statute provides for no authentication by an assignor.

APPEAL from *Ashley* Circuit Court.

JNO. M. BRADLEY, Judge.

M. L. Hawkins and *G. W. Norman*, for appellant.

1. There had been a *final settlement* of the estate; all debts had been paid; there was nothing more for an administrator to do, and the judgment passed by law to the heirs at law. They had the legal title to it and could assign to whom they pleased. 6 Wallace (U. S.), 458, 461.

2. The affidavit of Winningham was all that could be required in this case. The affidavit required by sec. 106, Mansf. Dig., not necessary under the circumstances. Mansf. Dig., sec. 102; 13 Ark., 276.

3. That the legal title was in the heirs, see 27 Ark., 445, 637; 5 Id., 608; 30 Id., 775.

4. That sec. 106, Mansf. Dig., is not a prerequisite, see 13 Ark., 276; 14 Id., 246; 22 Id., 535; 25 Id., 219; 9 Id., 440; 15 Id., 39; 13 Id., 262.

Mark Valentine, for appellee.

1. The heirs had no right to assign to Winningham the judgment in favor of Johnson as administrator. The assignment was made before the administrator's discharge. The heirs could not collect the judgment; they could not sue to recover it. 31 Ark., 723.

2. The claim was not properly authenticated. Mansf. Dig., sec. 106. It should have been sworn to by the Ethridge heirs.

BATTLE, J.

In 1865 George W. Ethridge died intestate, leaving an estate consisting partly of money. One Johnson administered; and he was ordered by the probate court to loan the money. J. L. Holloway borrowed about $600.00 of it, and he exe-

cuted his note therefor. The note not having been paid at maturity, the administrator brought suit on it against Holloway and recovered judgment, on which an execution was issued, and a small part of it was collected. In April of 1877, Johnson as administrator of Ethridge, filed a settlement in which he claimed a credit for the balance due on the judgment. The credit was allowed and the settlement was confirmed. Sometime after this, on the 10th of August, 1878, the distributees of Ethridge transferred the judgment to James H. Winningham; and still later on (when, it does not appear), the administrator, privately and without the direction of a court, assigned it to A. P. Holloway. In the meantime J. L. Holloway, the judgment debtor, died, and John D. Holloway became the administrator of his estate. When he died it is not shown, but it is conceded that he died before the transfer was made to Winningham. In April, 1881, Johnson as administrator of Ethridge, filed his final account current in the probate court and represented therein that he had paid the balance which remained in his hands at the filing of his last settlement, to the distributees of his intestate, and asked a credit and filed a receipt of the distributees therefor. At the next term thereafter the probate court confirmed his settlement and discharged him from further liability as such administrator. Each of the assignees of the judgment against J. L. Holloway, claiming to be the rightful owner of the same, presented it for allowance against the estate of J. L. Holloway. It was not authenticated, as presented by either one of the claimants, by the oaths of the administrator or distributees of Ethridge. It was allowed in the probate court in favor of Winningham, and the administrator of Holloway and A. P. Holloway appealed to the circuit court. In the circuit court the administrator of Hollo-

way moved to dismiss the claim as presented by Winningham (1), because he was not the owner, and (2) because it was not properly authenticated by his assignors. The court heard the evidence introduced to support the claim of each claimant and the motion to dismiss, sustained the motion and dismissed the claim as presented by each of the parties, and Winningham appealed.

The questions presented by counsel for our consideration and decision are: (1) Is the executor of James H. Winningham the owner of the claim in controversy; and (2) if so, was it legally authenticated?

1. JUDGMENTS: Recovered by administrator: Assignment.

The statute of this State prohibits the sale of personal estate of deceased persons "unless the same be ordered by last will and testament, or by direction of the court; and when so ordered or directed," provides that "the executor or administrator shall sell the same at public sale;" and expressly provides that the sale of choses in action shall be pursuant to an order of court and at public auction. The transfer to Holloway by the administrator was, therefore, in violation of the statutes, and conveyed or transferred no interest in the judgment. Mansf. Dig., secs. 73, 76, 77, 78.

2. SAME.

The administrator of Ethridge held the property of his intestate in trust for the benefit of those concerned,—first for the benefit of the creditors, and then for the distributees and heirs. Whenever the debts of his intestate and the expenses of administering the estate were fully paid, the distributees and the heirs became entitled to the balance of assets remaining on hand. In *Crane v. Crane*, decided at the present term, this court held that a judgment obtained by an administrator, after an estate has been fully settled and the administrator discharged, becomes the property of the distributees of the intestate, and can be revived in their names. In the

absence of an assignment, the judgment in this case would have become the property of the distributees of Ethridge when the estate was fully settled and his administrator discharged. But the effect of the assignment they undertook to make to Winningham was to transfer all their interest in the judgment, which was such interest as they were entitled to when the estate was fully settled. It follows, then, that the executor of Winnigham was entitled to probate the judgment in controversy against the estate of J. L. Holloway.

3. Probating Judgment.

But it is contended by appellee that the judgment was not so authenticated as to entitle it to allowance against the estate of Holloway, because it was not sworn to by the assignors. It is true that the statute of this State provides that no debt against the estate of deceased persons shall be paid or allowed before the same shall be sworn to in the manner prescribed by law; and that "if the debt be assigned after the debtor's death, the affidavit shall be made by the person *who held the debt at the death of the debtor*, as well as the assignee." But it is clear that the statutes refer to such assignors as were authorized to collect the debt; for the affidavit required is to the effect "that nothing has been paid or delivered towards the satisfaction of the demand, except what is credited thereon, and that the sum demanded (naming it) is justly due." The administrator of Ethridge is not required to make the affidavit to the claim in controversy, because he was not the assignor; and the distributees are the assignors but were not required to make it because they were not authorized to collect and are not presumed to know what was paid.

The statute fails to make any provision for an authentication by an assignor in a case of this kind. So far as the administrator is concerned, he is required to account for all assets which go into his hand under and by the oath he took,

when he assumed the burthen of administration, and an additional oath would not be likely to elicit the truth as to the collections made by him which the first failed to bring to light.

Reversed and remanded for new trial.

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KNIGHT V. GLASSCOCK.

1. FRAUD: *Allegations and proof.*

It is not sufficient to charge in general terms that a conveyance of land to a wife, was made to defraud her husband's creditors. The facts constituting the alleged fraud should be stated. And the charge will not be sustained by proof which merely shows that the husband paid for the land and that he owed at the time a small debt, without establishing other indebtedness.

2. CONVEYANCES: *Uncertain description of land: Reformation of deed.*

Where parties fully execute as they intend and believe, an agreement for the sale of land—on the one part by making and delivering a deed and on the other part, by paying the purchase price, accepting the deed and entering into possession under it, an indefinite and uncertain description of the land, inserted in the deed through a mistake as to the ordinary meaning of the terms used, will not render the contract void. But in such case as against the vendor and subsequent purchasers with notice, an estate in the land intended to be conveyed, will pass to the vendee when the deed is executed, with the right to demand that it be reformed so as to describe the land correctly.

3. SAME: *In fraud of creditors: Husband and wife.*

Although a deed executed by a husband to his wife in fraud of his creditors, may be avoided for their benefit in proper proceedings taken by them for that purpose, it cannot be avoided by the husband; and his subsequent conveyance to the creditors will not divest the wife of her title.

4. PARTIES: *In suit to reform deed.*

In a suit to reform a conveyance of land, the grantor is a necessary party defendant.

APPEAL from *Green* Circuit Court.

T. P. McGOVERN, Special Judge.

L. L. Mack, for appellant.

1. If the deed was void for uncertainty, still it is a memorandum in writing reciting a sale of land for value paid. This with possession is equivalent to a title bond, and imposed upon Hunt the obligation to specifically perform by describing the lands properly.

2. The return of the deed to Hunt did not reconvey the land, nor release him from reforming. 34 Ark., 503.

3. Glasscock purchased with notice and takes subject to appellant's equities. Story Eq. Jur., secs. 785, 788–9, 790.

4. There is no proof of Ritter's insolvency. Creditors only can attack a deed in fraud of their rights.

E. F. Brown, for appellee.

1. Recitals in a deed of payment of purchase money is no evidence of the fact of its payment as against third persons. 70 Am. Dec., 137; 45 Ark., 81.

2. It is patent upon the face of the deed that it is void. 51 Texas, 615; 41 Ark., 497.

3. In a contest between a wife and a husband's creditors, a natural presumption arises that the husband furnished the means of payment. 46 Ark., 542.

4. Hunt not being a party, the deed cannot be reformed.

HEMINGWAY, J.

Glasscock, the appellee herein, brought ejectment in the Green circuit court against Aaron Knight, one of the appellants, for the possession of two acres of land. He claimed title under a deed from R. W. Hunt, dated Dec. 10th, 1883.

Mary Knight, the other appellant, was made a party to

the cause, she claiming to have acquired the land by prior deed from R. W. Hunt.

She and the defendant, who is her husband, filed a joint answer and counter-claim, in which are the following allegations: That Mary Knight purchased the land in controversy from R. W. Hunt, and took deed dated Feb. 26th, 1883; that by accident or mistake the land was not correctly described in the deed; that she took possession under the deed and had held and occupied the land ever since; that Glasscock purchased with knowledge of her purchase and possession; that she paid Hunt for the land $100, which Glasscock knew also; that he purchased the land with a fraudulent intent to deprive her of it, and his deed was void. They ask that the answer be treated as a counter-claim against plaintiff; that plaintiff's deed be cancelled, and that the deed to Mary E., be so reformed as to describe the lands according to the intent of the parties in making it, and perfect title be vested in her. They exhibit the deed to Mary E., which is the form of warranty deed in ordinary use in this State; in it the lands are described as situated in Green county and as follows: "One lot or parcel of land commencing at south-east corner of said lot at stake, north 8 (4) chains 86 links to eight mile creek, thence at south-east corner of said lot running west 68 north (4) chains and 50 links to a stake on bank of creek, thence north-east direction with creek to east line, said lot to contain two acres."

To this counter-claim the plaintiff replied, denying that Mary E. purchased the lands described in the complaint, or that she is the owner thereof, or has an interest therein by purchase from Hunt, or that she paid him anything of value in purchase thereof. He alleges that if there was a pretended purchase by her, it was fraudulently obtained for the pur-

pose of cheating and defrauding the creditors of Chris. Ritter, who was at that time the husband of Mary E., and that no valuable consideration moved from her in said purchase. He denies that Mary E. took possession of the land under a purchase, or that the land was improved or capable of occupancy. He alleges that he is a *bona fide* purchaser for a valuable consideration, and asks that the deed to Mary E. be cancelled.

The cause was never formally transferred to equity, but further proceedings were had as in equity.

The depositions of the several parties, of Hunt, Ritter and other witnesses, were taken and read in evidence at the hearing and without any objection.

The court made special findings of facts, as follows: that the land was purchased and the money paid by Chris. Ritter; that at the request of Chris. Ritter and in order to prevent his creditors from seizing the land, Hunt attempted to convey it to Mary E. who was then the wife of Chris.; that the deed was inoperative because the description of the land was uncertain; that Chris. Ritter afterwards, for value, sold and conveyed the land to Glasscock.

Upon this finding, judgment was rendered for plaintiff, and the counter-claim dismissed; from which judgment the defendants prosecute this appeal.

Mary E. was the wife of Chris. Ritter when the deed was made in February, 1883; they separated some time about ten months afterwards, and she then married Aaron Knight.

It is not denied that the parties intended to describe in the deed to Mary E. the lands described in the deed to Glasscock.

Although the plaintiff charges in his reply that the deed was made to Mary E. with intent to defraud the creditors of 1. FRAUD: Allegations and proof.

Chris. Ritter, the charge is made only in general terms and no facts are alleged as constituting the fraud. It is not alleged that Chris Ritter was then involved financially, or in fact that he was in debt at all; nor that he owned no other property, nor even that the consideration for this purchase came from him.

The proof does show that he paid for the land, and that he owed Glasscock a small debt; but establishes no other indebtedness and fails to make out insolvency. This does not make out a case of fraud.

We are satisfied from the proof that the parties intended to describe in the deed from Hunt to Mary E. the land in controversy; that they considered the terms employed effective for that purpose; that from the time of the execution of this deed until the deed was made to Glasscock, Mary E. was in the actual occupancy of the land; and that Glasscock took his deed with a full knowledge and understanding of these facts. Such being the facts, it must follow, that if the deed to Mary E. possessed any validity, Hunt had parted with his title and could convey nothing by his deed to Glasscock.

2. CONVEYANCES: Uncertain description: Reformation of deed.

But it is contended by the appellee that the deed to Mary E. was void and wholly inoperative, because the description of the land was indefinite and uncertain.

This position is untenable. The parties had fully executed, as they intended and believed, their agreement to sell on the one part, by making and delivering a deed of conveyance, and to purchase on the other part, by paying the agreed purchase price, accepting the deed and entering into possession under it.

In the case of *Rhodes et al., v. Outcalt et al.*, 48 Mo., 367, a similar contention was made upon a state of facts more

favorable to it. A mortgagee sought to reform the description in a mortgage, against a subsequent purchaser from the mortgagor, who had no knowledge of the mistake in the description of the mortgaged property, but was held to know facts sufficient to put him upon inquiry. Judge Currier, speaking for the court, and quoting Judge Dillon, said: "The debtor for a valuable consideration, agreed to execute a mortgage on lands which he owned. That is, he agreed and undertook, though defectively in the eyes of a court of law, to bind these lands of his, to set them apart, specifically to appropriate them to the plaintiff. Now, in equity, he did thus bind, appropriate and set them apart. Therefore, in equity, which deems as done that which the party has agreed to do, the plaintiff had not only a mortgage, but a mortgage on the right land—on the land intended. In equity, the plaintiff did not, as contended, simply attempt to get a lien, but he actually secured a lien on the parcels designed to be conveyed to him; and not a lien merely, but his rights were such that he is regarded in the decisions of this court, as he would be regarded by the decisions of other courts, in the light of a purchaser. The debtor was bound in conscience to correct the mistake. His obligation to correct it was such an equity as would bind his heirs, voluntary grantees or purchasers with notice." *Welton v. Tizzard*, 15 Iowa, 495; *White v. Wilson*, 6 Blackf., 448; *Stone v. Hale*, 17 Ala., 557; *Burke v. Anderson*, 40 Ga., 535.

Adopting the doctrine of the cases above cited, we think that an estate in the land intended to be conveyed passed to Mary E. when the deed to her was executed, with a right to demand that it be reformed so as to describe the lands correctly.

These views are not in conflict with those expressed by

this court in the case of *Freed v. Brown*, 41 Ark., 495. In that case it was sought to reform a mortgage by correcting the description of the mortgaged property, which was as follows: "A portion of the north-east quarter of section twenty-two in township six, range twenty, containing twenty acres." It was contended that the parties understood and agreed that a particular twenty acre tract out of the one hundred and sixty acres described, should be covered by the mortgage; and that they thought this intention might be established by parol evidence. It was not contended that they believed that the terms employed described or ascertained the particular twenty acres covered by the mortgage; that, they thought, could be supplied whenever it became necessary. It was a clear mistake of the law; here a mistake was made as to the ordinary meaning of terms used, a mistake of fact. That courts of equity will, under proper circumstances, grant relief against the latter and generally refuse it against the former, is a doctrine so well settled that citation to authorities is unnecessary.

It is contended, in the next place, that the deed to Mary E. was made in fraud of the creditors of her then husband. If this be true, they have remedies adequate to the redress of their injuries; but they cannot be furnished in this cause. Such remedies are indicated in former decisions of this court. *Apperson v. Burgett*, 33 Ark., 339.

3. SAME: In fraud of creditors: Husband and wife.

The learned judge of the court below found that the appellee had purchased the land from Chris. Ritter, who treating the deed to his wife as a nullity, directed Hunt to convey to the appellee. We know of no authority to sustain the position that, where a husband conveys to his wife in fraud of his creditors, he may right the wrong by a conveyance to his creditors, and thus divest the wife of her title. We are

directed to no such authority. Although such conveyances are said to be void, it is true in the sense only that they will be avoided for the benefit of creditors who take proper proceedings to that end. The husband cannot avoid them. *McMaster v. Campbell*, 41 Mich., 516; Bump Fr. Conv., page 458.

It is further contended that the appellee is a *bona fide* purchaser for value. The evidence does not sustain this contention, but shows that he was fully advised as to the rights of Mary E., the appellant.

We are of the opinion that the court below erred. The judgment will be reversed, and judgment rendered in this court in favor of the appellant, Mary E. Knight; the deed from Hunt to Glasscock will be canceled, and he divested of all title in the land.

Hunt was not made a party to the suit; we are therefore unable to decree the reformation of the deed by him to Mary E., the appellant. 4. Parties.

KELSO V. ROBERTSON.

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EJECTMENT: *To recover lands sold for taxes: Tender of taxes, etc.*

Sec. 2649, Mansf. Dig., which provides that an action to recover lands held by virtue of a tax title, shall not be maintained unless the plaintiff shall, before any writ issues therein, file in the clerk's office an affidavit setting forth that he has tendered to the person so holding such lands, the taxes, costs, etc., applies only to such sales for taxes as are invalid because of irregularities or omissions on the part of the officers conducting them, and has no application where a sale is absolutely void for want of power to make it. The payment of a tax extinguishes the authority to make a sale for its collection, and where land is sold for taxes which have been paid, an action to recover it may be commenced without filing the affidavit of tender provided for by the statute.

APPEAL from *Columbia* Circuit Court.

CHAS. W. SMITH, Judge.

Smoote, McRae & Arnold, for appellant.

We refer the court to our abstract and brief in this case at large and here again state the points and authorities:

A tax deed for the taxes of any year which have been paid by the owner is fraudulent and void. *Shell v. Martin*, 19 Ark., 139; *Wallace v. Brown*, 22 Ark., 118; *Kinsworthy v. Austin*, 23 Ark., 375; *Davis v. Hare*, 32 Ark., 386; *Hickman v. Kempner*, 35 Ark., 505.

Where the sale is thus fundamentally void no affidavit is required by the statute. For there can be no sale for the non-payment of taxes where there are no taxes due. Mansf. Dig., sec. 2649. This section with reference to the affidavit came up for consideration in *Douglass v. Flynn*, 43 Ark., 398, and the conclusion there reached was that, in such cases the affidavit is unnecessary. And as the conceded facts in this case in its present aspect show that the taxes have been paid for 1882 and that the commissioner's deed was based on the non-payment of taxes for that year there was no necessity for the affidavit in this case, and the demurrer to the motion to dismiss should have been sustained.

H. P. Smead and *H. G. Bunn*, for appellee.

The affidavit required by sec. 2649, Mansf. Dig., was not made and the court properly dismissed the action.

HEMMINGWAY, J.

Kelso, the appellant, brought ejectment against Robertson, the appellee, in the Columbia circuit court, to recover a tract of land. It is alleged in the complaint that Kelso purchased the land, took deed, entered into possession and held it for more than seven years before the possession of defendant

began; that the defendant entered upon the land under a tax deed, it having been forfeited to the State for the non-payment of taxes for the year 1882; that plaintiff had paid the taxes of 1882 before the forfeiture. It is further alleged, that in a proceeding against the land under the over-due tax law, in the Columbia circuit court, it was at the October term 1882, decreed that no taxes were due on said land. The defendant filed a motion to dismiss the complaint for the reason that, "the land sued for by plaintiff was held by the defendant by virtue of a deed from the commissioner of state lands, the same having been forfeited to the State for the non-payment of taxes for the year 1882;" and that the plaintiff had failed to file an affidavit of tender in the office of the circuit clerk before filing his complaint, as prescribed in sec. 2649, Mansf. Dig. The motion to dismiss did not deny the allegation in the complaint, that the plaintiff had paid the taxes for which the land was forfeited, before the forfeiture. We must take it therefore as admitted. The allegations of the motion to dismiss were admitted, and the motion was sustained. The court rendered judgment dismissing the complaint, from which the plaintiff prosecutes this appeal. We do not deem it necessary to consider upon this appeal, the effect of the decree of the Columbia circuit court in the over-due tax proceeding; we have considered the single question, was the plaintiff required to file the affidavit of tender, provided for in the statute referred to, before filing his complaint? In the case of *Wallace v. Brown*, 22 Ark., 118, Mr. Chief Justice English, delivering the opinion of the court, said: "The delinquency of the owner to pay the taxes is the essential fact upon which the power of sale rests." In the case of *Hunt v. Curry*, 37 Ark., 100, he said: "If it had been shown that the proprietor of the lands had paid the

EJECTMENT: To recover land sold for taxes.

taxes, or that they were not subject to taxation, appellee would have had no personal claim upon him, or lien upon the lands for the taxes, penalties and costs paid by him." In the case of *Douglass v. Flynn*, 43 Ark., 398, Judge Eakin said, discussing the statute under consideration, that "it was not intended to repel from the assertion of their just rights, persons who had never been under any obligations to pay the taxes for which the lands were sold, and had committed no default in failing to do so; that it had no application where the State has no power in itself, nor its officers by any warrant of law to collect any taxes on the land, and where the sale is absolutely void on that account, and not for irregularities only." This court has repeatedly held, in actions brought to recover lands sold for taxes, where the sales were invalid because of some irregularities or omission on the part of the officers conducting them, that the affidavit of tender must be made out and filed; but it has never held this to be necessary in an action to recover lands held under a forfeiture for taxes, that had been paid before forfeiture. This question is not directly involved in either of the cases cited, for the facts are different; but their reasoning is all against such a contention. Judge Cooley discussing this line of legislation sanctions it, to the extent that it is carried under the previous decisions of this court; but he says, "the legislature can have no more authority to compel the land owner to pay a lawless exaction to a third party, than it has to compel a like payment to the State directly. The one as much as the other would be robbery. If the land owner performs all his duty to the State, nothing which the tax officer can do without his consent, and in the direction of depriving him of his freehold, can raise against him an equity requiring him to do more." Cooley on Taxation, 553. These views meet our

Tender of taxes, etc.

approval. It may be a hardship upon the purchaser at such a sale to lose the lands and the purchase money also; but the legislature might as well call upon any other citizen as the land owner to relieve him of the hardship. When the appellant paid the taxes he discharged his entire duty in the premises. His liability, the claims of the State and the authority of its officers to sell were extinguished. The State's charge upon the land was satisfied, and the warrant to it's collector annulled. It could confer no greater right than it had. The proceeding thereafter was a nullity. The appellee was not entitled to demand from appellant, "the amount of taxes and cost first paid for said land;" if not, the plaintiff was under no obligation to tender it, and therefore under no obligation to file the affidavit. The judgment will be reversed and the cause remanded with instructions to the circuit court to reinstate the cause, overrule the motion to dismiss and proceed further in conformity to law.

RAINWATER V. HARRIS.

1. ADMINISTRATION: *Payment of debt before grant of letters.*

The plaintiff's intestate at the time of his death was justly indebted to the defendant in the sum of $300, on which interest had accrued. His estate consisted of personal property of the value of $900, to one-third of which the plaintiff was entitled as his widow. Before the grant of administration she paid the defendant out of the assets of the estate the sum of $300, which he accepted in full satisfaction of his claim. She subsequently obtained letters of administration on the estate and brought this action as administratrix to recover the money paid to defendant. The deceased owed no other debt—there were no debts due to him and the plaintiff administered on the estate solely for the purpose of recovering in her representative capacity the sum she had paid to the defendant. *Held:* That the plaintiff is not entitled to recover, as the payment she made to the defendant discharged in the interest of the estate, a debt which she

would have been bound to pay in the regular course of administration, and the settlement thus made should not be needlessly disturbed.

2. EVIDENCE: *As to transactions with plaintiff's intestate.*

In an action brought by an administratrix to recover a sum of money which she paid to the defendant before administration in discharge of his claim against the estate of her intestate, he offered to prove by his own testimony that he loaned the deceased the money in controversy to pay upon certain land; that he took no note for the amount, but the deceased at the time of receiving it made an entry in his own private memoradum book; and that no part of the debt had been paid except as paid by the plaintiff. *Held:* That such testimony, relating to transactions between the defendant and the deceased, was properly excluded. Schedule to Const., sec. 2.

APPEAL from *Washington* Circuit Court.

J. M. PITTMAN, Judge.

B. R. Davidson, for appellant.

1. If in contemplation of the parties it was not intended that the money should be repaid, the law will not imply a promise to repay. Chitty on Contracts, p. 23; 3 Addison on Contracts, secs. 1408–9.

The action for money had, etc., is an equitable action in its nature and cannot be maintained where it is inequitable to make a party repay the money. 2 Greenl. Ev., sec. 117.

2. The payment by a widow before letters of administration are granted to her, of a debt of her husband, in good faith, the estate being solvent, is binding. The act of an executor *de son tort*, that must be performed in due course of administration by the rightful administrator should be upheld. See Williams on Exrs., 1451; 60 Ala., 322; 2 Rob. (Va.,) 664; 10 B. Mon., 148; 40 Mo., 644; 77 N. C., 357; 1 Salk., 295; 10 Page, 549; 17 Mass., 379; 4 Gray, 514; Schouler Exrs., sec. 193; 25 Ga., 537; 1 Plowd, 280; 16 Ala., 494–500; 58 Ala., 313. When one acts for an estate and subsequently administers, the letters relate

back to the death of the intestate and make valid all acts prior to administration. 102 Mass., 353–4; 12 Allen (Mass.,) 603; 2 Hill, (N. Y.,) 225; 19 Mo., 196–200; 21 Ind., 264; 1 Law Rep. Eq. Cas., 90–100; 2 Hill Chan. (S. C.,) 22; 10 Allen (Mass.,) 174; 38 Ark., 631.

The administratrix was estopped by her own act and conduct. 18 B. Mon., 519; 3 Johns. Chy., 417; Bigelow on Estp., p. 503; 5 Porter, (Ala.,) 64; 23 Ala., 555; 10 Paige Chy., 549–558; 122 U. S., 253.

J. D. Walker, for appellee.

HUGHES, J.

The complaint in this action alleged that the defendant, Rainwater, was indebted to the plaintiff in the sum of three hundred dollars for money had and received of her. The answer contains three counts; first a general and second a special denial. The third count is as follows: "That prior to the death of the said J. A. Harris, to-wit, in the year 188— this defendant loaned to him the sum of three hundred dollars in cash, and took no note or evidence of indebtedness therefor, but that the same was entered by the said Harris in his own private memorandum book; that the said J. A. Harris was thereafter taken sick and died intestate before securing or paying the same; that he died indebted to this defendant in the sum of three hundred dollars and the interest thereon; that at the time of his death he left the said M. J. Harris, his widow and Wm. Harris, his son, his sole heirs him surviving and left property not exceeding seven hundred and fifty dollars in value; that he was not indebted at said time except to this defendant, as he believes and alleges, and had no outstanding claims for collection, as defendant believes and alleges; that sometime after the death of the said Harris, this defendant called the attention of the said M. J.

Harris to the indebtedness of her said husband, deceased, to this defendant, and of his entry in his memorandum book of the same; that by agreement of the said M. J. Harris and this defendant she paid this defendant the sum of three hundred dollars in full satisfaction of the said claim, which was the only sum of money ever paid to defendant by the said plaintiff."

The defendant then sets out in the same plea that said M. J. Harris had sued him in her own right for said sum, as money loaned him, and that upon a verdict of a jury, judgment was rendered for him, and concludes his plea by saying, "this defendant says that the sole and only object had in administering upon the estate of her said husband was to try and compel him to pay the sum of money based on the transaction aforesaid with herself after the death of her said husband."

A demurrer was filed to the answer "because it did not state facts sufficient to constitute a defence to the action."

The court overruled the demurrer to the first paragraph of the defendant's answer, to which the plaintiff excepted, and sustained the demurrer to the third paragraph of same, to which defendant excepted. After hearing the evidence the court sitting as a jury found the facts, declared the law, and gave judgment for the plaintiff for three hundred and forty-six dollars and sixty-five cents. The defendant moved for a new trial, his motion was overruled and he excepted and appealed. The motion for new trial assigns four causes:

1st. The finding of the court is contrary to law.

2nd. The finding of the court is contrary to and not supported by the evidence.

3rd. The court erred in excluding evidence offered by the defendant.

4th. The court erred in sustaining the demurrer to the 3rd paragraph of defendant's answer.

The appellant's counsel abandons in his brief, all the causes or grounds alleged, save the 4th.

Did the third paragraph of defendant's answer contain a good defence to the action?

The demurrer admits the facts alleged in the plea, from which it appears that the said J. A. Harris, at the time of his death owed no debts save the one to defendant, which was paid by the widow before grant of administration to her; and that she had administered for the sole purpose of recovering in her capacity as administratrix, the three hundred dollars she had paid to the defendant. The trial court found that Mrs. Harris, believing her husband indebted to the defendant, had voluntarily paid him the three hundred dollars, but held that the same was unauthorized by law. But the payment having been made, ought the plaintiff now to be allowed to recover the sum paid to defendant? There are no creditors who can object to the settlement. It was not to the detriment of the estate, but in its interest, as no interest was paid upon the sum loaned by appellant to appellee's intestate. The widow was entitled to administration and to the care and custody of the property before administration. She was entitled by law to an interest of one-third in the estate, an amount that would have exceeded the sum she paid appellant—the estate consisting of about $900, personal property, as the evidence shows. There was but one heir, a son of the intestate, who may or may not have been of lawful age, as far as appears from the transcript in the case.

1. ADMINISTRATION.

Authorities are not wanting, which hold that, when an estate has been settled and the debts paid by those interested in it, without administration, the settlement will not be dis-

turbed, and that an administrator qualifying afterwards cannot recover the assets, where there is no necessity that he should be allowed to do so. In *Harris, admr., v. Seals and wife*, 29 Ga., 585, the court said: "In the case in which there are no debts, the regular administrator, if there is one, is bound to divide out the estate among the heirs or next of kin according to the statute of distributions. Therefore, if in that case, an executor *de son tort*, divide out the estate, in that way, the act will be good—the division will stand." "In a word, the act will amount to a valid administration of the estate in full." In *Taylor v. Phillips*, 30 Vt., 238, it is held that, "it is competent for all the heirs of a deceased person, if they are of age, to settle and pay the debts of the estate, and divide the property among themselves, without the intervention of an administrator, and neither the creditors or debtors of an estate have a right to complain."

In *Richardson v. The Estate of Merril et al.*, 32 Vt., 28, it is held that, "in settlement of an administrator's account he is entitled to be allowed for money paid by him, in liquidation of a claim, which could have been enforced against him either at law or in equity." Notes for one thousand dollars were returned by the administrator on his inventory of the intestate's estate, payable to the intestate. The widow claimed they were her property, and the administrator paid her $1000 and kept the notes. The notes were afterwards held to be the widow's. The probate court refused to allow the administrator credit for the thousand dollars and the judgment was reversed and the credit allowed. These cases serve to show that while it is irregular and unauthorized to settle estates, outside of a regular administration, yet that it is not every settlement, thus made, that will be interfered with, and that where a settlement is fair, without fraud, and in furtherance

Irregular settlement of estates.

of the purposes of a regular administration, and made by competent parties, it will not be repudiated merely on account of the irregularity. It is true, Judge Cooley, in *Gilkey v. Hamilton*, 22 Mich., 283, says that, "under our probate system, an administrator is a mere officer of the law, and though his title to the assets of the estate relates back to the death of the intestate, yet it is an official title which cannot be affected to the prejudice of the estate, by any acts of his prior to his appointment; nor will his title be affected by any estoppel that does not rest on equities against the estate."

If the doctrine of estoppel could apply in the case at bar, it could certainly rest upon an equity against the estate. This claim was for loaned money, for the use of which no interest was claimed or received; its payment could have been, and it was just and right that it should have been enforced against the estate, in the regular way, had not the widow of the deceased—being satisfied that it was just—discharged it, by the payment of the three hundred dollars to the appellant before grant of administration to her.

In *Priest, admr., v. Watkins*, 2 Hill, 225, a note belonging to the estate of the intestate was paid to his widow, who subsequently united with another in taking out letters of administration, and they then brought an action upon the note in their representative capacity: "Held that, notwithstanding the provisions of the revised statutes, as to executors *de son tort*, the letters related back to the time of the intestate's death, and, therefore, the payment to the widow was a bar to the action." This is the converse of the case at bar. Here the widow paid the debt of her deceased husband before administration, then administered and sued to recover the amount paid. Ought not the rule to work both ways?

In *Brearly v. Norris*, 23 Ark., 166, Chief Justice English said, in substance, that, though it is against the policy of the statute to allow a person, especially a stranger, to pay unauthenticated claims against an estate, and procure their allowance against the objection of the administrator, by the testimony of the original claimant, and might lead to gross frauds against an estate, yet when this was done by the widow of the deceased, there being no administrator, and there was reason to believe that she acted in good faith, and that the claims were just, no injustice could have been done the estate.

At common law the personalty of a testator vested in his executor from the death of the testator by virtue of the will, but in an administrator from the grant of administration. An executor, before probate, might, at common law, take possession and dispose of the personalty of his testator, and perform almost any act, pertaining to his office, except to bring or defend a suit. Under our statute, executors and administrators stand upon the same footing, and their powers before probate are limited to the decent burial of the deceased, the preservation of his estate, and the payment of necessary funeral expenses. Mansf. Dig., sec. 44; *Diamond v. Shell*, 15 Ark., 26. "But," says Judge Smith, delivering the opinion in *McDearmon v. Maxfield et al.*, 38 Ark., 636, "if he does intermeddle and afterwards qualifies, his letters relate back and legalize his previous tortious acts, making him accountable to the persons interested in the estate. And the liability to account involves a validity in his acts, which is a protection to those who have dealt with him," citing 3 Redfield Wills, ch. 1, sec. 2, pp. 13, 16; *Stagg v. Green*, 47 Mo., 500; *Alvord v. March*, 12 Allen, 603; *Hatch v. Proctor*, 102 Mass., 351; *Rattoon v. Over-*

acker, 8 Johns., 125; *Priest v. Watkins*, 2 Hill, 225; see also *Bell v. Welch*, 38 Ark., 147.

"The title to personal property of a decedent is in abeyance, until his executor qualifies, or an administrator is appointed, when it vests in him by relation from the time of his death." Only acts which come properly within the authority and scope of a rightful representative, when performed before appointment, and without probate sanction, will afford immunity from personal liability to the representative, under this doctrine of relation. Schouler Executors and Adm'rs, [2d ed.] 190-194. In *Brown v. Walter et al.*, 58 Ala., 310, it is held that "an *executor de son tort* cannot, by his wrongful act, acquire a benefit, but is protected in all acts, not for his own benefit, which the rightful representative may do, and that when one has received and used assets of an estate under circumstances constituting him an executor *de son tort*, he may show, when called to account in equity by the rightful representative, that there are no outstanding debts, and that he has applied the assets for the use and benefit of the distributees, as they must have been applied in due course of administration." See also Williams on Executors, vol. 1, 313.

Payment of debt before grant of letters.

The fair payment of money out of the assets of an intestate's estate, that is solvent, by one who afterwards becomes administrator, in discharge of *bona fide* indebtedness of the estate and which the administrator would have been bound to pay in due course of administration, should not be needlessly disturbed, where the parties to the transaction acted in good faith, prudently and honestly. Schouler's Exrs. and Admrs., secs. 193-194, and authorities cited.

2. EVIDENCE: As to transactions with plaintiff's intestate.

The defendant at the trial offered to prove by his own testimony that he had loaned said James A. Harris three hun-

dred dollars to pay upon the Carnahan land, on the 23d of November, 1883, that he had taken no note for the same, and that he had never been paid the same, or any part thereof, except as paid by the widow—the plaintiff; that at the time he loaned him the money, he, the said Harris, made an entry in his own private memorandum book; to which testimony plaintiff at the time objected, which objection was sustained by the court, and the said testimony was excluded, to which the defendant at the time excepted.

There was no error in excluding this testimony as to transactions between appellant and the deceased. *Bird v. Jones, Admr.*, 37 Ark., 195; *McRae, Admr., v. Holcomb*, 46 Ark., 306; *Park, Admr.. v. Lock, Admr.*, 48 Ark., 134; Schedule to Constitution of 1874, sec. 2.

There was error in sustaining the demurrer to the third paragraph of appellant's answer. Reversed and remanded.

Battle, J., dissented.

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JOHNSON V. GRISSARD.

MORTGAGE: *Description of property.*

A mortgage of "all my crop of corn, cotton or other produce that I may raise, or in which I may in any manner have an interest, for the year 1884, in Faulkner county, Arkansas," is not void as to third parties for uncertainty. The description could be made certain by extrinsic evidence, and the record of the conveyance was constructive notice of the mortgagee's lien on the crop mentioned.

APPEAL from *Faulkner* Circuit Court.

J. W. MARTIN, Judge.

J. H. Harrod, for appellants.

The mortgage is so indefinite and uncertain that it conveys nothing against the claims of third persons. 11 N. W. Rep., 621.

E. A. Bolton, for appellee.

1. The description in the mortgage was sufficient. It could be made definite by extrinsic proof. 79 Ala., 335; 66 Id., 258; 78 Id., 28; 65 Id., 256; 92 U. S., 325; Thomas on Mortg., 55,56; 65 Ga., 644; Jones Ch. Mortg., 64.

2. No verbal agreement can constitute a lien against a recorded mortgage, not even with a landlord. 5 Heisk. (Tenn.), 210; 43 Miss., 456.

HUGHES, J.

The appellee brought his action in the Faulkner circuit court to recover the value of three hundred pounds of seed cotton and fifty bushels of corn, which he alleged he owned and appellants had converted to their own use in 1884. Appellants answered, denied the ownership of appellee, the conversion by them, and that appellant was damaged. The case was tried by the court sitting as a jury upon the complaint, answer and an agreed statement of facts. The court found for appellee and gave judgment in his favor for $63.40. Appellee claimed the property under a mortgage executed to him by T. B. Lawson and recorded in that county on the 6th day of December, 1883. The property is described therein as "All my crop of corn, cotton or other produce that I may raise, or in which I may in any manner have an interest, for the year 1884, in Faulkner county, Arkansas," and other property not in controversy in this case. On the trial the appellee offered this mortgage in evidence; the appellants objected upon the ground that "the description of the mortgaged property is indefinite and uncertain, and, against the claims of third parties, gives no lien to plaintiff." The court considered the mortgage in evidence; and found

that Lawson raised a crop of cotton and corn on the land of the defendants Johnson & Johnson, in Faulkner coun-county, Arkansas, in 1884; that Lawson paid Johnson & Johnson all the rent due them in 1884; that Grissard's debt due him by Lawson was not paid; that Johnson & Johnson received from and converted to their own use cotton raised by Lawson in Faulkner county, Arkansas, in 1884, of the value of $41.95, and corn raised by Lawson of the value of $21.46; that they took the cotton and corn sued for here in payment for supplies furnished Lawson, after they had been fully paid all their rent for 1884; that the property so converted was demanded of them by W. H. Grissard before suit and that they refused to deliver it. The only question necessary to consider, and the only one made by appellant's counsel here is, is the description in the mortgage of the property in controversy sufficient? The appellants in the court below asked the court to declare the mortgage was too general, indefinite and uncertain in the description of the property conveyed; that it created no lien against an innocent purchaser for value, who had no notice of it except constructive notice from its registration; that under the facts admitted the lien of appellants is superior to the lien of the appellees; that the law was against the plaintiff, and that the defendants were entitled to judgment—all of which were refused by the court. The court of its own motion declared "the law to be for the plaintiff, and that his mortgage constitutes a valid lien on the property in controversy and superior to the claim of the defendants." To the refusal to declare the law as asked by the appellants, and to the declaration of law made by the court on its own motion, the appellants excepted at the time, made a motion for a new trial, which was overruled, and appealed to this court.

MORTGAGE: Description of property.

The description of the property in the mortgage in controversy in the cause is, "all my crop of corn, cotton or other produce that I may raise, or in which I may have in any manner an interest for the year 1884, in Faulkner county, Arkansas." The only question raised here is, is the description so general and indefinite as to avoid the mortgage as to third parties? We have not been able to find that the precise question as to the sufficiency of a description so general and indefinite has been determined in this court. Counsel for appellants contends that "a chattel mortgage ought not to be a drag-net covering a whole county in any such general terms" as was said in *Muir v. Blake*, 11 N. W. Rep., 621, by the supreme court of Iowa, in which a description in a mortgage of "all the crops raised by me in any part of Jones county for the term of three years" was held too indefinite and uncertain to charge third persons with notice of the mortgage. While both of these descriptions are very general, it will be noticed that the former is not so uncertain and indefinite as the latter, which was sought to be made to cover crops for three years. In *Ellis v. Martin*, 60 Ala., 394, which was attachment for rent levied upon three bales of cotton claimed by a third party, and in which an issue was formed to try the right of property in the cotton, the plaintiff offered in evidence a mortgage, or "lien note," over the objection of the claimant based on the ground "that the said instrument contained no sufficiently certain description of the property or crop alleged to be covered or described, and could not lawfully be explained by parol evidence." The court overruled the objection and admitted said deed as evidence, with proof that the cotton was part of the crop raised by said Ellis on said place (named in the mortgage) in 1875." The description was "my entire crop

of cotton and corn of the present year," without any other descriptive words. The supreme court of Alabama, by Brickell, C. J., said in this case: "The description of the thing conveyed in the mortgage is very general and indefinite; but it is capable of being rendered certain by evidence showing the lands cultivated by the mortgagor in 1875, and the quantity of corn and cotton raised thereon. Generality and indefiniteness of description will not avoid a conveyance." It is uncertainty that will not be removed when the conveyance is read in the light of the circumstances surrounding the parties at the time it was entered into and their manifest design is considered, that will render a conveyance void.

"Nor can it be admitted that the necessary effect of the generality of the description is to mislead and deceive strangers dealing with the mortgagor." In *Varnum v. The State*, upon indictment for removing mortgaged property, 78 Ala., 28, it was held that when a mortgage conveys the "entire crop" of the mortgagor of every description raised by him or caused to be raised by him annually, till a certain debt is paid, the uncertainty as to what the mortgage covers can be removed by parol evidence. In *Smith v. Fields*, 79 Ala., 335, it was held that a mortgage of "my entire crop of cotton and corn" is not void for indefiniteness and uncertainty, but the descriptive words may be made definite by parol testimony, showing that the parties had reference to the crop to be raised by the mortgagor on the plantation in the county, which he was then cultivating." "The description of the property in the mortgage, though general, is sufficient to put on inquiry; and the defendant purchasing from the mortgagor was bound to ascertain whether the cotton he bought was the same covered by the mortgage." In 92 U. S., 320, in *Wilson v.*

Boyce, it was held that where an act of the legislature of the State of Missouri declared that certain bonds issued thereunder and accepted by the Cairo & Fulton R. R. Co. "should constitute a first lien and mortgage upon the road and property" of the company, "the word 'property' included all the lands of said company, and that a valid lien upon them was created by its act, and that the title of a subsequent purchaser from the company of its lands is destroyed by the sale of them under the mortgage."

The description of the property mortgaged in the case at bar and in controversy in this cause, as "all my crop of corn and cotton for the year 1884, in Faulkner county, Arkansas," is not so indefinite and uncertain that it could not be made certain by extrinsic evidence. The record of the mortgage was constructive notice, and all persons purchasing any of the crop of the mortgagor in the county of Faulkner, for the year 1884, were bound to inquire whether it was covered by the mortgage to Grissard.

Affirm.

SMITH V. DAVIS.

ADMINISTRATION: *Allowance for expenses of deceased administrator.*

When an administrator expends money in preserving the estate of his intestate and dies without having presented an account thereof to the probate court, leaving his accounts unsettled, the sum thus expended may be allowed as expenses of administration on a final settlement of his accounts which may be had at the instance of his personal representative. But until such settlement and until it is shown thereby that a balance is due the deceased administrator, his administrator can collect nothing from the estate he has administered, on account of such expenditure.

APPEAL from *Crittenden* Circuit Court.

J. E. RIDDICK, Judge.

W. M. Randolph, for appellant.

The manifest purpose of the present proceeding is to avoid a settlement by Mrs. Eliza Wallace, or her representative, of her administration of R. C. Wallace's estate, and to collect from that estate the sums of money which she or her representatives have paid, without reference to the state of her accounts as administratrix, or the amount of her indebtedness to the estate on a proper settlement of her administration. I submit this cannot be done. *Underwood v. Milligan*, 10 Ark., 254; *Bomford v. Grimes*, 17 Ark , 567; *Tyner v. Christian*, 27 Ark., 306; *Yarborough v. Ward*, 34 Ark., 204.

2. The claims were barred.

E. F. Adams, for appellee.

That these were just claims against the estate, being for attorneys' fees and taxes, and were entitled to be allowed as expenses of administration, see 30 Ark., 520; 27 Ark., 306; 30 Id., 312; 34 Id., 204; 38 Id., 139. The administratrix clearly had the right to have these claims allowed, and having died her representative has the same right. Authorities *supra*.

COCKRILL, C. J.

In this case an administrator expended money for the preservation of his intestate's estate, and died without having made a settlement of his accounts, and without having presented to the probate court an account of his expenditures to be allowed as expenses of administration. His personal representative presented to the administrator *de bonis non* of the first estate a duly verified claim for the money expended, to be allowed against the estate upon which his intestate had administered. The circuit court, on appeal, allowed a part

of the claim and ordered that it be paid. The administrator *de bonis non* has appealed.

The administrator of the deceased administrator could collect nothing of the estate upon which his intestate had administered on account of expenses incurred by him in preserving the estate, until the accounts of his intestate with that estate had been audited by the probate court. Money expended by an administrator in the preservation of the estate may be allowed by that court as expenses of administration on a final settlement of the accounts of the deceased administrator, which may be had at the instance of his personal representative; and any balance found due him on the settlement should be paid by the estate upon which he administered. But the representative of the deceased administrator cannot collect the expenses of administration from the estate upon which his intestate administered in disregard of the state of the latter's accounts. It is only the balance due the deceased administrator after final settlement of his accounts that his administrator can collect. It was error to allow the claims, and direct their payment without a showing that a final settlement of the accounts had been had. See *Yarborough v. Ward*, 34 Ark., 204; *Nathan v. Lehman*, 39 Ib., 256.

Expenses of administration: Allowance of.

Reversed and remanded.

HAWKINS V. FILES.

EXECUTION LIEN: *Superior to prior unrecorded mortgage.*

The lien on land acquired by the levy of an execution, is superior to that of a prior unrecorded mortgage, although the mortgage is subsequently filed for record before the sale of the land.

APPEAL from *Ashley* Circuit Court in Chancery.

CARROLL D. WOOD, Judge.

On the 3d day of August, 1874, A. W. Files executed to Mildred H. Williams a mortgage on the land in controversy and other property. On the 13th day of April, 1876, J. M. Robinson & Co. recovered a judgment against Files in the United States Circuit Court for the Eastern District of Arkansas, in which said land is situated. Execution was issued on the judgment on the 24th of May, 1876, and was levied on the land in controversy on the 1st day of June, 1876. On the 23d day of June, 1876, Mildred H. Williams, who had neglected to have said mortgage recorded, filed it for record in the proper office and it was duly recorded there on the same day. On the 30th day of June, 1876, the land was sold by the marshal and purchased by Robinson & Co., the plaintiffs in the execution, to whom it was conveyed by the marshal. An assignee of the mortgage brought this suit to foreclose it against Robinson & Co. and against certain persons claiming title to the land in controversy acquired by purchase from Robinson & Co. The court below held that the lien created by the levy of the execution was superior to that of the mortgage and dismissed the appellant's bill as against Robinson & Co.'s vendees.

M. L. Hawkins, pro se.

An unrecorded mortgage is superior to an after-acquired judgment. Jones Mort., [2d ed.] p. 462; see also 16 Ark., 548-9; 28 Id., 85; 33 Id., 336.

J. M. Moore, for appellee.

The lien of a judgment attaches from its date. 12 Ark., 276, and is superior to a subsequent mortgage. 13 Ark., 547. The levy of the execution created a specific lien, 31 Id., 392, which is superior to that of an after-recorded mort-

gage. 9 Ark., 112; 22 Id., 136; 40 Id., 536; 41 Id., 191-2; Mansf. Dig., sec. 4743, and note.

PER CURIAM.

The lien acquired by the levy of an execution upon lands is superior to that of a prior unrecorded mortgage, even though the mortgage be subsequently filed for record before sale. This is in accordance with *Main v. Alexander*, 9 Ark., 112. See annotation to the case cited; also *Dodd v. Parker*, 40 Ark., 536; *Wing v. Ringo*, 49 Ib., 457.

Affirmed.

JOHNSON V. PARKER.

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1. DEEDS: *Defective acknowledgment: Curative acts.*

The application of the curative acts of 1883 is not limited to the obvious omission of words from certificates of acknowledgment, but extends to every case in which the acknowledgment of a deed is insufficient to give full legal effect to its terms.

2. SAME: *Same: Relinquishment of dower.*

Where a married woman joins her husband as grantor in conveying lands in which she has no estate except a contingent right of dower, the deed, although it contains no clause relinquishing dower, will bar her right thereto if she acknowledges it in proper form; and if it does not have that effect merely because the officer's certificate is not in the form prescribed by the statute, then her acknowledgment of such deed is "defective," and "the proof of" its "execution" is "insufficient" within the meaning of the curative acts.

3. SAME: *Same.*

In 1859 the plaintiff joined her husband as grantor in the execution of a deed which contained no clause expressing a purpose to relinquish dower. The officer before whom the deed was acknowledged certifies that the husband acknowledged it "to be his act and deed and that the wife being privily examined separate and apart from her said husband, declared that she did freely and willingly sign and deliver said * * * without any fear or compulsion from her said husband, as her act and deed," but makes no mention of dower. The deed was recorded soon after its execution.

After the death of her husband the plaintiff petitioned for dower in the land thus conveyed. *Held:* That the defective acknowledgment of the plaintiff as a relinquishment of dower, was cured by the healing acts of March 8th and March 14th, 1883, and her petition was properly denied.

APPEAL from *Desha* Circuit Court in Chancery.

JNO. A. WILLIAMS, Judge.

W. G. Weatherford, for appellant.

Plaintiff was certainly not barred of her dower by any law in force at the time the acknowledgment was made. What then is the effect of the curative act of 1883?

The act declares that such deed shall be held to *pass the estate* which it *purports* to convey. In this case the deed *purports* to convey the *fee*, and the act makes it good *for that purpose*.

Reviews 44 Ark., 112; 41 Id., 101; Gould's Dig., p. 268, sec. 21, and contends that there was no defect either in the deed or acknowledgment to cure, and that a married woman can only relinquish her dower in the manner prescribed in the statute. *Lex ita scripta*.

Jas. Murphy, for appellee.

The defects in the deed and acknowledgment were cured by acts of March 8th and 14th, 1883. The act simply gives to the deed the effect the grantors in equity and good conscience intended, but which from ignorance or mistake perhaps was not perfected. 44 Ark., 365; 45 Id., 41; Ib., 101; 15 Ohio, 232.

COCKRILL, C. J.

This is a suit by Mrs. Johnson, the appellant, for assignment of dower in lands which she had joined with her husband in conveying to one Wyley in 1859. The conveyance was in form a warranty deed in which the wife joined as a grantor. It was recorded soon after its execution. There

is no clause relinquishing dower in the body of the deed. nor any mention of it in the officer's certificate of acknowledgment. It is conceded that the acknowledgment was not in the form prescribed by statute for the relinquishment of dower, and that the widow is not barred of her right according to the previous decisions of this court, (*Myers v. Gossett*, 38 Ark., 377, and cases cited,) unless the subsequently passed curative acts have made the conveyance effective for that purpose. The court decreed against the widow in so far as the deed controls, and the effect of the statutes referred to, is the only question we need consider. The first of these provisions is the sixth section of the act of March 8th, 1883, entitled, "An Act for the better quieting of titles," which was substantially re-enacted under the same title in 1885, (see Acts of 1885, p. 190,) and is as follows: "All deeds and other conveyances recorded prior to the first day of January, 1883, purporting to have been acknowledged before any officer, and which have not heretofore been invalidated by any judicial proceeding, shall be held valid to pass the estate which such conveyances purport to transfer, although such acknowledgment may have been on any account defective." The second is the act of March 14th, 1883, entitled: "An Act to cure defective acknowledgments," viz: "All conveyances and other instruments of writing authorized by law to be recorded, or which have been heretofore recorded in any county of this State, the proof of the execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate, * * * * shall be valid and binding as though the certificate of acknowedgment or proof of execution was in due form."

Defective acknowledgments: Curative acts.

In the case of *Johnson v. Richardson*, 44 Ark., 365, we ruled that these provisions of the statute validated a previous-

ly defective acknowledgment of a relinquishment of dower, and that no vested right was disturbed thereby. In that case, however, the certificate of the officer showed that the wife had made an ineffectual effort to relinquish dower, and the curative acts were permitted to supply the defect in the certificate; while here, no mention is made of dower either in the deed or in the officers certificate of acknowledgment, and the question is, is the acknowledgment "defective" within the meaning of the first act, or "insufficient because the officer certifying such execution omitted any words in his certificate," within the meaning of the second? The officer certifies that the husband acknowledged the instrument "to be his act and deed and that the wife being privily examined separate and apart from her said husband, declared that she did freely and willingly sign and deliver said * * * without any fear or compulsion from her said husband as her act and deed." The certificate is imperfect as to both parties inasmuch as it omits all mention of the "purposes and consideration" for which the deed was executed. *Little v. Dodge*, 32 Ark., 453. With the addition of these words in their proper connection, the acknowledgment would be good as that of grantors to the fee. It is not pretended that the curative statutes do not supply them, but the contention is, that their operation should stop there and leave the certificate as in perfect form for the conveyance of the fee by both husband and wife. The argument is, that as the wife has not manifested an intent to relinquish dower, there is no defect in that respect to be cured; and not being bound by the covenants in the deed on account of her coverture, she is not barred of her recovery of dower. If there had been a clause in the deed expressing the purpose thereby to relinquish dower, unquestionably the effect of the statute would be to

supply any defect in the acknowledgment which prevented the deed from having that effect; otherwise the clearly expressed intent of the parties to vest an estate in their grantee, freed from the wife's contingent right of dower, would be defeated by the lack of form in the ceremony of execution, which was the very consummation the legislature intended to prevent. But, when the acknowledgment is in form for that purpose, the fact that the wife joins in the deed with her husband, as grantor, is sufficient to bar her dower even though there is no clause in the deed expressly relinquishing it. It was so determined in *Dutton v. Stewart*, 41 Ark., 101. If she joins with her husband in the conveyance as a grantor, her estate passes; if she has no estate, but only the possibility of dower, for what purpose, asks Judge English in the case last cited, does she join in granting the estate except to relinquish her right to dower? The deed is sufficient to pass her title, right or interest whatever it may be, provided only the requirements of the statute as to the acknowledgment are observed. A deed of general warranty purports to convey a perfect title or estate. If "the estate which the conveyance purports to transfer," does not "pass," to use the language of the statute, merely because the officer's certificate of acknowledgment is not in the form prescribed by the statute, then the acknowledgment is on that account defective; and "the proof of the execution is insufficient because the officer certifying to it has omitted words" which were necessary in the acknowledgment to give full legal effect to the terms of the conveyance. The application of the statute has heretofore been made only to obvious omissions of words from the certificate of acknowledgment; and particular instances of this nature may have given rise to the legislation in question, but the terms employed are comprehensive and enunciate a

Relinquishment of dower.

Application of curative acts.

general rule applicable to all cases in which the acknowledgment is insufficient to give full legal effect to the terms of the conveyance.

The evil of the one case is as great as that of the other. As was said by the supreme court of Ohio in *Goshorn v. Purcell*, 11 Ohio St., 641, in construing a statute which authorized the courts to correct "errors, defects and mistakes" in the deeds of married women, "we should look rather to the principle of justice and right which the rule was intended to enforce by an application to past transactions, than the particular instances to which a like application had been made, though historically connected with the adoption of the rule." And in that case it was said that the statute would apply to a conveyance perfect in form if it did not comply with the obvious intent of the parties. Our statutes were designed to operate upon the ceremony of the execution of conveyances—a subject wholly within the control of the legislature; and, as was said in Mrs. Richardson's case, *supra*, the power which prescribed the form to be observed in the execution of a conveyance has said that a non-compliance with it shall be excused in order that the contract made by the parties shall have effect according to its purport. If that effect is given to the conveyance made by Mrs. Johnson in this case, it will bar her right of dower as effectually as though the officer had certified that upon privy examination she had acknowledged that she had signed the relinquishment of her dower for the purpose set forth in the deed.

The court did not err, therefore, in refusing the prayer of the complaint and the decree is affirmed.

DISSENTING OPINION.

BATTLE, J.

I do not concur with the majority of the court in the opin-

on delivered in this case. I expressed my views upon the questions decided in this cause, in a dissenting opinion delivered in *McCranie v. Chase*, which was orally decided at the present term. The facts in that case illustrate, and the opinion expresses my views in this case, so fully that I quote it at length. It is as follows:

I do not think that the deeds and acknowledgments relied on in this cause operate, under the curative statutes of this State, to divest Mrs. McCranie of her right to dower in the town lots in controversy. Neither the deeds nor the acknowledgments are defective. In the deeds she undertook to convey the lots in fee simple, as her own property. In two of them she covenants that she is seized of the lots in fee simple, and in the other mortgages them to secure the payment of her own individual indebtedness, contracted in the course of her separate business. In neither of them does she undertake, or intimate an intention or desire, to relinquish her right to dower. She acknowledged the execution of them as the law authorizes a married woman to do when she conveys her own lands. Now it is insisted that she became divested of her dower in the lots conveyed, under the curative statutes, because she undertook to convey in fee simple.

One of the statutes relied on provides: "That all deeds and other conveyances, recorded prior to the first day of March, eighteen hundred and eighty-five, *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* (excepting only cases where such conveyance shall have been executed by minors or in-

sanes); provided that the records of such instruments shall be as *valid as if they had been acknowledged according to law.*" I do not understand this statute to refer to any valid deed, properly acknowledged and recorded. The object of it, as I understand, is to make the defective acknowledgments and record of deeds which were recorded prior to the first of March, 1885, valid, and to give to them (the deeds) the same force and effect they would have had had they been properly acknowledged and recorded in the first instance.

The other statute is as follows: "All conveyances and other instruments of writing authorized by law to be recorded, or which have heretofore been recorded in any county in this State, the proof of execution whereof is insufficient because the officer certifying such execution *omitted any words in his certificate*, or because such officer *failed or omitted to attach his seal of office to such certificate, or attached to any certificate any seal not bearing the words or devices required by law, or otherwise informal*, shall be as valid and binding as though the certificate of acknowledgment or proof of execution *was in due form* and bore proper seal." The object of this statute is to cure defects in the certificates of acknowledgments caused by the omission of words necessary to certify the acknowledgment the parties to the conveyance or instrument of writing had obviously intended to make, and by the failure of the officer to attach a proper seal. It never was intended to supply a certificate of an acknowledgment which the parties never intended to make and never made.

The certificates of the acknowledgments of the wife, in this case, are sufficient and valid. I give one as an illustration. It is as follows: "And I further certify that on this day voluntarily appeared before me Frances C. McCranie, wife to said J. S. McCranie, to me well known to be the person whose name

appears upon the within and foregoing conveyance or instrument of writing, and in the absence of her said husband declared that she had of her own free will executed the same for the purposes and considerations mentioned and set forth, without compulsion or undue influence of her said husband. In witness,'' etc.

But it is said that the deeds relied on purport to convey the lots in controversy in fee, and, therefore, divest her of her right to dower in the lots conveyed. The reason for this contention, as I understand it, is, in attempting to convey in fee simple, she must have intended to relinquish her dower as well as convey all interest and estate she had in the lots. But the reverse is true. In claiming dower she would necessarily assume that her husband was seized of an estate of inheritance in the lots; for she is only dowable in the real estate in which her husband was seized of an estate of inheritance during their coverture. She could not be entitled to dower in, and seized in fee of, the same land at the same time. To claim one was to deny her right to the other. The deeds are proof conclusive, I think, that she did not thereby intend or undertake to relinquish dower.

The certificates of acknowledgment also prove that she did not intend to relinquish dower. She undertook to acknowledge the execution of the deeds in the manner prescribed by statutes enacted before the adoption of the constitution of 1868, which prescribed different modes in which deeds to the wife's land and the relinquishment by the wife of dower in the husband's land should be acknowledged. She acknowledged the deeds in question in the manner prescribed for the acknowledgment of the execution of deeds to the wife's lands, thereby showing that she did not undertake to relinquish dower.

But it is said that this court held in *Dutton v. Stuart*, 41 Ark., 101, that "a wife can relinquish her dower by joining in her husband's deed and acknowledging the relinquishment of dower in the form provided by the statutes, without any clause of relinquishment in the deed." But the wife in that case appeared before an officer authorized to take acknowledgments, and in the absence of her husband declared that she had of her own free will signed and sealed the relinquishment of dower in the deed, for the purposes therein contained and set forth, without compulsion or undue influence of her husband. She joined with her husband in the deed and acknowledged the relinquishment of dower in the manner prescribed by the statutes; and this court held that this was a sufficient relinquishment, because the statutes provide that a "a married woman may relinquish her dower in any of the real estate of her husband, by *joining with him in a deed of conveyance* thereof, and acknowledging the same" in the manner prescribed by law.

In *Meyer v. Gossett*, 38 Ark., 380, this court said: "To make a valid relinquishment of dower, by the wife, in the real estate of the husband, she must join him in the deed of conveyance and acknowledge it in the manner prescribed by the statute. Gantt's Dig., sec. 839. If she does not join him in the deed the acknowledgment is of no validity. Nor if she join him in the deed, is there a valid relinquishment of dower without a proper acknowledgment of its execution by her. Both are requisite to complete the conveyance on her part. *Stidham and Wife v. Matthews*, 29 Ark., 659; *Witler v. Biscoe et al.*, 13 Ib., 423; *McDaniel v. Grace*, 15 Ib., 465."

Neither the deeds nor the acknowledgments in this case evince an intention to relinquish dower. As I understand

them and the facts in this case, there was no such intention.

The statutes of this State provide that "a widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form;" and provide that such legal form shall be "by such married woman joining her husband in a deed of conveyance of the land and voluntarily appearing before the proper court or officer and in the absence of her husband declaring * * * that she had signed the relinquishment of dower for the purposes therein contained and set forth, without compulsion or undue influence of her husband." Mrs. McCranie has not done so in this case, and I think that she is entitled to dower in the lots in controversy.

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SANSOM V. HARRELL.

HOMESTEAD: *Order vesting in widow: Rights of minor children.*

Since the adoption of the constitution of 1874, which, by art. 9, sec. 6, provides that when the owner of a homestead dies his widow and minor children shall share the same equally, the power of the probate court to make an order under sec. 3, Mansf. Dig., vesting the estate of a deceased person in his widow where it does not exceed in value the sum of three hundred dollars, is confined to cases where the deceased leaves no minor children, or if he leaves such children, no part of his estate constitutes a homestead.

APPEAL from *Faulkner* Circuit Court in Chancery.

J. W. MARTIN, Judge.

Bruce & Bolton and *C. W. Cox*, for appellants.

The probate court had no jurisdiction to make the order. Mansf. Dig., sec. 3; 33 Ark., 824; 38 Id., 243. The order fails to recite jurisdictional facts, but on the contrary

shows affirmatively that the court did not undertake to determine the value of the estate, nor to vest the entire estate, but did undertake to vest the land in controversy in the widow after determining its value alone, without regard to the rest of the estate. 33 Ark., 824. The order was void.

Sam. Frauenthal, for appellee.

The probate court had jurisdiction. Mansf. Dig., sec. 3; Freeman Judg., secs. 118, 119. The presumption is in favor of the validity of the order. 33 Ark., 824; 31 Id., 190; 49 Id., 336.

The matter is now *res adjudicata*.

BATTLE, J.

In 1876 Thaddeus W. Sansom died, at his late residence in Faulkner county, intestate, leaving surviving him a widow and three minor children. At the time of his death he was the owner of a tract of land, which he and his family resided upon and occupied as a homestead when he died. It was in the country and consisted of about eighty acres and did not exceed three hundred dollars in value. He had no other homestead. A short time after his decease and during the minority of his children, his widow presented a petition to the probate court for an order to vest the land in her absolutely, representing that it was not worth exceeding three hundred dollars. The court finding that it did not exceed in value the amount stated, made the order. The question is, did the court have the authority to make this order?

The order in question was based upon section 3 of Mansfield's Digest, which provides: "When any one shall die, leaving a widow or children, and it shall be made to appear to the probate court that the estate of the deceased does not exceed three hundred dollars, the court shall make an order

that the estate vest absolutely in the widow or children, as the case may be; and in all cases where the estate does not exceed eight hundred dollars the widow or children, as the case may be, shall be entitled to retain the amount of three hundred dollars of the property at its cash price." In construing this section and speaking of the proceedings under it, in *Harrison v. Lamar*, 33 Ark., 827, Mr. Justice Eakin said: "It is a proceeding *in rem* fixing the status of the property as to ownership, and declaring to all the world the course of devolution which, under the circumstances, the law gave to the property of the deceased. It did not vest the right so much as declare it, and it was not necessary that it should specify the personal property, or describe the lands by metes, bounds or numbers. It carried the whole property without reserve, leaving nothing to be determined with regard to its identity, but the fact that it was part of the estate left by the deceased—a fact, in this case, necessary to sustain the claim of either party. The statute does not prescribe any notice to be given to heirs or distributees. As to these small estates, they have no *prima facie* rights, the amount of the estate being admitted. They are taken out of the course of devolution prescribed to larger ones, and there being no right to be divested out of them, there is no other reason for making them parties than that they should have the right to question the amount of the estate, a fact admitted here, or, rather, not contested; and there is no reason at all for making them parties by notice or otherwise, to the probate court proceedings, which would not, with equal or greater force apply to creditors."

HOMESTEAD:

But section 6 of article 9 of the Constitution of 1874, adopted subsequently to the enactment of the statute in

question, provides that, when the owner of a homestead dies, his widow and minor children shall share the same equally, and that the minor children shall be entitled to half the rents and profits till each of them arrives at twenty-one years of age, and that each child's right shall cease when he becomes twenty-one years old and go to the younger children, until all cease to be minors, when the entire homestead goes to the widow for her natural life or until she abondons it. The right to share it equally and to one-half of the rents and profits thereon becomes a vested interest in the children upon the death of the parent. The widow is not entitled to the absolute or exclusive control or dominion over it. She cannot alienate her interest in it. *Garibaldi v. Jones*, 48 Ark., 230. The moment she acquires a homestead in her own right, or abandons it, her right to it ceases to exist. Until the children reach the age of twenty-one years it cannot be sold to pay the debts of the estate of the deceased owner, nor be partitioned among the heirs. The land constituting it cannot be sold to pay such debts, subject to the homestead rights of the children, during their minority. The Constitution sets it apart as a home and sanctuary for the widow and children, and for the purpose of preventing any other person invading it under a claim of right or interfering with them in the undisturbed enjoyment of the shelter, comfort and security of it as a home, guards and protects it against sales and transfers. The same reason which makes it unlawful to sell the land constituting it for the payment of the debts of the deceased owner subject to the homestead rights of the children, during their minority, makes it unlawful to vest it in the widow, subject to the same rights of the children, during their minority. One endangers the quiet, security and comfort of a home provided in the homestead

Rights of minor children: Order vesting land in widow.

as much as the other, and both equally violate the spirit and manifest intent of the constitution.

As said in *Harrison v. Lamar* the order which the probate court is authorized by section 3 of Mansfield's Digest to make, does not vest a right in the widow so much as declare it. This being true, it is obvious that it has no authority to make such an order as to the homestead. The vested rights of the minor children forbid. They cannot be divested by such an order, during their minority, especially in an *ex parte* proceeding.

If it be conceded that the probate court had the jurisdiction to determine whether the land in controversy was impressed with the homestead character by the parent in his lifetime, it does not appear to have done so. While it found that the land did not exceed three hundred dollars in value, it says nothing about it being a homestead. The proceeding instituted by the widow was *in rem, ex parte*, such as is only authorized by the statute in cases where the whole estate does not exceed three hundred dollars and no part of it constitutes a homestead. The whole proceeding, including the order made, precludes the idea that the court undertook to determine its character as a homestead. *Hohn v. Kelly*, 34 Cal., 391.

The order of the probate court, by which an effort was made to vest the land absolutely in the widow, having been made during the minority of the children, is void.

Reversed and remanded for a new trial.

BELL V. PELT.

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1. VENDOR'S LIEN: *Where land is sold for cotton.*

Where an obligation to deliver cotton is given in the purchase of land, no lien arises in favor of the vendor to enforce its performance. *Harris v. Hanie*, 37 Ark., 348.

2. EQUITABLE MORTGAGE: *By instrument intended to secure debt.*

Where an instrument is intended to secure a debt by fixing a charge on land which it properly describes, equity will give effect to the intention of the parties by enforcing the lien, although the writing is not in the form of an ordinary technical mortgage and contains neither words of grant or defeasance.

3. SAME: *Same.*

The defendant executed and delivered to the plaintiff an instrument in the following words:

"$320.64. On or by the 1st day of November, 1883, I promise to pay James D. Pelt, or bearer, the sum of three hundred and twenty dollars and sixty-four cents, for value received, with ten per cent. interest from the 1st day of November, 1882. This note given as aid for that of the purchase money of parcel of land, the W½ of NW¼, sec. 21 and the SE¼ of SE¼, sec. 17, and the NE¼ of sec. 20, all in township 15, range 20 west, and vendor's lien is hereby reserved on said land for the purchase money, all the above land being in the county of Columbia and State of Arkansas. This 10th day of January, 1883.

Witness my hand: his

JOHN M. x BELL.

Witness: J. D. PELT. mark

Held: That such instrument is an equitable mortgage and constitutes a lien on the land it describes.

APPEAL from *Columbia* Circuit Court in Chancery.

C. W. SMITH, Judge.

J. M. Kelso, for appellant.

The notes were payable *in cotton* and no vendor's lien can be enforced thereon. 37 Ark., 348. Nor was Pelt the vendor at all and hence could have no lien. No lien was reserved in the deed in favor of the vendor even, and certainly the assignee of the notes had none. Gantt's Dig., sec. 174 and cases cited.

The substitution of a new note with the recital that it was for purchase money, gave no lien.

Atkinson & Tompkins, for appellee.

The lien in this case is not the equitable vendor's lien, but

is a lien created by contract of the parties, an equitable mortgage. Review Mansf. Dig., sec. 474; 28 Ark., 401; 37 Ark., 511, 516, 517 and other decisions, and cite 54 Ill., 130; 67 Ill., 34; 2 Head, 151; 3 Ib., 537; 53 Miss., 85; 2 Yerger, 84; 2 Head, 128; 8 Allen, 536; 6 S. W. Rep., 420; 2 Ib., 737; 58 Texas, 383; Story Eq. Jur., secs. 791, 1020, 1231.

HEMINGWAY, J.

The record in this cause discloses about the following state of case. On the 1st day of November, 1879, one W. W. Atkinson sold to the appellant, by warranty deed, for the consideration of nine hundred dollars, the lands in controversy. The deed recites full payment of the consideration in cash, but a part at least was not so paid. The appellant gave Atkinson two or more obligations for the delivery of cotton, and it is probable that the entire consideration was to be so paid. Two of these cotton obligations were assigned by Atkinson to the appellee; the cotton was not delivered according to their terms, and on the 10th of January, 1883, the appellant and appellee had a settlement of the matter, and fixed the sum of $320.64 to be paid on account of them. When the settlement was made, the appellant executed and delivered to the appellee an instrument in the words following:

$320.64. On or by the 1st day of November, 1883, I promise to pay James D. Pelt, or bearer, the sum of three hundred and twenty dollars and sixty-four c'ts, for value received with ten per cent. interest from the 1st day of November, 1882. This note given as aid for that of the purchase money of parcel land, the W½ of NW¼, sec. 21, and the SE¼ of SE¼, sec. 17, and the NE¼ of sec. 20, all in

township 15, range 20 west, and vendor's lien is hereby reserved on said land for the purchase money, all of the above land being in the county of Columbia and State of Arkansas.

This the 10th day of January, 1883.

Witness my hand his

JOHN M. x BELL.

Witness, J. D. PELT. mark

In the deed from Atkinson there was no express reservation of a lien. The complaint alleges the execution of the deed, the assignment of purchase money notes, that a lien was reserved in the deed, that the settlement of January 10th, 1883, was made, and asks that the lands be charged with a lien and sold to pay the debts.

The defendant filed a general demurrer with answer.

He contests the claim to a lien; first, because the plaintiff sued as assignee, and no lien was expressly reserved in the deed; second, because obligations to deliver cotton, executed in purchase of land, are not secured by a vendor's lien.

The plaintiff demurred to the answer, his demurrer was overruled and the suit went to final hearing. The court found that the instrument of January 10th, 1883, was intended to be, and in fact was, a mortgage on the land, and accordingly rendered judgment, from which the defendant prosecutes this appeal. As the vendor's lien was not expressly reserved in the deed from Atkinson, Pelt as the assignee of Bell's paper could acquire none. Mansfield's Digest, sec. 474 and cases cited. As Bell gave no promissory notes in the purchase of the land, but gave contracts to deliver specified quantities of cotton at specified times, there was no vendor's lien even in favor of the vendor. *Harris v. Haynie*, 37 Ark., 348. The decree can find no support in the original transaction. This conclusion requires that we

1. VENDOR'S LIEN: Sale of land for cotton.

determine the character and effect of the instrument of January 10th, 1883, for the decree must stand upon it, if at all. What is the instrument? It comprises, first, an ordinary promissory note by the appellant to the appellee; second, a recital that it is given "in aid" of the note for purchase money; third, a stipulation that a lien is thereby reserved on the land, which is accurately described. This is not an ordinary, technical mortgage; it contains neither words of grant nor defeasance. Is it an instrument which a court of equity will enforce as an equitable mortgage? Such an instrument has never received the consideration of this court, so far as we are advised. In the case of *Barnett, et al., v. Mason, et al.*, 7 Ark., 254, a bill of sale was offered in evidence and excluded, which contained the statement, "that B. A. & L. are to retain a lien on the boat until the above named notes are discharged." The court say that "the mere allegation in the bill of sale that they retained a lien, cannot be considered a mortgage." Again a note contained this expression: "The tax lien given by law on my property, for which this money was advanced to pay taxes, I hereby recognize." But the law gave no lien, and as the owner only "recognized" the lien given by law, there was no lien fixed by the notes. *Peay, admr., et al., v. Field*, 30 Ark., 600. A lien was claimed on a crop upon the following expression in a note: "This note constitutes a lien upon the cotton and corn raised upon said land this year." It was held not to create a lien; to be a mere assertion, and not an undertaking. *Roberts, et al., v. Jacks*, 31 Ark., 597. A lease executed by both lessor and lessee, reserving a lien in favor of the lessor on crops to be grown on the demised land, was held to be a chattel mortgage. *Mitchell, et al., v. Badgett*, 33 Ark., 387. A deed recited that "said lands and improvements are

held bound for the payment of said two notes." This was held to be an equitable mortgage. *Talieferro's Exr. v. Barnett*, 37 Ark., 511. The recital in a promissory note given for land, that "this note is to stand as a lien on said land until fully paid," was held not to create a mortgage. No precise reason is given for this conclusion. The fact that the expression contains no words of grant is alluded to, but the opinion seems to rest on the reason that controlled in the other cases cited, that the terms used implied the mere suggestion of a fact, and not a stipulation, a statement and not an obligation. *Waddell, admr., v. Carlock*, 41 Ark., 523. The defect pointed out in the cases cited was that, while the instrument under consideration contained statements in one form or another, that liens would be or were retained, they indicated no intent to create or fix the liens. They professed to state what were assumed as facts, but indicated no purpose to accomplish them. The instrument under consideration provides that "a vendor's lien is hereby reserved." It is not a recital of what has been done or exists, but is a manifest effort, by its own terms and through its own efficiency to produce the result. Mr. Pomeroy says that, where an instrument manifests an intent to charge or pledge property, real or personal, as security for a debt, and the property is so described that the thing intended to be charged or pledged can be sufficiently identified, it is held that a lien follows. 3 Pom. Eq., sec. 1237. An attempt to create a security in legal form having failed, equity will give effect to the intention of the parties and enforce the lien as an equitable mortgage. Any agreement that shows an intention to create a lien is in equity a mortgage. 1 Jones on Mort., 168; *Daggett v. Rankin*, 31 Cal., 321. In the case of *Flagg v. Mann*, 2 Sum., 486, Judge Story said, if a transaction re-

2. EQUITABLE MORTGAGE. Instrument intended to secure debt.

solve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage.

These principles have received a wide, if not universal recognition and application. A purchaser of land executed two notes with sureties, reciting that they were given for land, and providing, "In case I fail to pay said notes, I do bind myself, etc., to convey to said sureties the aforesaid land." Upon default in paying said notes, the sureties were held entitled to a mortgage on the lands. *Courtney v. Scott*, Litt. (Ky.) Sel. cases, 457. So an instrument reciting that the maker had employed counsel to prosecute a claim for certain land, and would at the end of the litigation pay them a certain sum "out of the land," was held to be a mortgage. *Jackson v. Carswell*, 34 Ga., 279. An agreement by the owner to pay the occupant of his land a given sum, conditioned, that if the land should be sold to raise the amount, the occupant would surrender his possession, meantime the use of the land to offset interest, was held to be an equitable mortgage and to charge a lien on the land. *Blackburn v. Tweedie*, 60 Mo., 505. A purchaser gave his obligation for the purchase of land. On the face of the bond and immediately below the seal, it was stated that the land should be liable to the debt until the purchase money was paid. It was held in a suit by the assignee of the bond that it was an equitable mortgage. *Eskridge v. McClure*, 2 Yerg., 84. The owners of land agreed in writing, to pay a sum of money out of the proceeds of sale of land if they were sold; "it being understood and agreed that the debt was a charge on their joint estate in the land." This was held to charge the land with the payment of the debt. *Pinch v. Anthony, et al.*, 8 Allen, 536.

A vendor conveyed by absolute deed, but took the notes of his

purchaser in which a lien was reserved on the lands conveyed. Renewal notes were given, containing similar reservations. It was held in a suit on them, that they constituted a lien on the lands, which a court of equity would enforce. *Helm v. Weaver*, 6 S. W. Rep., 420. A deed contained a stipulation, that, if notes given in purchase of the land conveyed were not paid at maturity, it should be lawful for the sheriff to sell the lands conveyed, to satisfy the notes. The notes were assigned and the assignee brought suit to establish and foreclose a lien on the lands. As the vendor's lien had not passed to the assignee, the case turned upon the clause authorizing the sheriff to sell. It was contended that this provision constituted neither a mortgage nor deed of trust; that there must be words of grant to constitute either. The court held that although it was not "an ordinary technical mortgage or deed of trust" that it was intended to be a security for a debt, and was therefore an imperfect or equitable mortgage. This decision was placed upon the ground, that courts of equity look through form to the substance of an agreement, and exact no peculiar formula to create a lien on lands. *Moore v. Lackey*, 53 Miss., 85. The case of *Mitchell, et al., v. Wade*, 39 Ark., 377, seems to sustain the doctrine of the cases last cited. Pillow was involved in a lawsuit with the executors of Pointer, affecting the title to lands. A compromise was agreed on, and in order to perfect it, Pillow borrowed money from Wade, a person not interested in the controversy, which was paid the executors. They conveyed to Pillow a tract of land comprising a part of the Defeat Cone place, by deed which contained the following stipulation: "The said G. J. Pillow stipulates and agrees that his portion of the Defeat Cone place shall be still held subject to a lien in favor of Wade." This was held to give Wade a perfect

lien on the land. We are satisfied that Bell intended in the instrument of Jan. 10th, 1883, to fix a charge upon the land. It contravenes no rule of law or public policy, is supported by a valuable consideration, and accurately describes the land. There can be no doubt of its validity as a lien, unless it be necessary in order to create one, to square the instrument by inflexible rules of technical conveyancing. The courts of equity make no such requirements. The findings and judgment of the circuit court were correct, and the judgment is affirmed.

3. SAME:

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ROBINSON V. INSURANCE CO.

1. EVIDENCE: *Contradicting policy of insurance.*

Parol evidence is inadmissible to contradict the provisions of a policy of insurance.

2. PROMISSORY NOTE: *Given for insurance: Consideration:*

The plaintiff by its policy agreed to insure the defendant from loss by fire from the first of February, 1885, to the first of February, 1890, in consideration of a certain premium. But the policy provided that it should be void during such portion of said period as any past-due note of the defendant, given for any part of the premium and held by the company, should be unpaid in whole or in part. The defendant paid part of the premium in cash and for the balance executed his note due Dec. 1st, 1885. The note recites that it was given in payment of premium and that if it is not paid at maturity, the policy should then cease and be void until full payment of the note. The plaintiff's action on the note was defended on the ground that it was without consideration after its maturity. *Held:* That the insurance being for one indivisible period, in consideration of one indivisible premium, the note was part of the consideration upon which the defendant was insured up to the time of its maturity; and as the policy was thereafter only suspended by the default of the defendant and could be revived at any time by the proper payment, the note was not without a valuable consideration to support it.

3. PRACTICE IN SUPREME COURT: *Objection not made in trial court.*

An objection to the ability of a plaintiff to prosecute an action, will not be entertained in the supreme court where it is not made in the court below.

APPEAL from *Faulkner* Circuit Court.

J. W. MARTIN, Judge.

P. H. Prince, for appellant.

The note was null and void for want of consideration. The policy was void by its own terms after Dec. 1, 1885, and appellee not being bound in case of loss, appellant was not bound.

The application, note and policy all constitute one contract (7 N. W. Rep., 139), and the question is, What is the contract? In a similar case the policy was held void, and the risk being ended that there was no liability for the deferred premium. 41 Mich., 385.

Robinson's testimony should not have been excluded. 27 Ark., 328; 25 Id., 380; 15 Id., 543; 4 Id., 179.

The appellant paid the full amount of the earned premium to the time the policy became void and there could be no further liability.

The appellee, a foreign corporation, failed to show compliance with the laws of Arkansas. Mansf. Dig., sec. 3827; 1 N. W. Rep., 877.

J. H. Harrod, for appellee.

1. Robinson's testimony properly excluded. 15 Ark., 543; 17 Wall., 96; 23 How., 49; 22 Id., 28; 109 U. S., 672.

2. The policy was not null and void *absolutely*, but the rights of the assured were simply suspended during default. Upon payment the policy becomes valid. Similar policy upheld in 19 Mich., 451.

No objection was raised in the circuit court to the com-

pany's capacity to do business in this State. It is too late now. Ark. Rep. *passim*. 43 Ark., 219; 43 Id., 535. See also, 72 Ind., 95; 60 N. H., 458.

HEMINGWAY, J.

The plaintiff, appellee here, sued defendant, the appellant here, on a note dated January 30 and due Dec. 1st, 1885.

The note recites that it was given in payment of premium on an insurance policy, and that if it is not paid at maturity, the policy shall then cease and determine, and be null and void, and so remain until the same shall be fully paid.

The defendant answers that he paid as a premium $41.50 cash for the protection of his property until Dec. 1st, 1885, the day the note matured; that he gave the note in payment of premium from Dec. 1st, 1885, until Feb. 1st, 1890. That by the terms of the note and policy of insurance it was provided, that if the note was not paid at maturity the policy should cease, determine and be null and void, and so remain until the note should be paid. That the note was not paid at maturity, the policy became inoperative, and the company ceased to be liable upon it, and the note was therefore without any consideration to support it. The cause was submitted to the court sitting as a jury, and the defendant introduced in evidence the policy and offered to introduce the testimony of A. P. Robinson, which was excluded. The policy is very long, but its provisions material to the determination of this cause are about as follows: The company, by the policy, in consideration of $40.50 cash and the note sued on, insures Lester L. Robinson against loss or damages by fire, etc., on property specified, in an amount specified, from the first of February, 1885, to the first of February, 1890, except such of said period of time as the company shall hold against the assured any promissory note past due

and unpaid, in whole or in part, given by the assured for the premium charged for the policy or any part of it; and during such portions of time the policy should be null and void and so continue until such note is fully paid. The note was to be taken as a payment until its maturity and default in paying it, but if a loss occurred while such default continued, there could be no recovery on the policy.

The defendant asked the court to make two declarations of law as follows: "First—Defendant asks the court to declare the law to be, that the application, insurance policy and note, all must be taken together, as one entire contract; and that said policy being null and void at the time the note was due, if not paid, that the note was also null and void and the plaintiff could not recover. Second—Defendant asks the court to declare the law to be, that if the evidence shows that the full payment of premium was paid on the policy up to December 1st, 1885, the date when said note was due, that there was no consideration for the execution of said note and the plaintiff could not recover." The court denied the request and found in favor of plaintiff.

Defendant filed his motion for a new trial, alleging as error that the court excluded the testimony of A. P. Robinson, and that the court declined to declare the law as requested. The motion was overruled, judgment rendered for plaintiff and the defendant prosecutes his appeal, and we are asked to reverse the judgment for the reasons set out in the motion for a new trial.

1. EVIDENCE: Contradicting policy of insurance.

Part of Robinson's testimony, which was excluded, was wholly irrelevant, and could have availed nothing if admitted. The balance was in direct contradiction of the provisions of the policy and therefore incompetent. There was no error in its exclusion.

2. PROMISSORY NOTE: Given for insurance: Consideration.

But it is earnestly contended that the declarations of law were proper, should have governed in determining the cause, and that the note was without any consideration and void. Whether this contention be well taken or not must be determined by an inspection of the policy, which is without ambiguity or uncertainty. As appears from examining it, the company agreed to insure the appellant from loss by fire for the period of five years, for the consideration of $41.50 and the note sued on, which was taken as payment until its maturity and default in paying it. By its terms it provides for one entire, indivisible period of insurance for the consideration of one entire, indivisible premium. No part of the consideration procured the insurance for any particular portion of the time, but the entire insurance was procured by the entire consideration. The contract certainly furnishes no intimation or guide by which any part of the premium paid could be apportioned to any part of the term. The assured was protected by the insurance ten months, and there is nothing in the contract that indicates that the note was not as much a consideration for this insurance as the cash paid. The appellant, to justify his position, refers us to the case of the *American Ins. Co. v. Isaac Stoy*, 41 Mich., 385 (S. C., 1 N. W. Rep., 877), and to none other.

We think the case fails to support his position, but on the contrary concedes its error.

In that case the policy of insurance was for five years, and the insured made a cash payment as premium for the first year's insurance, and gave an installment note, comprising four equal annual payments, each as a premium for one year's subsequent insurance. The policy provides that if either installment was not paid at maturity, the policy should be void. It clearly appeared that each installment in the note was given for insurance during a distinct year. The

company sued on the note and it was held that it could not recover, but the court drew the distinction between the case decided and such cases as the one at bar, in which it recognized the law as the other way. In the same court a case similar to the one at bar had been previously decided. The policy was held not to be void in case of default in paying the notes, because it was expressly stated that it could only be void while the past due note, or a part of it, was unpaid; in case of default there was a suspension of liability which the assured could revive any time by payment of the note. The court expressed its inability to discover any ground on which the validity of the note could be questioned, because the parties were competent to make their own contract, agree upon the rate of premium, and determine contingences upon which the period of insurance might be made shorter. *Williams v. Albany Ins. Co.*, 19 Mich., 451. The above views are sustained by the supreme court of Indiana. *Am. Ins. Co. v. Haly*, 60 Ind., 515. The note was a part of the consideration upon which Robinson had insurance from Feb. 1st to Dec. 1st, 1885. That it was suspended, was due to his failure to discharge his obligation. He could have revived it at any moment. There was a valuable consideration to support it, and the court properly refused the instructions.

3. PRACTICE IN SUPREME COURT: Objection not made below.

Appellant urges that defendant is a foreign corporation, and to maintain this suit must prove that it has complied with the State laws relating to foreign corporations doing business in the State. No such objection was made in the circuit court, and an objection to the ability of a plaintiff to prosecute an action will not be entertained in this court if not made below. There is no error and the judgment is affirmed.

CITY OF FORT SMITH V. DODSON.

1. SALES: *By officer without judicial warrant: Compliance with law: Burden of proof.*

Where an officer sells property under a special statutory authority, without judicial warrant and acting upon a state of facts of the existence of which he judges for himself, a strict compliance with the law is exacted of him, and must be proved affirmatively by all persons who justify under him. Proof of such compliance cannot be supplied by the legal presumption that the officer did his duty.

2. SAME: *Same.*

In an action against a city to recover the value of a hog, sold by the marshal under an ordinance prohibiting the running at large of swine, and providing that such stock when found at large in the city limits shall be impounded by the marshal and sold by him at public auction after a prescribed notice, the burden is upon the defendant to prove the fact that the notice required by the ordinance was given.

APPEAL from *Sebastian* Circuit Court, Ft. Smith District.

JNO. S. LITTLE, Judge.

T. S. Osborne, City Attorney, for appellant.

A city marshal is a ministerial officer. 2 Rapalje Law Dec., 822; 39 Ark., 82. The presumption is that he complied with the ordinance, until the contrary is shown. Whart. Legal Max., lxv, 145; 2 Ark., 26; 25 Id., 311; 30 Id., 69; 31 Id., 609; 12 Wheat, 69; 8 Conn., 134; 3 Yerg., (Tenn.), 308; 10 Am. Dec., 680; 45 Miss., 71; 20 Kas., 572.

Plaintiff must make out her case by a preponderance of evidence. Mansf. Dig., sec. 2870-1.

Clayton & Forrester, for appellee.

The burthen of proof was on the appellant, to show that the ordinance had been complied with. Wade on Notice (2d ed.), sec. 1105, 1122; 35 Ill., 417; 12 Cush., 98; Bailey Onus Probandi, 231-3; Wade Notice, pp. 6, 7;

Sumn. (U. S.), 390; 13 La. Ann., 397; 19 N. J. Eq., 220; Wood Pr. Ev., p. 646, notes 10 and 11; 28 Me., 481; 21 Peck., 55; 13 Id., 384; 13 Ill., 64; 7 Barb., 39; 16 Penn. St., 22; 3 Mo., 302; 8 Id., 344.

HEMINGWAY, J.

This is an action in favor of the appellee, to recover of the appellant twenty-five dollars, the value of a hog. It was tried in the Sebastian circuit court upon an agreed state of facts, substantially as follows: The hog belonged to plaintiff; it was worth twenty-five dollars; it was sold by the defendant's marshal, who assumed to act by the authority of a city ordinance; the ordinance was in full force, prohibited the running at large of swine on the streets and unenclosed grounds of the city, and cast upon the marshal the duty to take up and impound swine found at large in violation of the ordinance.

The ordinance further provides that "within two days after impounding the animal the city marshal shall cause to be posted in three public places in the city limits a notice of the same, containing a description of the animal so impounded, the date of impounding, and notice that the same shall be sold at public auction, to the highest bidder, five days from the date of said notice, unless said animal shall be reclaimed before that time." There was evidence tending, upon the one side, to prove that the prescribed notice had been given; and, upon the other, that it had not been given. There was no other issue in the cause. The plaintiff asked and the court gave the following instructions: "That the burden of proof is upon the defendant city to show by a preponderance of the testimony, that the city marshal complied with the ordinance read in evidence, by giving the notice therein required,

before making the sale." To this action of the court the defendant excepted, and asked the court to give instructions placing the burden of proof that notice was not given on the plaintiff. The court refused to give the instruction asked, and the defendant excepted.

There was verdict and judgment for the plaintiff, from which the defendant prosecutes this appeal. The only error complained of, is the action of the court in giving the instruction asked by the plaintiff and refusing the one asked by defendant. Did the law cast upon the plaintiff the burden of proving that the notice had not been given? Or was the burden cast on the defendant to prove that it had been given? A sale without the notice would be a nullity. In one case, where notice had been given for a time less than that required, by only a part of a day, the sale was held void. In another, the law required ten days' notice and but eight days' notice was given, and the sale was held void. Notice is required to apprise the owner that his animal is impounded and will be sold unless reclaimed. In the ordinance under consideration, the notice is given by posting bills in three public places in the city; and if the animals posted are not reclaimed in five days, they are sold by the marshal, and title transferred. Notice is the fact that imparts validity to the marshal's act, and deprives the owner of title to his property. It is the warrant of the officer. It is affirmative, defensive matter; it is matter peculiarly within the knowledge of the city. In so large a city as Fort Smith, while the city could easily prove whatever notice it gave, it would be exceedingly difficult for the owner to prove that no notice had been given. Any number of persons might testify that they had not seen the notices; still the fact would not be

proven that notices had not been posted. That is the best proof the owner could offer. If the notice had been given, it was done through the agent of the city, who could be called and easily establish the fact.

A general rule of evidence requires "that the issue must be proved by the party who states an affirmative; not by the party who states a negative." Another, that "the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant." Bailey's Onus Pro., page 1.

If the action of the lower court should be tested by these rules there would be little doubt that it was correct.

1. SALES: By officer without judicial warrant:

But it is contended that the sale was made by an officer, and that the law will presume that all things requisite to its validity were done. This contention is met by the opposing contention, that the law raises no presumptions in favor of the sales of officers made under special statutory authority, without judgment or decree of court, and that they depend for their validity upon a strict compliance with the statutes authorizing them.

In the case of *Rose v. Ford*, 2 Ark., 26, a sheriff made return upon a summons in the following language: "Executed the within by reading, April 9, 1839." The rule under consideration was invoked to sustain the return. The court held the service bad, and declared that the rule raised for facts stated the presumption of truth, but could not be invoked to supply necessary facts that were omitted.

In the case of *Hogins v. Brashear*, 13 Ark., 242, the plaintiff offered in evidence a tax deed. Objection was raised to its introduction, because its recitals failed to show a sale according to law. The court held that the deed should dis-

close the performance of all "essential prerequisites," and that nothing was presumed as to their performance. We think the correct application and extent of the rule is defined by the court, in the case of *Davany v. Koor*, 45 Miss., 71. The matter under consideration was the lease of sixteenth section lands, and what presumptions would be raised by the law as to the performance of conditions essential to its valid execution. The court say: "When the register, receiver, or State commissioner issues a paper on its face conforming to the law, that a certain person has become the purchaser, it has always been held that the paper itself is *prima facie* evidence that all things required to be done have been performed. It is the State who can only act through agents and officers, disposing of lands held by her for public purpose, and not like the case of a marshal or tax collector, who assumes the right to sell private property for a sum due to the government. Before the citizen can be deprived of property for public uses, or to satisfy a debt to the State, the due course of law must be rigidly pursued. An officer laying his hand upon the property of the citizen, and passing the title by sale, must be strictly within the pale of the law, and his purchaser must show full compliance." The rule of presumption would be the same, whether the city or its purchaser were defending. The law could not exact a more rigid compliance with the conditions of authority of a tax collector than of a pound keeper. Each acts without any warrant from a court, upon a state of facts authorizing it, of the existence of which the pound keeper certainly judges alone for himself. It is a rule of law as well as of common justice then, which exacts that the pound keeper must show that he has strictly complied with the law to justify an action brought against him by the owner of the animal. Dil. Mun. Corp.,

Compliance with law.

Burden of proof.

sec. 150. That the notice must be given, and that the burden of proving it is upon the pound keeper or those who justify under him, whether the proof can be made easily or not, is announced by high authority. *Clark v. Lewis*, 35 Ill., 417; *Coffin v. Vincent*, 12 Pick., 98; *Morse v. Reed*, 28 Me., 481.

2. SAME. Mr. Chief Justice Marshall, discussing a claim under a tax deed, said: "If the validity of a deed depends on an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act as he would be bound to prove any matter of record. * * * These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title. * * * It is easy, for example, to show that the collector has posted up the necessary notifications in four public places in his election district as is required, but very difficult to show that he has not." He then sustained an instruction of the circuit court to the effect that the burden rested upon the tax purchaser to show that the lands had been advertised for sale as the law directed, and that such proof could not be supplied by the legal presumption that the officer did his duty. *Williams et al. v. Peyton's Lessee*, 4 Wheat., 77. The sale of property under this class of ordinances, like the sale for taxes, is in derogation of private property rights. It deprives an owner, *in invitum*, of his property and transfers it to another. Attempts to enforce these ordinances should not be received with more favor than attempts to sell for taxes. They affect the citizen in the same way, are executed alike without judicial warrant, and a rigid compliance with the conditions of authority should be exacted of officers and proven by all persons who justify under them.

The judgment is correct and will be affirmed.

THOMPSON V. SHERRILL.

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1. TAX SALES: *Statute governing right of redemption: Exceptions.*

The right to redeem lands from a tax sale depends upon the statute in force at the date of the sale; and the strict rules that apply to others, apply to persons under disabilities unless the statute in terms makes exceptions in their favor.

2. SAME: *Same.*

The overdue tax act, approved March 12, 1881, provided that lands sold under it might be redeemed "within the period fixed by law for the redemption of lands sold for taxes;" and the law then in force fixed the period of redemption at two years from the date of sale, but allowed *femmes covert* to redeem within two years after the removal of their disabilities. The revenue act of March 31, 1883, which took effect from its passage and repealed all conflicting acts, also fixes the period for the redemption of lands from tax sales at two years, but contains no exception in favor of married women. Pursuant to a decree rendered under the overdue tax law, the lands of the plaintiff, a married woman, were sold for taxes on the 16th day of May, 1883, after that law had been repealed. *Held:* That the plaintiff's right of redemption was governed by the act of March 31, 1883, and was therefore limited to the period of two years from the date of the sale.

APPEAL from *Pulaski* Chancery Court.

D. W. CARROLL, Judge.

Marshall & Coffman, for appellants.

Chapter 104, Mansfield's Digest repeals by implication so much of sec. 4489, Mansf. Dig. as exempted a married woman from the statute. 47 Ark., 558. The Constitution of 1874 authorizes her to convey as a *femme sole*. 43 Id., 160. Her name is omitted from the privileged class in the matter of redemption of lands, by act March 31, 1883. Mansf. Dig., sec. 5772. After that time she has only two years to redeem, or she is barred.

The rule in redemption from execution sales is that the law in force at the time the sale is made governs. 31 Ark., 429. The same applies to sales under decrees in chancery.

Mansf. Dig., sec. 3072. Also to tax sales. Cooley Tax., p. 545; Borough on Tax., p. 322; 11 Paige Chy., 484.

The *disability*, to be availing, must exist at time of sale. Borough on Tax., p. 362; Desty on Tax., p. 1002.

The legislature can remove disabilities at any time. They are an act of grace—and being a part of the remedy or procedure, may be changed at any time, during suit, or after appeal, and no contract right is impaired. Cooley Const. Lim., p. 366; 6 Sup. Ct. Rep., 209; 115 U. S., 620; 48 Ark., 183.

Sec. 11 of the overdue tax law is not binding on future legislatures.

All statutes *in pari materia* should be construed together, even though one or more be repealed. Smith St. and Const. Law, sec. 637-8; Potter's D. W. on St., p. 189, note 9.

The overdue tax law was continued in force as to pending suits. 44 Ark., 273. Construing the three acts together as *in pari materia*, and remembering that the latest law in force at the time of sale governs in matters of redemption, Mrs. Sherrill is barred by the act of 1883.

John B. Jones, also for appellant.

There is no inherent right in any one to redeem from tax sales or decrees. It is a mere act of grace, or statutory privilege. Prior to 1868, minors and married women had to redeem within the same period as other persons. 20 Ark., 17.

Married women are not expressly exempt from the provisions of the overdue tax act. The only provision for redemption is found in sec. 11, which provides for redemption within the same period fixed by law for other lands sold for taxes, *i. e.*, two years, with special privilege to married

women. Construing this section with sec. 15, it is plain the legislature intended to allow only two years, and did not embrace the exception. The special provision of sec. 15 controls the general one in sec. 11. 17 Wis., 530; 38 Ill., 451; 15 Ark., 583; Potter D. W. on St. and Const., 272; Endlich on Int. St., 43, 44.

The act 1883, general revenue law, repealed all former laws on the subject, and married women are not exempted—she must redeem as others. 1 Pick., 45. The law at time of sale governs the redemption, the sale occurred after the passage of the act of 1883, and the appellee is barred.

Blackwood & Williams, for appellee.

It was the settled policy of the law before the passage of the overdue tax law, that married women had two years after the removal of their disabilities to redeem, and they intended to include it in secs. 11, 13. 41 Ark., 62; Gantt's Dig., sec. 5197. They simply embodied into the act sec. 5197, with its exceptions, as much so as if they had re-enacted it.

The general revenue law of 1883 does not repeal sec. 5197, except by implication, by omitting to name her in the exceptions. But general laws do not repeal special laws (as the overdue tax act) on a different subject. Blackwell on Tax Titles, 480; Sedg. Con. St. and Const. Law, 97, 104; Potter's D. W. on St., etc., p. 154; 41 Ark., 152; 24 Id., 479; 34 Id., 499; *Chamberlain v. State*, 50 Ark.; 19 Iowa, 61; 20 Id., 24.

Redemption statutes are liberally construed. 9 Watts, 99; 1 Rob., (La.) 421; Black. Tax Titles, 432.

See opinion attorney general, December, 1886, p. 66, in which a married woman's right to redeem is upheld.

HUGHES, J.

On the 16th day of May, 1883, pursuant to a decree of condemnation, by the Pulaski chancery court, the E. half N. W. quarter and N. half S. E. quarter, Sec. 28, T. 1 S., R. 10 W., were sold to the State of Arkansas, under the "over due tax law," and afterwards certified to the State Land Commissioner. On the 16th day of March, 1886, the State sold to appellant D. H. Thompson, the E. half of the N. W. quarter, and to appellant Boss Henson the N. half of the S. E. quarter of Sec. 28, T. 1 S., R. 10 W., and made deeds to them for the same. Appellee brought this suit in chancery to redeem these lands, September 3, 1886, more than two years after the sale of them to the State, under the decree for overdue taxes, and alleges that she was at the date of the sale and thence until the filing of her complaint, a married woman, and that the lands were her separate property; that she had tendered to each of the purchasers the amount necessary to redeem the land purchased by him and that the same had been refused; and she makes a tender of said amounts in her complaint. Defendants filed separate answers, denying plaintiff's rights as a married woman, or otherwise, to redeem, and asked that their answers be taken as demurrers, and that they be considered as cross complaints and that their titles as against the plaintiff be quieted. Plaintiff demurred to that part of the answers of defendants, which denied the right of plaintiff as a married woman, to redeem the lands in controversy. This demurrer was overruled, with leave to the plaintiff to raise the same questions of law at the final hearing; the cause was submitted on complaint, answers, exhibits and depositions. The chancellor found that plaintiff was a married woman at the date of the forfeiture of the lands for the non-payment of the taxes due

thereon, and at the date of the decree; that she was the owner of said lands, and was the owner thereof at the date of the forfeiture, and had been in possession since March, 1867; and held that she had the right to redeem the lands, and so decreed; that the deeds of defendants be cancelled, and as against them, that plaintiff's title be quieted. Defendants excepted and appealed.

Sec. 11 of the act entitled, "An act to enforce the payment of overdue taxes," approved March 12, 1881, provides that "The owner of any lands thus sold may redeem from the purchaser at any time within the period fixed by law for the redemption of lands sold for taxes." The law in force at the time of the passage of this act fixed the period for the redemption of lands sold for taxes at two years from the date of the sale, but allowed *femmes covert*, insane persons, minors, or persons in confinement two years after the removal of such disabilities within which to redeem their lands which had been, or might thereafter be sold for taxes. (Sec. 5197, Gantt's Dig.) The revenue act of March 31, 1883, which took effect from its passage, provides (in sec. 136) that the period allowed for the redemption of lands sold for taxes shall be two years from the date of the sale, and that insane persons, minors, or persons in confinement may redeem within two years from and after the expiration of such disability, but did not extend the exception to married women. (Acts of 1883, p. 268.)

February the 17th, 1883, "the overdue tax law" was repealed, three months before the sale under the decree of the chancery court in this case. The act of 1883 repealed all laws in conflict with its provisions. The decree under the "overdue tax law" was rendered one day before the repeal of the law. By what law is the right of redemption gov-

erned, that in force when the overdue tax decree was rendered in this case, or that in force when the sale was made under the decree?

1. TAX SALES: Statute governing right of redemption: Exceptions.

The right to redeem lands from a tax sale depends upon the statute in force at the date of the sale, and the strict rules that apply to others apply to persons under disabilities, unless the statute, in terms, makes exceptions in their favor. The right to redeem is a privilege, a favor conferred by statute, it does not exist independent of the statute. Cooley on Taxation, 533; *Craig v. Flanagin, et al.*, 21 Ark., 322. The general revenue law of March 31, 1883, was in force when the sale of the lands in controversy was made. All laws in conflict with it were expressly repealed by it. By it the time for redemption of lands sold for taxes was limited to two years from the date of the sale; but an exception was made in favor of insane persons, minors, and persons in confinement, who were permitted to redeem their lands sold for taxes within two years from the expiration of such disability. It makes no exception in favor of married women.

2. SAME:

Without deciding whether insane persons, minors and persons in confinement had longer time than two years, under the "overdue tax law" and other revenue acts within which to redeem their lands sold for taxes, under the "overdue tax law," we hold that the appellee's right to redeem the lands in controversy was limited to two years and was governed by the act of 31st March, 1883, in force when the lands were sold under the decree of the chancery court, under the "overdue tax law," that there was no exception in the act of 1883, in favor of married women, under which a married woman could claim a longer time within which to redeem than that allowed other persons generally. The decree of the chancery court is reversed and appellee's bill is dismissed.

EUREKA SPRINGS RY. V. TIMMONS.

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1. RAILROAD COMPANIES: *Liability as common carriers.*

The defendant is a corporation organized under the laws of this State, and the plaintiff while a passenger on its train was injured by an accident which occurred in the State of Missouri, on a connecting road over which the defendant was then operating its trains and which belonged to another corporation organized and existing there. *Held:* That by the common law—which in the absence of proof to the contrary is presumed to be in force in Missouri—the defendant, as a common carrier, is liable for the injury if sustained through its negligence.

2. SAME: *Evidence of negligence.*

The fact that a car leaves the track is *prima facie* evidence of negligence on the part of the company.

3. SAME: *Bound to utmost diligence.*

Passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and if an injury occurs, by means of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the injury occurs, the carrier is responsible. *George v. St. L., I. M. & S. Ry. Co.*, 34 Ark., 613.

APPEAL from *Carroll* Circuit Court.

J. M. PITTMAN, Judge.

Crump & Watkins, for appellant.

1. The injury occurred on the road of a Missouri corporation which had no legal existence in Arkansas. 16 How. U. S., 325; 13 Pet., 519; 13 Wall., 270. This company is not liable for an injury occurring on another road. Wood & Field on Corp. 2nd ed., sec. 326.

2. The damages are excessive. The verdict an outrage. 46 Ark., 275; 25 Id., —; 39 Id., 387.

3. It was error to instruct the jury that defendant must show * * * that its track and machinery and appliances were the best of the kind and in *perfect* condition, etc. 34 Ark., 613; 40 Id., 298; 2 Rorer on R. R., 948; Sackett

on Inst. to Juries, 266; Hutchinson on Car., sec. 502; 14 How. U. S., 486; 16 How. U. S., 469; 17 Wall., 357; 3 Otto., 291.

The appellee, *pro se*.

1. Appellant does not deny that it *operates* said road and runs its cars to Seligman, Mo. The action is transitory and could be brought in Arkansas. Rorer on R. R., vol. 1, p. 677; 2 Id., p. 1113.

2. The verdict is sustained by evidence and this court will not reverse. 25 Ark., 474. The fact that the car left the track is *prima facie* negligence. 40 Ark., 321; Rorer on R. R., 1066; 68 Mo., 340.

3. Instruction No. 1, for plaintiff is law. 34 Ark., 613.

4. The instruction to the jury that the road, machinery, etc., must be "the *best of the kind and in perfect condition*" is not unreasonable. It is quite different from saying that the appliances, etc., must be *perfect*. See 2 Rorer on R. R., 1050, 1088–9; Lawson Car. Pass., 16.

HUGHES, J.

While a passenger in one of the coaches on the railway of appellant *en route* from Seligman, Missouri, to Eureka Springs, Arkansas, appellee received personal injuries, by the coach in which he was seated leaving the track of the road, and turning over down an embankment. The complaint alleges that the appellant was, at the time, operating its road from Eureka Springs, Arkansas, to Seligman, Missouri, and that appellant was guilty of negligence in using defective machinery and in operating its road, which was the cause of appellee's injury. Appellant denied negligence; denied that appellee was injured, and denied that one of its coaches was thrown from the track; and alleged that that

part of said railroad from the Missouri line to Seligman, Missouri, was owned by the Missouri and Arkansas Railway Company, a corporation organized and existing under the laws of Missouri; but did not deny that it was *operated* by the Eureka Springs Railway Co. (the appellant). There was evidence tending to show that the train consisted of a combination car, passenger coach and engine, and was going down a steep grade, at the rate of 15 or 16 miles an hour, or over; that the rear car jumped the track, ran some three or four hundred feet, came uncoupled and turned over down a steep embankment; that the appellee was in this car; that the car ran off the track within one and a half or two miles of Seligman; that there was at the time no brakeman on the rear car; that appellee was injured in the hand, arm, thumb and leg. Some of the witnesses testified that the train at the time the car ran off the track was running 25 or 30 miles an hour. Edward Church, the engineer in charge of the train, testified that he examined the air brakes and machinery before he left Seligman, and just before the accident occurred, and that they were in good condition; that just before the car turned over he received a signal to stop and applied the air brakes, and about this time received a signal to go, and then he attempted to release the brakes and could not do it; that he could not see the rear car, but that his fireman said that it was off the track, and then he reversed the engine and stopped the train, and that, as the train stopped, the rear car came uncoupled and turned over on its side. He testified that "the train ran about 150 feet with a wheel off the track before I received the first signal. After receiving the first signal we ran about 150 feet, when the train stopped." States, "there were two brakemen on the train that day;" that the position of one was at the front end of the combina-

tion car, and of the other on the rear end of the train. That the duty of the brakeman on the passenger train is to take up slack of brakes and see that the couplings are secure at all times and to receive any signals from the engineer, and in case of accident to apply brakes; that it is a fact that these brakemen can stop the cars, when the air brakes fail to work for the engineer; that it is about 150 feet from where the wheel left the track to where the engineer got the first signal; that immediately there were two taps of the gong, which meant go on. "When I attempted to release the brakes I detected there was something wrong with the brakes, that the air wouldn't release freely, when I told the fireman to look out and see what was the matter, and he said that the rear car was off the track and at that time the rear car had not turned over, and I immediately reversed the engine." "The bell rope was working properly before up to the time of the stopping of the car." "Successive ringing of the bell about half a minute before the train stopped." Powell Clayton testified that the "rails are steel rails of the very best order, the track is an unusually good one. The track on the day of the accident was in excellent condition. The machinery was of the best and improved kind." That he "examined track; it was in perfect condition. If train had been running 25 or 30 miles an hour, it could not have been stopped in distance it was. From where truck got on rail to where car turned over was about 400 feet, and certainly not 500 feet. It would not attract attention so long as truck was on the rail; it ran on rail about 30 feet." Also, that "in case of an accident car conductor should either ring the bell for brakes, or run to water closet and apply air brakes himself." J. B. Obenchain testified, "examined air brakes on coach that came in after accident and they were all right.

Perhaps at speed they were running, if cars were on track would stop at 150 feet. If truck was off rail, can't say how long it would take, (that is, supposing the train to be constructed as it was.)" "The stopping of train at distance I have mentioned depends upon whether everything was quiet and no confusion, and there was prompt action." He also testified that he was the master mechanic for the company, and that his duty was to look after and keep up machinery; that he examined the wheels and boxes on morning before the accident; that there was no defect in the machinery save after the accident; one wheel was out of shape; could not discover any defect in rail. It must have gone 140 or 150 feet, from where it ran off. "Train running on that grade at 15 miles an hour, if heavily loaded, must run 160 or 170 feet before it could be stopped. It is owing to the load. If it was running 25 or 30 miles an hour it would perhaps run 200 or 250 yards before it could be stopped. I can give no explanation of why accident occurred, or the cause of it; road was in good condition, car had been to Pierce City after I examined it; can't say when the wheel got out of shape. The fact of wheel running over track and ties would likely have damaged the wheel." This was substantially the evidence.

The court at the request of the plaintiff instructed the jury that: "If the defendant undertook to carry the plaintiff outside of their charter authority, or by a different conveyance, or time of conveyance, the defendant would be liable as a common carrier, for such injuries as are sustained by the plaintiff through defendant's negligence." 2nd. "That the running of a passenger train of cars off the track is *prima facie* evidence of negligence, either as to the condition and care of the track, and careful running of the train, and if

proven it shifts the burden of proof on to the company to show a proper construction and condition of the track and careful running of the train, or such facts, if any, as will excuse it from liability."

3rd. "If the jury find for the plaintiff they will take into consideration in assessing his damages, his mental and bodily pain and anguish, his incapacity to labor, and the permanency of his injuries, if such elements of damage be shown by the proof."

4th. "If the plaintiff shows *prima facie* negligence on the part of the defendant, then before defendant can excuse itself, it must show by a preponderance of the testimony that its track and machinery and appliances were the best of the kind and in perfect condition, and that the servants of the defendant used proper care in the running of the train, and after they had notice of an imperiling accident, that they used every effort in their power to avoid it." To the giving of instructions three and four for plaintiff, defendant excepted. At defendant's request the court gave the following instructions:

1. "The court instructs the jury that it is the duty of all railroad companies to use all reasonable means and efforts to furnish good and well-constructed machinery, adapted to the purpose of its use, of good material, and of a kind that is found to be the safest when applied to use; and if you find that defendant used these means, and that the accident occurred by reason of a defect in the machinery of the said defendant, which they, by the exercise of all reasonable care and skill could not detect, then you will find for the defendant."

2. "If you find from the evidence that the defendant had used all the proper means in its power to furnish the proper

track, and the best and most approved material and appliances for the carrying of passengers, and you further find from the evidence that the injury was caused by some unavoidable accident, not the fault of the defendant, then you will find for the defendant."

Defendant then asked the court to instruct the jury as follows:

3. "That before you can find for the plaintiff for an injury which occurred to him in the State of Missouri, you must find by a preponderance of the evidence that defendant had either bought or leased said road, running in the State of Missouri, or that it had legally consolidated with its road, which was a corporation under the laws of the State of Arkansas."

4. "I charge *that* the plaintiff has alleged that the road where the injury to him occurred was a corporation under the laws of the State of Arkansas, that this is denied by the defendant, that the burden of proving this fact by a preponderance of evidence is on the plaintiff, and that before you can find for him, you must find that the defendant had bought or leased said road running where the injury occurred, or that it had been legally consolidated into the road which is a corporation in the State of Arkansas."

The court refused to give instructions Nos. 3 and 4, and defendant at the time excepted. The jury found for the plaintiff and assessed damages at $1,000; defendant filed a motion for a new trial, and set up—

1st. "That the verdict is contrary to the evidence."

2nd. "That the verdict is contrary to law and that the verdict is contrary to both the law and evidence."

3rd. "Because the court erred in refusing to give instructions Nos. 3 and 4 asked for by defendant against objection

of defendant, and in giving instructions 3 and 4 asked for by the plaintiff over objection of defendant."

4th. "Because the damages given by the jury are excessive, unreasonable and were given under passion and prejudice."

The court overruled the motion for a new trial, defendant excepted and appealed to this court.

1. RAILROAD COMPANIES: Liability as common carriers.

I. The appellants counsel insist that the injury, if any, was received in the State of Missouri on the Missouri and Arkansas Railway, which is a corporation existing in said State, and organized under its laws, and that no action will lie in Arkansas, unless it be shown, first, that the Eureka Springs Railway Company had purchased or leased the road owned by the Missouri corporation, or that said road had been legally consolidated with the Arkansas road as provided in secs. 5511, 5516, Mansfield's Digest; and cites authorities to show that a corporation can exist only in the state of its creation. The complaint alleges, however, and the answer does not deny that the Eureka Springs Railway Company was *operating* its trains over the other road at the time the accident occurred and, therefore, if the evidence warrants, the company is liable at common law, being at the time a common carrier. In the absence of proof to the contrary the courts of this State will presume the common law to be in force in Missouri. *Thorn v. Weatherly*, 50 Ark., 237, and cases cited. The appellant reasons with much force in urging his objection to the expression in the 4th instruction given for appellee that, "before defendant can excuse itself, it must show by a preponderance of testimony, that its track and machinery and appliances were the best of the kind, and in perfect condition," objecting especially to the latter clause, "and in perfect condition." Conceding that

this would be objectionable without qualification, yet it is qualified by instructions one and two given for the defendant (appellant), which correctly charged the law.

2. Evidence of negligence

II. The car leaving the track was *prima facie* evidence of negligence. This presumption may be rebutted by showing that the injury arose from an unavoidable accident, or an occurrence which could not have been prevented by the utmost skill, foresight and diligence. Railways are not insurers of passengers, but passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and if an injury occurs, by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible. *George v. St. L., I. M. & S. Ry. Co.*, 34 Ark., 613; *L. R. & Ft. S. Ry. v. Miles*, 40 Ark., 298, and cases cited. It was within the province of the jury to determine the facts, and it is a settled principle of law, that where there is any evidence to support a verdict a judgment will not be reversed upon the evidence.

3. Bound to utmost diligence.

Finding no substantial error the judgment is affirmed.

ST. L., I. M. & S. RY. V. RICE.

1. PRACTICE IN SUPREME COURT: *Finding of jury.*

It is the settled policy of this court to uphold the verdicts of juries, where they have passed upon disputed matters of fact, *provided* the evidence be legally sufficient to support their findings. Of this it is the province of the court to judge.

2. CONTRIBUTORY NEGLIGENCE: *Proximate cause of injury.*

In order to defeat a right of action on the ground of contributory negligence, it must appear that but for the plaintiff's negligence, operating as an efficient cause of the injury complained of, in connection with the fault of the defendant, the injury would not have happened.

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3. SAME: *Same.*

The plaintiff sued the railway company to recover for an injury to his hand, sustained while in the employ of the defendant as yard foreman. He had been in the employ of railroads as brakeman and yard foreman for twelve years prior to the date of the injury, and coupling cars was one of his duties. The published rules of the company, of which he had a copy, enjoined the observance of "great care" "in coupling and uncoupling cars," and forbade an attempt to make a coupling unless the draw-bars and other appliances were "known to be in good order." The rules did not require employes to couple cars having uneven draw-heads, with straight links or when the draw-heads were defective. In making couplings it is customary and considered safer to do so with the link in the moving car. The weight of a draw-head is about two hundred pounds. The plaintiff went between a standing and a moving car to couple them. He saw that there was a link in the draw-head of each car. He tried to take the link from the standing car, but found it fast. He saw that the draw-head of that car was one and a half or two inches lower than it should have been and was twisted to one side. While the ordinary play of a link is from six to seven inches, the plaintiff saw that the link in the standing car had no play and that he could not couple with it without raising it up by extra force. He then took the link out of the approaching car and seizing the link in the standing car—which was a straight one—tried to raise it up and his hand was caught and injured. *Held:* That the plaintiff was guilty of gross negligence which contributed directly to produce the injury sustained, and he was not therefore entitled to recover.

4. MASTER AND SERVANT: *Duty of railway company to employe: Negligence.*

It is the duty of a railway company to furnish its employes safe appliances for performing the services intrusted to them, and to exercise care in maintaining such appliances in good repair. To this end the company should have its inspectors not only at its termini, but at convenient stations along its line. And where it knowingly employs and retains an incompetent inspector it will be liable for an injury resulting from his incompetency, although the person injured is the fellow-servant of such inspector. But the master is not an insurer of the servant's safety, nor does he guarantee that the tools, machinery and instrumentalities which he furnishes may not prove defective. He only undertakes to use reasonable care to prevent such results. [*St. L., I. M. & S. Ry. v. Gaines*, 46 Ark., 555.)

5. SAME: *Same: Burden of proof.*

In an action against a railway company for an injury received by an employe through defective appliances furnished for his work, the plaintiff must show by positive proof that such appliances were defective and that the company had notice of the defect, or was negligently ignorant of it.

6. SAME: *Negligence of fellow-servant.*

Where a yard inspector and yard foreman are not only employed at the same yard by the same railroad company, but their separate services have an immediate and common object—the moving of trains—and neither works under the order of the other, but both are subject to the control of the same yard master, they are fellow-servants and the company is not liable to either for the negligence of the other in the performance of his service.

APPEAL from *Nevada* Circuit Court.

C. E. MITCHEL, Judge.

Dodge & Johnson, for appellant.

1. *Contributory negligence.*

By plaintiff's own confession he was guilty of such contributory and palpable negligence as to preclude a recovery. 5 McCrary, 471; 75 Ill., 108; 27 Minn., 141; 47 Miss., 420; 12 Metc., 415; 41 Miss., 131; 2 M. & W., 244; 1 Ad. & El., 36; 4 Beng., 142; 9 Hill, 522; 17 Fed. Rep., 882; 39 Id., 620; 74 Ind., 445.

2. *Disobedience of rules.*

Plaintiff, by violating the rules of the company known to him, or which he ought to have known, took the risk upon himself, and he cannot recover. 51 Miss., 641; 31 Mich., 430; 50 Wis., 66; 33 Ohio St., 227; 67 Mo., 239; 44 Ark., 293; 66 Me., 429; 74 Ill., 344; 98 Mass., 575; 46 Ark., 567; 44 Wis., 250; 92 Ill., 139; 76 N. Y., 125; 50 Iowa, 680; 20 Mich., 105; 5 Ohio St., 541; 45 Ark., 264; 46 Id., 78, 567.

3. *Fellow-servant.*

Even if the car inspector was negligent, it was the negligence of a fellow-servant for which the company is not liable.

46 Ark., 568. This decision is sustained by the weight of authority, citing 2 A. & E. R. Cases, 142; 46 Mich., 258; 11 A. & E. Cas., 187; 77 Ala., 1882; 5 N. Y., 492; 98 N. Y., 211; 17 A. & E. R. Cases, 578; 129 Mass., 271; 124 Id., 114; 62 Tex., 597; 81 N. C., 446; 8 Atl. Rep., 594; 6 N. W. Rep., 485; 2 Thomp. Neg., 1034; 17 N. E. Rep., 216; 54 Wis., 264; 32 Md., 418; 49 Miss., 285; 85 Ill., 502; 78 Ind., 79.

The ruling in the Gaines case is supported by a majority of the State courts and text writers, and should not be disturbed.

Scott & Jones, for appellee.

1. *Contributory negligence.*

Primarily it was the duty of defendant to have exercised ordinary care and prudence, to have furnished plaintiff with safe tools and instrumentalities with which to have performed the services intrusted to him, and to have exercised the same care and prudence in maintaining such tools and instrumentalities in good repair.

The State and Federal courts with singular unanimity have held this to be the master's duty to his servant. The servant has a right to presume the master has performed this duty and act upon this presumption. 48 Ark., 334. And it was the duty of plaintiff to exercise ordinary care and prudence in performing his services. The want of this, if the proximate cause of the injury, would bar a recovery. See 11 East., 60; Beach Cont. Neg., 8; 2 M. & W., 224; 68 Ill., 580. Review the evidence and contend that plaintiff came up to the full measure of his duty, and was neither reckless or imprudent, as he did not know of the defects until after the accident happened. The mere fact that he

knew of defects and uses them, does not necessarily charge him with negligence, or the assumption of the risks. The question is, ought he to have known such risks in the exercise of common sense and prudence? 33 N. W. Rep., 551; 32 Minn., 230; 34 Id., 45; 27 N. W. Rep., 662; 13 Pac. Rep., 491; 3 Col., 499.

2. *Proximate Cause.*

Want of ordinary care is no defence, unless such want of care on the part of plaintiff was the *proximate cause* of the injury. Beach Cont. Neg., 32; 85 Penn. St., 293; 8 A. & E. R. Cas., 130. This is a question of fact for the jury, under proper instructions. 75 Mo., 653; 24 Ohio St., 654; 4 Cal., 30; 11 A. & E. R. Cas., 421.

The burden was on defendant to show by preponderance of evidence that plaintiff was guilty of contributory negligence. 46 Ark., 182; Ib., 436; 48 Id., 475.

3. The plea of "*foreign cars*" will not avail. 30 Minn., 231; 56 Ind., 511; 7 S. W. Rep., 477.

4. As to "Disobedience of Rules," see 57 Miss., 641; 50 Wis., 66; 33 Ohio St., 227; 48 Ark., 348; 110 Mass., 240.

5. *Fellow-servants.*

Review the decision of this court in *R. R. v. Gaines*, 46 Ark., 568, and contend that it should be reviewed and overruled, as against the weight of authority and better reasoning. 55 Vt., 84; 45 Am. Rep., 591; 48 Ark., 345; 100 U. S., 213; 53 Iowa, 395; 55 Ill., 492; 12 Pac. Rep., 352; 29 Kan., 633; 33 Kan., 669; 65 Mo., 225; 78 Mo., 567; 7 S. W. Rep., 477; 26 Minn., 40; 14 Fed. Rep., *King v. O. Ry. Co.;* 116 U. S., 642; 80 N. Y., 46. The true test is the *character* of the act performed, and not the *rank* or *grade* of the person performing it.

6. When the servants of a common master are employed in "*different departments*," the master is liable. 4 S. E. Rep., 211; 12 N. E. Rep., 225; 109 Penn. St., 296; 110 Mass., 240; 14 Am. Rep., 508.

SANDELS, J.

In attempting to couple cars on the yard of appellant, at Texarkana, the appellee's hand was seriously injured. He sued appellant for damages. Defendant denied negligence on its part and alleged that negligence on the part of plaintiff caused the injury.

The evidence disclosed the following facts: That Rice for twelve years prior to the date of injury had been in the employ of railroads as brakeman and yard foreman. Coupling cars was one of his duties. At the time of the injury he was night yard foreman and went to the yard about 5 o'clock p. m. The day yard foreman informed him that a car marked "1130 Way," was to go out to Texas next morning; this car had just come in. About 7:30 o'clock that evening, Rice got some cars from another track and proceeded to couple them to the car "1130 Way." He went between the standing and the approaching cars and noticed the position of the draw-heads of both; that of the standing car (1130) was one and a half or two inches lower than it should have been. He tried to take the link from the draw-head of the standing car, but found it fast. He then took the link from the draw-head of the approaching car. He says he saw that he could not enter the link into the draw-head of the approaching car with the play it had *without straining the link*. He thought that by using *a little extra force*, he could raise the link and make the coupling. The link used was a straight one. He

did not use a crooked link because he thought he could make the coupling with the link fastened in the standing car. The weight of the draw-head is about two hundred pounds. He tried to lift up the link fastened in the depressed draw-head, and his hand was caught and injured. It is customary to have link in moving car; it is considered safer. The cause of the depression of the draw-head of the standing car was the depression of the carrying iron. It is a common thing to make couplings of cars of uneven draw-heads. The railroad company issued to employes, and to plaintiff among others, a time card with its rules and regulations printed on the back. Of these printed regulations, Rule 23 is as follows: "Great care must be used in coupling and uncoupling cars. Do not go between the cars unless they are moving at a slow and safe speed. Nor attempt to make any coupling unless the draw-bars and other appliances are known to be in good order." That the published rules of the company do not require employes to make couplings between cars where one draw-head is lower than another, with straight links or when the draw-heads are defective. It was the business of the plaintiff, Rice, as yard foreman, to couple and uncouple cars, make up outgoing trains, and to move cars marked "B. O." (bad order) to the repair tracks. As at this yard the railroad company had a night and a day foreman, so it had its night and day inspector. Plaintiff did not know that the car "1130 Way" had been inspected, but says: *"I suppose this car was inspected; they always are."* It was the duty of the yard inspector to inspect all cars immediately on arrival at the yard. If he finds a trifling defect it is his duty to repair it; if a serious one he marks it "B. O.," and the yard foreman then moves the injured car to the repair tracks. He carries a wire upon

which nuts of all sizes are strung. The yard master had supervision and control of the whole yard and those employed therein. The distance between the point to which a coupling link may be raised and that to which it may be depressed is six or seven inches.

The court, among other instructions, gave to the jury the following: "The jury are instructed that the duty which defendant owed to its employes, to exercise ordinary care and prudence in furnishing them safe appliances with which to perform the service intrusted to them, and to keep said appliances in good repair, as explained in the above instruction, cannot be delegated to an agent or servant of defendant so as to relieve defendant from responsibility. The defendant may not be able to perform this duty in person, but he must see that some one discharges it faithfully for him. He cannot shirk the responsibility. The law casts upon him certain duties to perform, and if he deputes them to another, the latter, as to these duties is not a fellow-servant with the other employes, but stands in the master's place, and his negligence is the negligence of the master. It is not material what the rank of the servant or agent is, if he is deputed to perform a duty which the employer owes to his employes, the employer is deemed to be present and is responsible for the manner in which it is performed. So in this case, if the jury find from the evidence that the plaintiff, while in the usual course of his employment as yard foreman, as is alleged in the complaint, and without negligence on his part, was injured while coupling cars on the defendant's road, or in the yards of the defendant in Texarkana, Ark., by reason of a defective drawhead or other defective appliances on one of such cars, and such injury was caused by the negligence of a servant of the defendant, whose duty it was to inspect said car and the

draw-heads attached thereto, and to mark such cars as defective or unsafe, and in certain instances to repair such defects, and the injury was caused by a defect in such car or its appliances which, under the rules and regulations of defendant, it was the duty of said servants to have repaired, then the jury are instructed that the negligence of such servants was the negligence of defendant, and their verdict may be for the plaintiff; unless they further find that such servant and plaintiff were at the *time* of such accident fellow-servants of defendant engaged in the same common employment, or that plaintiff was guilty of contributory negligence which was the proximate cause of the injury."

The defendant asked the following instruction, which was refused: "If the jury find from the evidence that the said car upon which the draw-head was, by which the plaintiff claims to have been injured, was inspected, or should have been inspected, at Texarkana before the plaintiff attempted to couple the same, and that through the negligence of said car inspector, the defects in the draw-head, if there were any, were not discovered, the court tells you that the plaintiff cannot recover for any neglect or carelessness on the part of the car inspector, either in not inspecting said car, or in failing to discover said defect, for the reason that said car inspector was plaintiff's fellow-servant, and you must find for the defendant." The jury returned a verdict for plaintiff for $6500.

1. PRACTICE IN SUPREME COURT: Finding of jury.

The first ground for new trial presented by defendant, was that the verdict was contrary to law and the evidence. In support of this it is urged that the undisputed facts show the plaintiff to have so contributed to the happening of the injury as to preclude his recovery in this action; upon the part of appellee it is argued that this question was fully and fairly submitted to the jury, upon proper instructions; and that

where there is any evidence to sustain a verdict this court will not disturb it. It is the settled policy of this court to uphold the verdicts of juries, where they have passed upon disputed matters of fact, *provided* the evidence be legally sufficient to support their findings. Of this it is clearly the province of the court to judge, as decided in *Clark v. Hare*, 39 Ark., 258. The rule which precludes a plaintiff from recovery for an injury received on account of his own negligence, must be considered in determining the legal sufficiency of that evidence here to warrant the verdict.

2. CONTRIBUTORY NEGLIGENCE:

"Contributory negligence consists in such acts or omissions on the part of the plaintiff amounting to a want of ordinary care, as concurring or co-operating with the negligent acts of the defendant, are a proximate cause or occasion of the injury complained of." Beach on Contributory Negligence, sec. 7.

In *Mayor v. Baily*, 2 Denio, 433, Chancellor Walworth, in defining ordinary care, says: "The degree of care and foresight which it is necessary to use must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against." And Beach on Contributory Negligence, sec. 9, says: "He who does what is more than ordinarily dangerous is bound to use more than ordinary care; that is to say, it will require greater care under those circumstances to amount in law to ordinary care, than it would if the undertaking were less hazardous."

Proximate cause.

Mr. Justice Agnew, in 70 Penn. St., 86, says: "Many cases *illustrate*, but none *define* what is a *proximate* and what a *remote* cause." A great array of cases state the rule satisfactorily to this court as follows: "It must appear in order to defeat the right of action, that but for the plaintiff's neg-

ligence operating as an efficient cause of the injury, in connection with the fault of the defendant, the injury would not have happened." 12 Bush., (Ky.) 41; 79 Ky., 160; 55 Texas, 88; 14 Allen, 429; 5 Colo., 197.

3. SAME.

The appellee went between a standing and a moving car to couple them. He saw that there was a link in a draw-head of each car. It was customary to couple with the link in the moving car. He tried to take the link from the standing car, but found it fast. The draw-head was one and a half or two inches lower than it should have been and twisted to one side. While the ordinary play of a link is from six to seven inches, he could not couple with this link without raising the link up with extra force. He then took the link out of the approaching car, seized the link in the standing car, tried to raise it up, his hand was caught and was injured. He knew that the draw-head was depressed; he knew that it was twisted to one side; he knew that the link was fast and that it had no play; and he had in his possession the rules of the company, one of which forbade him to go between the cars to make a coupling, "*unless the draw-head and other coupling appliances are known to be in good order.*" He knew them to be in bad order, yet, because long familiarity with hazardous undertakings had blunted his apprehension of danger, he violated the rules and attempted to make the coupling. Upon his own testimony the court is of the opinion that appellee's negligence was gross, that it contributed directly to produce the injury, and that the court below erred in overruling the motion for a new trial on that ground.

2. The second ground of the motion alleges error of the court in refusing certain instructions prayed by the appellant; and the third ground relied on is error of the court in giving certain prayers of the appellee. They may be considered

together, and we deem it necessary to look only to the second instruction given for appellee, and instruction numbered 12 asked by appellant and refused. Both are set out in full above. The one given, in short, holds that the yard inspector was vice-principal and not a fellow-servant of appellee; while the one refused was based upon the theory that, under the law, the yard foreman and yard inspector were fellow-servants.

We are well aware that there is great conflict upon the question presented by the facts of this case. We know that one line of authority upholds the view of the honorable circuit judge, as also the contention of appellee here; while another sanctions the view of the law expressed in the rejected prayer of the appellant. The court has endeavored to arrive at such conclusions as will best conserve the great interests of those to whom masters and employers owe the duty of protection; as also the ancient principles and land-marks of the law which we should especially guard. As in most cases the chief difficulty lies not in the ascertainment of the law applicable to any one proposition; but in the blending of those principles applicable to the whole case.

4. MASTER AND SERVANT: Duty of railway company to employe: Negligence.

It is urged here that it was the duty of the defendant railway to furnish its employes safe appliances for performing the services intrusted to them, without subjecting them to unusual danger; and to exercise care and prudence in maintaining such instrumentalities in good repair. This is true, both in justice and upon authority. The railway company must have its repair shops to maintain its tools, rolling stock, etc., in good repair, and it must have its inspectors, not only at its termini, where a general overhauling of property is had, but at convenient stations along its line, to detect such injuries as may have been received *en route*. And should such company know-

ingly employ and retain persons incompetent for the performance of this high service, it would be liable to the person injured, though such person were the fellow-servant of the inspector. But "the master is not an insurer of the servant's safety. Nor does he guarantee that the tools, machinery and instrumentalities which he furnishes may not prove defective. He only undertakes to use reasonable care to prevent such results." *St. L., I. M. & S. Ry. v. Gaines*, 46 Ark., 555; *L. R. & Ft. S. Ry. v. Duffy*, 35 Ark., 602; *St. L., I. M. & S. Ry. v. Harper*, 44 Ark., 529.

5. SAME: Burden of proof.

The presumption is that the master has done his duty by furnishing suitable instrumentalities, and when this is overcome by positive proof that the appliances were defective, the plaintiff is met by a further presumption that the master had no notice of the defect, and was not negligently ignorant of it. 46 Ark., 555, and cases cited.

6. Negligence of fellow servant.

Turning to the case before us we find that John Carmichial was yard master at Texarkana. Under his control were two yard inspectors (each having an assistant) whose duties were one operating at night and the other during the day, to inspect all cars immediately upon arrival, to ascertain their fitness to continue their journey, to make trifling repairs, and, where serious damage was found, to mark the cars "B. O." Under the control of this same yard master were two yard foremen, one for night and one for day service, each having two assistants. The duties of these were to uncouple and couple cars, to take apart and make up trains in that yard, and take such cars as the inspector marked "B. O." to the repair tracks. At this yard the inspector determined the suitability of the cars for service, and the yard foreman put them together and made up the outgoing trains. The yard foreman and the yard inspec-

tor are not only employed and paid by the same corporation, but their separate services have an immediate and common object—the moving of trains. Neither works under the order or control of the other, and each takes the risk of the other's negligence. *St. L., I. M. & S. Ry. v. Gaines*, 46 Ark., 555; *Randall v. B. & O. Ry. Co.*, 109 U. S., 478.

While we recognize the liability of the railway company for the wilful or negligent default of its chief inspectors, and those deputed to supervise the condemnation of unsuitable tools, rolling stock, etc., we cannot assent to the proposition that every yard inspector on the line of a railroad is a vice-principal. Upon what we conceive to be the soundest principles, and the weight of authority we hold that the appellee and the yard inspector were fellow-servants, and hence that appellee had no cause of action against the appellant. *St. L., I. M. & S. R. R. v. Gaines*, 46 Ark., 555; *Smith v. Potter*, 2 A. & E. R. R. cases, 142; *R. R. v. Foster*, 11 A. & E. R. R. cases, 187; *Coons v. R. R.*, 5 N. Y., 492; *R. R. v. Fitzpatrick*, 17 A. & E. R. R. Cases, 578; *Whaalan v. R. R.*, 8 Ohio St., 257; *Mackin v. R. R.*, 135 Mass., 201; *T. & P. Ry. v. Harrington*, 62 Tex., 597; *Kirk v. R. R.*, 25 A. & E. R. R. Cases, 512; *Brown v. R. R.*, 6 . W. Rept., 485; *Gibson v. N. Y. Cent. Ry.*, 22 Hun., 292; *R. R. v. Hughes*, 49 Miss., 285; *R. R. v. Murphy*, 53 Ill., 337; *Robertson v. R. R.*, 78 Ind., 79; *Valtez v. R. R.*, 85 Ill., 502.

It follows, therefore, that the court below erred in giving plaintiff's second prayer and in refusing that numbered 12 asked by the defendant. Let the judgment be reversed and the cause remanded for further proceedings.

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

MAY TERM, 1889.

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RANA V. STATE.

INTOXICATING LIQUORS: *Presumption as to ownership: Burden of proof.*

On the trial of an indictment for selling intoxicating liquors without a license, where the State proves a sale made by the defendant, it will be presumed in the absence of proof to the contrary, that he was the owner of the liquor sold; and if he made such sale as the agent of a licensed dealer, that is a matter of defence and the burden is upon him to establish it.

APPEAL from *Logan* Circuit Court.

J. S. LITTLE, Judge.

This appeal is from a conviction for selling intoxicating liquor without a license. The only evidence given to the jury was that of a witness (John Edmonds), who testified that at a dance he asked the defendant if he, the witness, could get any whiskey to drink. The defendant replied that he had no whiskey himself but thought he could get the witness some, and told the latter what it would cost. The defendant then went off and after being gone sometime, brought the witness

a half pint of whiskey, for which the witness paid him a few days afterwards. Sec. 4511, Manst. Dig., provides that, "any person who shall sell, either for himself or another, or be interested in the sale of, any ardent, vinous, malt or fermented liquors, * * * * * * without the owner or owners thereof shall have previously procured a license authorizing the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined," etc.

The court instructed the jury, in effect as follows: (1.) That if they found that defendant made a sale of whiskey to the witness Edmonds, or aided or abetted another person to make such sale, they should convict; (2.) That if they found that some person unknown, was engaged in selling whiskey unlawfully and that fact being known to defendant, he at the request of the witness Edmonds, went to such person and made a purchase of whiskey for said Edmonds and delivered the whiskey to him and received the money therefor from him, they should convict; (3.) That the sale of whiskey in Logan county was unlawful.

The defendant excepted to the 2nd and 3rd instructions.

J. H. Evans and *Lewers & Humphrey*, for appellant.

1. There was no evidence to show that defendant sold or was interested in the sale of the liquor, for himself or as agent for another. Sec. 4511, Mansf. Dig. It must appear that he was the owner or agent of the seller.

2. If he acted as agent of the buyer he is not guilty. 45 Ark., 361.

3. There was no proof that it was against the law to sell liquor in Logan county.

W. E. Atkinson, Attorney General, for appellee.

If defendant sold as agent of a licensed dealer, it was matter of defence, and he should have shown it. 37 Ark., 96;

39 Id., 210; 17 N. H., 83. The presumption is that the seller is the owner of the liquor. *Supra*. See, also 25 Oh. St., 383; 45 Ark., 366.

Courts take judicial notice of the public records of a county. It was a matter of general notoriety and of public record, that no liquor could be lawfully sold in Logan county. 1 Greenl. Ev., sec. 6; 1 Whart. Ev., sec. 338.

Appellant was liable as an aider and abettor. 83 Ill., 431.

PER CURIAM.

The presumption is that the defendant was the owner of the liquor sold. *State v. Devers*, 38 Ark., 517.

There was no proof that he sold as the agent of a licensed dealer. But this was a matter of defence and the burden was upon the accused. The jury could not rightfully have returned any other verdict upon the evidence. The instructions could not have prejudiced the accused.

Affirmed.

HENDERSON V. BEARD.

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1. STATUTE OF FRAUDS: *Agreement to sell land.*

In an action to recover damages for the breach of a contract for the sale of land, an undelivered deed of the defendant to a third person is not sufficient to take the case out of the statute of frauds, where, upon the face of the deed, the plaintiff is a stranger to the contract and there is no memorandum in writing connecting him with it. Nor could the plaintiff rely on such deed, if it could be shown by parol that the title it purports to pass was to be held in trust for him, unless it was also shown that the grantee had, on his part, offered to perform the contract.

2. SAME: *Same: Authority of agent.*

Where an agent is simply authorized to sell land, he has no authority to sell it on credit without retaining a lien by contract for the security of the purchase money; and his agreement to make such unauthorized sale, although in writing, will not bind his principal.

APPEAL from *Sebastian* Circuit Court, Fort Smith District.

JOHN S. LITTLE, Judge.

This is an action to recover damages for the breach of a contract for the sale of real estate. The complaint alleges that on the 9th day of March, 1887, the plaintiff, Henderson, purchased from the defendant, Beard, a house and lot on Garrison avenue, in the city of Fort Smith, for which he agreed to pay the sum of $11,000—one-third to be paid in cash and the balance in two equal payments, in one and two years, with ten per cent. interest from date until paid; that on the 28th day of March, 1887, the plaintiff tendered the defendant the full amount of the cash payment and stated his willingness to complete the contract; but the defendant refused to make a deed to the property which, since the 9th day of March, 1887, had increased in value to the amount of $3000, for which sum the plaintiff sued. For answer the defendant filed a general denial, and pleaded the statute of frauds. On the trial of the cause, the plaintiff proved that the firm of Williams Bros. had attended to business for the defendant for a number of years; that they had collected rents for his house on Garrison avenue and were agents for no other property belonging to him; that in February and March, 1887, they had a correspondence with the defendant in reference to a sale of his property and that the first letter received from him in regard to the matter, was dated February 26, 1887. This letter authorized Williams Bros. to sell the property for $9000, if that price could be obtained; if not, it was left to their discretion to sell for $8500. It also directed them to send papers for signature.

The second letter was as follows:

"CITRA, FLA., March 3, 1887.

"*Messrs. Williams Bros., Fort Smith, Ark.:*

"GENTLEMEN—I received telegram to-day from a Mr. Dabbs asking me to wire him the least money that would buy my store. I did not answer by wire, but wrote him that you were my agents there and had my price. I hope you have sold at $9000 before this, but if you can't get above figures take $8500. I wrote Mr. D. Dabbs I hoped he would give you $10,000 for it. Hoping the boom will continue, I am, yours truly,

[Signed.] "R. A. BEARD."

The third letter from defendant to Williams Bros. was as follows:

"CITRA, FLA., March 14, 1887.

"*Messrs. Williams Bros., Fort Smith:*

"GENTLEMEN—I received telegram from Mr. Givens, stating that he could get $12,000 for store if I was not bound by sale, and asks to give preference at that price. I do not understand what sale he has reference to, as I have not heard a word from you since your telegram that you were offered $8500. Please write me if you can get $12,000 *now.* Hoping to hear from you soon, I am, yours,

[Signed.] "R. A. BEARD."

It was also proved on the part of the plaintiff that on the 9th day of March, 1887, Williams Bros. sold the property to the plaintiff for $11,000. The plaintiff paid at that time $300 on the price, for which the following receipt was given:

"Received of Eugene Henderson three hundred dollars, part payment on part of lot 12, block 17, fronting on Garrison avenue, city of Fort Smith, Ark., known as the property of R. A. Beard. Consideration, eleven thousand dol-

lars; one-third cash, balance in one and two years, equal payments, with ten per cent interest from date until paid.

[Signed.] "R. A. BEARD.
"Per Williams Bros."

When the trade was closed the plaintiff directed that the deed be made to himself. He afterwards ordered it made to J. A. Sweet. The agents consented and directed the deed drawn to Sweet, but ordered an abstract of title to be delivered to the plaintiff. Williams Bros. forwarded the deed to the defendant and received in reply the following letter:

"CITRA, FLA., March 15, 1887.

"*Messrs. Williams Bros., Fort Smith:*

"GENTLEMEN—Your favor containing deed just received. I will return it immediately or bring it. I think I will leave to-morrow (16) for the Fort, stopping over one day at Tupelo. Hoping to see you soon, I am, yours truly,

[Signed.] "R. A. BEARD."

The letter to which this was a reply stated that the property had been sold "for $11,000, as per payments stated in the deed," and gave directions as to the execution and return of the deed, but did not mention the name of the purchaser. Sweet had agreed with the plaintiff to join him in the purchase. The defendant arrived at Fort Smith a few days after his letter of March 15 was received. In the meantime, some defects were discovered in the title, and Sweet declined to complete the purchase. It seems that Sweet's refusal to purchase was communicated to the defendant a few days after he reached Fort Smith. The plaintiff told him that Sweet was afraid of the title, but that he, the plaintiff, would take the property, and proposed that the deed to Sweet should be deposited in the bank until another could be executed. The defendant refused to make any other

deed. There was testimony to show that the plaintiff then offered to accept the deed executed to Sweet—to make the first payment and to execute notes for the deferred payments; and that this offer was declined by the defendant, who declared that he "considered the trade off." There was also testimony to show that the defendant was willing to complete the sale made by Williams Bros. only on condition that the deferred payments were secured by mortgage. The deed referred to as having been sent by Williams Bros. to the defendant was produced by the latter on the trial, and read in evidence. It purported to convey the property described in the complaint to J. A. Sweet, and reserved a vendor's lien to secure deferred payments. It was signed and acknowledged by the defendant and his wife. The court excluded from the jury all the letters, the receipt and the deed offered in evidence by the plaintiff. The verdict and judgment were for the defendant and the plaintiff appealed.

Clendenning & Read and *F. A. Youmans*, for appellant.

1. Was the memorandum in writing sufficient to take the contract out of the statute of frauds? As to the requirements of such a memorandum, see Brown St. Fr., sec. 371; 45 Ark., 17; 14 N. Y., 589; 95 U. S., 289; Brown St. Fr., secs. 371 *a*, 372, 376, 382, 385.

The letters, the receipt, and the deed fill all these requirements. 15 N. W. Rep., 674; Brown St. Fr., sec. 348; 22 Ohio, 75; 65 Am. Dec., 666; 58 Am. Dec., 212; 6 Grat., 78; 4 S. W. Rep., 835; 81 Ill., 317; 95 U. S., 289; 56 N. Y., 230; 99 U. S., 100.

2. Parol evidence was admissible to show that appellant and not Sweet was the real purchaser. 1 Gr. Ev., 282; and to identify the property. 1 Peters, 640; 95 U. S., 444; 40 N. Y., 357; 33 Mass., 227; 95 U. S., 200; 14 N.Y., 584.

See also Add. on Cont., vol. 2, secs. 513 and 522; 2 Parsons on Cont., p. 660, that when no time is specified, it must be done within a reasonable time, and 79 Mo., 227, and 48 Miss., 247, as to supplying facts by parol proof. Also 4 S. W. Rep., 835, a case like this.

The appellee, *pro se*.

The contract is not sufficiently set out in the memoranda in writing. *It must be certain in itself*, or capable of being made certain by reference to something else whereof the terms can be ascertained. 13 Johns., (N. Y.) 229; 12 Vesey, 466.

Parol evidence not admissible. 2 Kent, 511; Brown St. Fr., sec. 371; 3 Pars. Cont., p. 13; Brown St. Fr., sec. 385, note 2.

See also 45 Ark., 17; 66 Ga., 338; 42 Am. Rep., 73.

PER CURIAM.

The court did not err in excluding from the consideration of the jury the memoranda offered to take the case out of the statute of frauds. If reliance is placed upon the undelivered deed to Sweet, it must fail because upon the face of it the plaintiff is a stranger to the contract, and there is no memorandum in writing connecting him with it; if it could be shown by parol that Sweet was to hold the title in trust for the plaintiff, still the contract shows that Sweet is the party with whom the defendant contracted, and the record fails to disclose a tender of performance of the contract on his part. On the contrary, it shows affirmatively that he repudiated it.

If we look to the receipt executed and delivered to Henderson by Williams Bros. as agents for Beard, and concede that it contains all the requisites of a perfect contract, we find no authority in them to execute such a contract. They

had authority to sell the land, but that did not authorize them to enter into a contract to sell on credit without retaining a lien by contract for the security of the purchase money. The contract was not, therefore, signed by an agent authorized to bind the person to be charged. Affirmed.

BLACKMER V. STONE.

SPECIFIC PERFORMANCE: *Of agreement to assign interest in patent.*

A court of equity has power to order the specific performance of an oral agreement, entered into before the issue of a patent, to assign an interest therein, in consideration of expenses borne in procuring it. And it is not error to decree a direct divestiture of the interest contracted for, instead of compelling the patentee to assign it.

APPEAL from *Johnson* Circuit Court in Chancery.

G. S. CUNNINGHAM, Judge.

J. E. Cravens and *J. N. Sarber*, for appellant.

A State court has no jurisdiction to issue an injunction in patent cases, *pendente lite*. 102 N. Y., 167; 55 Am. Rep., 793; 100 N. Y., 365.

It was error to vest a one-half interest in the patent in appellee. 3 S. E. Rep., 781; 8 Sup. Ct. Rep., 255. The very most the court could do, was to compel an assignment of a half interest. 3 N. W. Rep., 490; 105 U. S., 126.

Review the evidence and contend that there never was a contract for a sale of a half interest in the patent, but only a partnership to manufacture and sell springs, and divide profits of sale thereof and of sale of territory, etc.

L. H. McGill and *A. S. McKennon*, for appellee.

1. Even if the court erred in vesting a half interest in appellee, instead of causing it to be conveyed or assigned, appellant is not prejudiced, and therefore no ground of reversal.

2. The issue in this case does not arise under the patent laws of the United States, nor involve the validity of the patent or its infringement. It was a pure matter of contract and the State courts alone have jurisdiction. 4 Del. Ch., 338; 1 Wood. & Min., 34; 2 Curt., 507; 34 Conn., 325; 107 Mass., 94; 118 Id., 279; 115 Mass., 279; 115 Ill., 289; 23 Fed. Rep., 86; Curt. on Pat., sec. 496; Rev. St. U. S., 4898.

3. Issues of fact in equitable proceedings are triable by jury. Mansf. Dig., sec. 5106; 48 Ark., 426. And when so tried the chancellor cannot disregard the verdict. 3 Gr. Ev., sec. 262, (Redf. Ed.)

4. Courts of equity, while they are not accustomed to specifically enforce performance of partnership contracts, will secure a partner in his rights and interests to which he is entitled under the agreement. 118 Mass., 279.

5. Review the evidence and contend that the decree is right.

COCKRILL, C. J.

The parties to this controversy were partners in the manufacture and sale of wire bed springs. Pending the partnership Blackmer obtained a patent for an improved method of manufacturing the springs, and the partners shared the profits in the sale of licences to manufacture and sell under the patent. This suit was brought by Stone to settle the copartnership accounts and to compel Blackmer to carry out an oral agreement which he alleged they had entered into, to assign to him a half interest in the patent when issued. No question is made here upon the settlement of accounts. The question whether there had been an agreement between the parties that the inventor should sell an interest in the patent to

his copartner in consideration of expenses borne by the latter in procuring the patent, was submitted by the court to a jury with the consent of both parties. The verdict was for the appellee and was satisfactory to the chancellor. We have carefully examined the evidence presented by the abstracts of the parties, and find no reason for disturbing the verdict of the jury.

The only other questions we understand counsel for the appellant to urge are the power of the court to order a specific performance of the oral contract entered into before the patent issued to assign an interest in it; and its action in decreeing a divestiture of the interest instead of compelling the party holding the legal title to assign. The power of the court to compel a compliance with the contract is fully established by the authorities. *Somerly v. Buntin*, 118 Mass., 279; S. C. 19, American Reports, 459; *Burr v. De La-Vergne*, 102 N. Y., 415; *Blakeney v. Goode*, 30 Ohio St., 350; *Littlefield v. Perry*, 21 Wallace, 221.

The direct divestiture of the title was not more prejudicial to the appellant than the course suggested.

Affirmed.

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REICHERT V. ST. L. & S. FR. RY.

1. STREETS: *Fee in soil of: Right of adjacent owner.*

Subject to the easement of the public in a street, to use and enjoy it as a highway, the fee therein belongs to the owners of adjacent lots. And any use of the street not contemplated by its original dedication to the purposes of a highway, is an infringement of the reserved rights of such owners, for which they may invoke the ordinary legal remedies.

2. RAILROADS: *Right of way over street.*

The use of a street for constructing and operating thereon a railroad, is not within the scope of the easement which the public have therein as a high-

way. A city cannot therefore grant to a railway company the right of way over one of its streets; and no validity can be imparted to an ordinance adopted for that purpose, by an act of the legislature confirming it.

3. SAME: *Ejectment for land occupied by: Estoppel.*

Where a railway company enters upon land without compensation to the owner and without his consent, and occupies it for a period of more than three years, during which time the owner of the land, with a knowledge of such occupancy, makes no objection thereto, although he knows that the company is expending large sums in laying its track and in erecting depot buildings which can only be reached by passing over his land, he will be held to have acquiesced in the occupancy of the road and will be estopped to maintain ejectment for the land.

APPEAL from *Sebastian* Circuit Court, Ft. Smith District. JNO. S. LITTLE, Judge.

Martin & McDonough, for appellant.

The court erred in overruling the demurrer to the 3rd and 4th paragraphs of defendant's answer. The company constructed its track without the consent of the property owners, without proceedings of condemnation, or making compensation; the city ordinance was void; nor did the company get the consent of two-thirds of the property owners as required by law. (Mansf. Dig., sec. 5471.) The legislature could not authorize the passage of such an ordinance as was passed by the council.

The owner of an abutting lot on a public highway owns the fee to the middle of the way. 9 Ind., 467; 48 Id., 178; Sedg. & W. Tr. of Titles to Lands, 132, 135; 3 A. & E. R. Cases, 218; Thompson Highways, 25–27, and many others. And so owning the fee may maintain ejectment against any one occupying the street in a way inconsistent with the public easement. 1 Burrow, 133; 41 Cal., 259; 3 Dutch, 76; Dill Mun. Corp., 662–5; Adams Eject., 19–21; Wait Ac. and Def., vol. 3, p. 68, secs. 4, 5; Tyler Eject., 37; Sedg. & W. Tr. Land Titles, secs. 130, 132 and

135; 70 Ala., 227; 56 Tex., 66; 33 N. J. L., 115; Rorer on R. R., 305, 327, 333, etc.; 19 Minn., 439; 37 Miss., 700; 54 Miss., 259; Pierce on R. R., 167; 89 Penn. St., 282; 27 Ind., 260; 67 Ill., 191; 90 Ill., 316; 13 Kans., 496; 64 Iowa, 293; 20 N. W. Rep., 442; 20 Wis., 135; 43 Iowa, 498; 37 Oh. St., 147; 46 Am. Rep., 164; 1 Conn., 103; Angel High., sec. 320; 6 Am. Dec., 216; 11 Id., 658; 13 Allen, 256; 23 N. Y., 61; 24 N. Y., 655; 30 N. J. L., 97; 55 Ala., 413; Redfield on Ry., p. 335, note 2, etc., and 364.

The council had no power to pass the ordinance, this is conceded, but if it had the company never complied with the act of the Legislature March 1, 1883.

The legislature cannot directly or indirectly through a city council authorize a railroad company to take private property without compensation. The running of a steam railroad over a public highway is an additional easement, inconsistent with the former public easement, and is taking private property without just compensation. Dill. Mun. Corp., 707 to 727 and C. C.; art. 2, sec. 22, const.; art 12, sec. 9, Ib.; 60 Iowa, 740; 43 Iowa, 636; 57 Ia., 393; Thomp. Highw., 396; 3 Kent., 340 note y, and cases; 16 N. Y., 109; 41 Cal., 259; 14 Wis., 640; 67 Ind., 439; Dill. Mun. Corp., 704, note 1, 703 and cases, 725.

2. The facts set up in the 4th paragraph do not create an estoppel. It has none of the elements of an estoppel *in pais*, and is certainly not *by deed*. Big. Est., 586 to 600; 39 Ark., 131; 36 Id., 96; 26 Ala., 612; 18 Id., 323; 3 Dana, 73; 55 Am., Dec., 113; 9 B. and C., 577; 6 Peck, 454; 57 Am. Dec., 64 and note; 57 Id., 442, 782 and note, and many others. Also, 33 Ark., 465.

Review the authorities holding contrary views, but con-

tend that the constitutions of these States do not require *compensation first to be made.* 7 Ind., 32, and Ib., 577, have been overruled. 89 Ind., 128; 10 Am. and E. cases, 284; 3 Ib., 208; review *Turner* case, 31 Ark., 494, which was decided upon a statute that does *not exist now. R. v. Baker*, 45 Ark., 252.

81 Mo., 127, is not in point; then the fee was not in the owner. In other cases the Ry. entered *by consent.* In 57 Mo., 256, the land was *regularly* condemned, and so we find the distinction in most if not all the cases. See 57 Mo., 265; 6 N. C., 540; 20 Oh. St., 81, and others.

Pierce on R. R., 169, is not sustained by the authorities he cites, reviewing them. But at p. 167, Pierce says ejectment is the remedy. See cases cited. See, also, Wood Ry. Law, 792, 787; Redf. Ry., pp. 373, 381; Mills Em. Dom., sec. 140; 41 Iowa, 419; 64 Id., 292; 66 Penn. St., 464; 35 Ark., 363; 32 Id., 25.

The great weight of authority is that ejectment will lie. See late case, *Organ v. M. & L. R. R. R.*, 51 Ark., 235.

Clayton & Forrester, for appellee.

1. The third paragraph of the answer was a valid defence. The council properly passed the ordinance, which was validated by acts 1883, p. 69, sec. 1.

2. No action of ejectment will lie for the additional burden on the fee; the remedy is by action for damages. 41 Ark., 202; 45 Id., 252; 57 Mo., 496.

The legislature had power to ratify the ordinance, even if the council had no power to pass it. 1 Rorer R. R., 497–8, 509, n. 2; 33 Fed. Rep., 900; 23 Am. Law Reg., 440.

The fourth paragraph set up a good defence. Appellants are estopped. 22 A. and E. R. Cases, pp. 123, 128 and

note; 17 Id., 107; 33 Vt., 311; 41 Mich., 336; 13 Barb., 646; 57 Mo., 296; 9 C. E. Green., 49; 10 Id., 316; 31 Ark., 494; 14 Wis., 443; 22 Wis., 288; 7 Dana., 276; 14 A. and E. R. Cases, 225; 21 N. J. Eq., 288; 63 Wis., 327; 5 Vroom, 99; 108 Mass., 208; 35 La. Ann., 924; 21 Cent. L. J., 334–6, note; 28 A. and E. R. Cases, 250; 2 So. Rep., 69.

Acquiescence bars ejectment. 18 Oh. St., 179; 6 Id., 136; 17 Fed. Rep., 492; 64 Mo., 453; Mills Em. Dom., 2d ed., secs. 140 and 141.

Owner of land who knowingly permits a railway to be constructed upon it without objections, is estopped from recovering possession of the land so used by such railway. *Lawrence v. Morgan's Louisiana and Texas R. R. and Steamship Co.*, 39 Louisiana Annual, 427; 4 Am. State Reports, p. 265 and note at p. 269; *Teegarden v. Davis*, 36 Ohio State, 603; 98 Am. Dec., note, p. 102; *Cin., Ham. and Ind. Ry. Co. v. Clifford*, 113 Ind., 467; *Ind., Bloom. and West. Ry. Co. v. McBroom*, 114 Ind., 200; 2nd Wood's Ry. Law, 792.

A license may be inferred from the acts of the parties in connection with the silent acquiescence of the plaintiff and such acquiescence may inure as a license by estoppel. Abbott's Trial Evidence, 638. As to estoppel, see further *Little Rock and N. R. R. Co. v. L. R., Miss. River and Texas R. R. Co.*, 36 Ark.

HEMINGWAY, J.

The appellants are the owners of certain lots in Fort Smith that abut on Ozark street. In 1883 the appellee constructed its railroad along the centre of the street, and since then has used it in running its trains.

The appellants owning the lots and therefore to the middle

of the street, brought this action to recover possession of that part of the street occupied by the appellee's road bed.

The appellee answered in five paragraphs. The appellant demurred to the answer, and the court overruled the demurrer to the third and fourth paragraphs; the appellants "elected to stand on their demurrer" and the court dismissed their complaint with costs. They allege as grounds upon which to reverse the judgment, that the court erred in overruling their demurrer to the third and fourth paragraphs in the answer, which are as follows: "3. Defendant further answering says, that on the 2nd day of Jan., 1883, the city council of the city of Fort Smith granted to it by an ordinance passed by said council the right of way over, along and upon said street; that under and by virtue of said ordinance and the provisions of its charter, it entered upon and constructed its road bed upon said street and has continued to occupy the same in the manner and for the purpose contemplated by its charter and the said ordinance. That on the 1st day of March, 1883, the General Assembly of the State of Arkansas passed an act validating and confirming said ordinance and the right of the defendant thereunder, and defendant says its entry upon and use of said streets and premises as a right of way was and is not wrongful, and that plaintiffs are not entitled to have and maintain their said action.

"4. Defendant further answering says, that it entered upon and constructed its road along, over and upon said street as claimed by plaintiffs, and built its station house and established its depot for the city of Fort Smith, at the intersection of Ozark street with Walnut street, and expended large sums of money laying its track, acquiring depot grounds and erecting suitable depot buildings. That plaintiffs and those under whom they derive their alleged title had full

knowledge of the aforesaid facts and made no objection to the occupancy of said street by defendant as aforesaid, although they knew that the use and occupancy thereof was essential to enable the defendant to reach its depot with its trains and conduct its business. Wherefore the defendant alleges that plaintiffs are estopped from bringing their action in this cause."

It is conceded in the pleadings, that the appellants hold the freehold to the middle of the street, subject to the easemet of the public to use and enjoy it as a street.

1. STREETS: Fee in soil of: Right of adjacent owner.

A street is a highway, nothing more, over which the people have a right of passage. The interest of the public in it does not comprehend any interest in the soil; the right of the freehold is unaffected by establishing the highway. Its use by every citizen must be appropriate for the purpose for which it was intended—that is, of transit, with such stoppage as business, necessity, accident or the ordinary exigencies of travel may require. The owner of the freehold may make any use of the soil not inconsistent with the public easement; and any use of it by another, which is not within the scope of the easement, is an infringement of his rights for which he may invoke the ordinary legal remedies. 2 Smith's Leading Cases, 144, 167; *Goodtittle v. Alker*, 1 Burr., 133; *Taylor v. Armstrong*, 24 Ark., 102. The appellee's occupancy and use of the street is an infringement of the reserved rights of the appellants therein, unless it is one of the modes of enjoying the easement in a street contemplated in its original dedication. Upon this question the authorities are divided.

Judge Dillon, after a thorough and discriminating investigation and consideration of the authorities, concludes that, "The weight of judicial authority at present undoubtedly is, that where the public have only an easement in the street,

the fee is retained by the adjacent owner, the legislature can not, under the constitutional guaranty of private property, authorize a steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude." Dillon Mun. Corp., vol. 2, page 717. The question was decided by the supreme court of Massachusetts in the case of the *Inhabitants, etc., v. Conn. Riv. R. Co.*, 4 Cush., 71, and Mr. Chief Justice Shaw delivering the opinion of the court said: "The two uses are almost, if not wholly, inconsistent with each other; so that taking the highway for a railroad will nearly supercede the former use to which it had been legally appropriated." The court of appeals in New York, in several cases have announced the same conclusion. In the case of *Wager v. Troy U. R. Co.*, 25 N. Y., 533, the court say: "It is quite apparent that the use by the public of a highway, and the use thereof by a railroad company, is essentially different. In the one case every person is at liberty to travel over the highway in any place or part thereof, but he has no exclusive right of occupation of any part thereof except while he is temporarily passing over it. It would be a trespass for him to occupy any part of the highway exclusively, for any longer period of time than was necessary for that purpose and the stoppage incident thereto. But a railroad company takes exclusive and permanent possession of a portion of the street or highway. It lays down its rails upon, or imbeds them in the soil, and thus appropriates a portion of the street to its exclusive use, and for its own particular mode of conveyance." The same court discussing the question in the case of *Williams v. N. Y. C. R. Co.*, 16 N. Y., 109, says: "The argument is, that he has consented to the laying out

of a highway upon his land; *ergo*, he has consented to the building of a railroad upon it; although one of these benefits his land, renders access to it easy and enhances its price, while the other makes access to it both difficult and dangerous and renders it comparatively valueless. It is the public interest supposed to be involved which begets the difficulty, and it is just for this reason that the constitution interferes for the protection of individual rights, and provides that private property shall not be taken for public use without just compensation." The operation of the cars endangers others in the use of the highway, and is always attended with annoyance and inconvenience to those occupying adjacent property. The rules above find emphatic endorsement from the supreme court of Wisconsin, in the case of *Ford v. N. W. R. Co.* 14 Wis., 609. They are approved either directly or indirectly, by the courts of last resort in a large number of the States, and we think are sustained as well by reason as authority. *City of Denver v. Bayer*, 23 Am. L. Reg., 440; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill., 439; *Imlay v. Union Branch R. Co.*, 26 Conn., 249; *Kuchemon & Kinke v. C. C. & D. Ry. Co.*, 46 Iowa, 366; Cooleys Con. Lim., 549; *Taylor v. Chi. St. R. Co.*, 63 Wis., 327. When the carriages and motors used in operating a railroad, and their danger to others using the same highway,—the insecurity, inconvenience and annoyance they occasion occupants of adjacent lots, and the injury to the use and value of the lots are considered, the analogy between the use of the street for ordinary travel and its use for a railroad, is entirely lost.

2. RAILRODS: Right of way over street.

Such being the case, the right of way of the appellee was carved out of the freehold of the appellants, and not out of the easement controlled by the city of Fort Smith. Under

the constitution, the city of Fort Smith could not transfer it to the appellee. The legislature could impart no validity to such an attempted transfer. The third paragraph in the answer did not allege facts constituting a ground of defence. The public interest in the street is under the control and supervision of the city, and the ordinance may furnish the appellee immunity from complaint or prosecution for interference with the easement; it can confer no rights as against the owner of the servient estate.

Although the appellee acquired no right of way under the city ordinance or act of the General Assembly, it was authorized legally to appropriate it, upon making compensation to the owner. The State had invested it with its right of eminent domain to be exercised at its will, upon compliance with that condition. It was not bound to consult the pleasure of the owner. His consent would not have been required, nor his dissent regarded, if compensation had first been made to the owner. This condition is imposed upon the right, for the benefit and protection of the owner. It is entirely for his good, and has no reference to any public interest or policy. Such being its object and purpose, compliance with it may be insisted upon or waived, at the pleasure of the owner. He may arrest the first step toward appropriation, until compensation is made, and to this end the law supplies abundant remedies; or he may permit the acts of appropriation to proceed until it is consummated. In that event it does not follow that he can invoke the same remedies.

A text writer of high standing says: "That if a landowner knowing that a railway company has entered on his land and is engaged in constructing its road without having complied with the statute, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from

maintaining ejectment, and will be regarded as having acquiesced therein." Woods Railway Law, page 792. This conclusion is reached from the principle announced by Lord Chancellor Cottenham, in the case of the *Duke of Leeds v. Earl of Amherst*, 2 Phill. Chy. Cases, 117–23, that "if a party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he can not afterwards complain."

Judge Redfield quoted the Lord Chancellor with approval, in a case involving the principle invoked in this, though on a different state of facts. He says, "in these great public works the shortest period of clear acquiescence, so as to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their work, and especially to stop the running of their road after it has been put in operation, whereby the public acquire important interests in its continuance. The party does not, of course, lose his claim, or the right to enforce it in all proper modes. He may possibly have some right analogous to the vendor's lien in England." His conclusion was that a waiver barred the action of ejectment. It is possible that the fact in that case did not call for the opinion delivered; but be that as it may, the case was reviewed by the court years afterward, when time and experience had given opportunity to test the correctness of the opinions expressed, and they were in so far as here quoted approved, in stronger language. The court there say: "We therefore hold that where the railroad company has entered upon land and constructed its road without making compensation to the land owner, and such entry and construction

3. Ejectment for land occupied by railroad: Estoppel.

were by the latter's consent, that ejectment can not be maintained; and the same rule should apply where the original entry was without the consent of the land owner, in case he stands by and knowing of the entry and conrtruction, makes no objection to it and permits the road to be used for years. He should under such circumstances be held to have acquiesced therein. But the owner should not be deprived of compensation for his land." *Kittrell v. R. R. Co.*, 63 Vt., 79. The supreme court of Indiana in a late and well considered opinion, announces the same rule. *Midland Ry. Co. v. Smith*, 15 N. E. Rep., 256.

The same views are expressed by the supreme court of Ohio, and in very much the same terms. They say, "Where a party stands by, as we must presume the plaintiff to have done in the present case, and silently sees a public railroad constructed upon his land, it is too late for him, after the road is completed, or large sums of money expended on the faith of his apparent acquiescence, to seek by injunction or otherwise to deny the company the right to use the property. Considerations of public policy, as well as recognized principles of justice between parties, require that we should hold in such cases, that the property of the owner can not be reclaimed and that there only remains to him a right of compensation. * * * The work being completed, the public, as well as those directly interested in the road, as stock-holders and creditors, have a right to insist on the application of the rule, that he who will not speak when he should, will not be permitted to speak when he would." *Goodin v. Cin. W. Con. Co.*, 18 O. St., 169. The general doctrine is sufficiently indicated in the cases cited and is abundantly sustained in many others. *U. S. v. Great Falls Man. Co.*, 112 U. S., 645–56; *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich.,

336; *Pryzbylowicz v. Mo. Riv. R. Co.*, 17 Fed. Rep., 492; *Lawrence v. Morgan's L. & T. R. & S. S. Co.*, 2 So. Rep., 69; *St. Julian v. R. R. Co.*, 35 La. An., 924; *N. O. & Selma R. Co. v. Jones*, 68 Ala., 48; *Pettibone v. La. C. & Mil. R. Co.*, 14 Wis., 443; *Nicholson v. N. Y. & N. H. R. Co.*, 22 Conn., 74.

By authority and upon principle, it would seem that, original consent of the owner and his subsequent unreasonable acquiescence, should be viewed alike. In the case of *Turner v. C. & F. R. Co.*, 31 Ark., 494–510, this court said, "if the appellee was not confined to his statute remedy, as it seems from the authorities he was, he should in justice be required to resort to some remedy that would give him the value of his land, and leave the company in the use of the easement." The facts in that case did not call for this expression of opinion, but it indicates that the mind of the court looked with approval upon the line of authorities we have here referred to. The matter is incidentally discussed by this court in the case of *Ogan v. M. & L. R. R. R. Co.*, *ante 235* involving kindred questions; in that case the court granted the relief sought, for the reason as stated that, it could not be said that the party seeking it had stood by and acquiesced in the acts of appropriation. In that opinion the views of this court are to some extent indicated as to the rights and remedies of the owner against a company occupying his lands.

There are some courts of high learning that differ with the views quoted; but after a careful examination of the cases cited in the brief of appellants and many others upon the subject, we think they are against the current of authority and not sustained by reason. The complaint was filed Sept. 10th, 1886; the city ordinance was passed Jan. 2nd, 1883,

and during that entire time the record discloses no objection on the part of the appellants to the use and occupation of the street by the railroad. We think they must be held to have acquiesced in it.

The fourth paragraph of the answer contains a sufficient defence to the complaint. The appellee urges that no action of ejectment will lie for the burden imposed on the fee by the railroad, and cites in support two decisions of this court; *Little R. & Ft. S. Ry. v. McGehee*, 41 Ark., 202; *L. R. & F. S. Ry. Co. v. Boken*, 45 Ark., 252. The question was not involved, referred to or discussed in either of the cases cited. That ejectment is a proper remedy, seems to be borne out by the authorities elsewhere, and it is defeated in this cause by the voluntary conduct of the appellants. *Weisbudd v. Chi. & N. W. R. Co.*, 21 Wis., 609; *Wager v. Troy Union R. Co.*, 25 N. Y., 534; *Smith v. Chi., A. & St. L. R.*, 67 Ill., 191; *Sharp v. St. L. & S. E. Ry. Co.*, 49 Ind., 296; Dillon on Mun. Corp., sec. 662.

As the fourth paragraph in the answer set up a good defence the judgment is affirmed.

ST. L., I. M. & SO. RY. CO. V. GRAFTON.

1. REWARDS: *For performing official duties.*

The policy of the law forbids an officer, or one called to aid him in the performance of an official duty, to receive for his services any reward or compensation not allowed by law. And the promise of such reward is illegal and without consideration.

2. SAME: *Same.*

Where parties while acting as the *posse comitatus* of a sheriff, called out during a railroad strike to aid him in preventing interference with trains, etc., arrest a person accused of interfering with a "switch," they cannot claim to have acted as individuals, independently of the sheriff, and are

not entitled to recover a reward offered by the railroad company for the arrest and conviction of persons thns offending.

APPEAL from *Nevada* Circuit Court.

C. E. MITCHEL, Judge.

Dodge & Johnson, for appellant.

At the time of the arrests each and all of the plaintiffs were acting as a *posse comitatus*, and as special deputy sheriffs, and as members of the Arkansas State militia, under the direction and control of the sheriff of Miller county. They were acting at the time in the capacity of peace officers or officers of the law, and they cannot claim the reward; and the offer (or contraet), as to them, is void as being contrary to public policy. *Weaver v. Whitney*, 1 Hopk. (N. Y.), 11; Greenhood on Pub. Policy, pp. 330, 331; 2 Burr., 924; 15 Wend., 780, 781, 782; *Pool v. City of Boston*, 59 Mass., 220; *England v. Davidson*, 3 P. & D., 594.

It is against public policy to allow a man to receive a reward for doing his duty as a public officer. *Dorris v. Burnes*, 87 Mass., 352; *Stilk v. Myrick*, 2 Camp., 317; *Bridge v. Cage Cro Jack.*, 103; *Harris v. Watson*, Peake, 72; and a person accepting a public office with a fixed salary, is bound to perform the duties of the office for the salary. *Evans v. Trenton*, 4 Zeb. (N. J.) 764. An agreement to reward a public officer or policeman for doing that which it is his duty by law to do, is void as against public policy. *Kich v. Meny*, 23 Mo., 74; *State v. Roberts*, 10 Mo., 28; *Means v. Hendershott*, 24 Iowa, 79. Nor is he entitled to extra compensation for performing services which were a part of his official duty. *Pilie v. City N. O.*, 19 La. An., 275. The statute makes it the duty of the sheriff to keep and preserve the peace of his county, for which pnrpose he is empowered to call to his aid such person or persons of his

county as he deems necessary. *Warner v. Grace*, 14 Minn., 489; *Austin v. Supervisors, etc.*, 24 Wis., 279; *Preston v. Bacon*, 4 Conn., 479; *Smith v. Smith*, 1 Bailey (S. C.), 71; and as a matter of public policy he would not be entitled to claim the reward. *Stamper v. Temple*, 6 Humph., 116; *Smith v. Whitden*, 10 Pa. St., 40; *Bussier v. Pray*, 7 S. & R., 447; *Harwell v. Mayor*, 81 N. Y., 259; *Gilmore v. Lewis*, 12 Ohio R., 286; *Callagan v. Hallett*, 1 Comes, 104; *Ring v. Devlin*, 32 N. W. Rep. (Wis.), 121.

Arnold & Cook, for appellees.

If an officer performs an act for which a reward is offered, which act he is under no specific legal obligation to perform, he is not precluded from the recovery of the reward. *Davis v. Manson*, 43 Vt., 676; *Smith v. Moore*, 1 Man., G. and Scott, 438; *England v. Davidson*, 11 Ad. and El., 856; *Smith v. Whilden*, 10 Pa. St., 39. And if he performs extraordinary and additional services beyond what he was legally bound to perform, that is sufficient foundation for the promise and the law will compel its performance. Addison on Contracts, pp. 23, 27; *Reif v. Paige*, 55 Wis., 496; *Russell v. Steward*, 44 Vt., 170; *Pile v. N. O.*, 19 La. An., 274; *Morrill v. Quarles*, 35 Ala., 544; *Hayden v. Sanger*, 56 Ind., 42.

When a public officer, not acting in the line of his duty, arrests a party for whom a reward is offered, with the reward in view, when he is under no specific legal obligation to make the arrest, he can recover the reward. *Davis v. Manson*, *sup.* And the recovery of a reward in such case is not against public policy. *Ryer v. Stockwell*, 14 Cal., 134.

HUGHES, J.

In March, 1886, in the time of the great strike upon the

Missouri Pacific Railway system, the appellant offered a reward of $500.00 each for the arrest and conviction of any one found interfering with the switches, side tracks or railroad property in the county of Miller in this State. Appellees brought suit to recover six thousand dollars of appellant for the arrest and conviction of twelve persons, alleged to have interfered with a switch on appellant's road. Appellant filed a demurrer to the complaint and a motion for a change of venue, and the cause was transferred to Nevada county for trial. Appellant answered, admitting the offer of the reward, denying the arrest of the twelve persons named in the complaint, or any or either of them, or that any or either of the appellees prosecuted said twelve persons or either or any of them to conviction for interfering with defendant's (appellant's) switches, side tracks, trains or railroad property in the county of Miller; and denied that the twelve persons or any or either of them were ever arrested and convicted by the plaintiffs of the offence of interfering with defendant's property, as charged in the complaint.

The second paragraph in the answer avers, that the twelve men were arrested by the sheriff of Miller county; that at the time of said arrests, said plaintiffs were each acting as a *posse comitatus* and as special deputy sheriff, and as a member of the Arkansas State militia and under the direction and immediate control of the sheriff of Miller county, and were simply discharging their duty and were not entitled to any reward. The case having been submitted to a jury, upon the testimony and instructions of the court, they returned a verdict for the plaintiff for six thousand dollars. Defendant filed a motion for a new trial, which was overruled and he appealed to this court.

Without going into the evidence in detail or discussing

the instructions of the court below, we think that the evidence in the case shows, that the appellees were, at the time of the arrest of the men for the arrest and conviction of whom they claim the rewards offered by appellant, acting as a part of the *posse comitatus* of the sheriff of Miller county, called out to aid him in preserving the peace and in preventing interference with the railroad tracks, engines, trains, etc., in Miller county, and that they cannot be heard to say that in making the arrests they ignored the sheriff and acted as private individuals. We are of the opinion that the verdict is without evidence to support it. The policy of the law forbids a public officer, or those called to aid him in the discharge of a public duty, receiving any reward or compensation for his services outside of that allowed by law. The plaintiffs were assisting the sheriff's deputies—and, in fact, some of the plaintiffs were his regular deputies—in making these arrests; and they were paid for their services as a sheriff's *posse* by Miller county. Public policy and the laws forbid that they receive other reward for the same. "The rewards of officers are established by law; their services are to be performed for these legal rewards, and other private rewards for acts which are required from them as public duties by the laws of their country and the obligations of their stations, must be regarded as corrupt and illegal exactions." *Weaver v. Whitney*, 1 Hopk. (N. Y.), 11. A promise of a reward for performing a duty, is illegal and without consideration. *Pool v. City of Boston*, 5 Cushing, 220. *Stotesbury v. Smith*, 2 Burr., 924; "It is against public policy to allow a man to receive a reward for doing his duty as a public officer." *Davis v. Burns*, 87 Mass., 352; *Kick v. Merry*, 23 Mo., 74; *Means v. Hendershott*, 24 Iowa, 79; *Pillie v. City of New Orleans*, 19 La. Ann., 275.

1. REWARDS: For performing official duties.

"It is undoubtedly a sound rule of law, that a public officer shall not be allowed to receive for performing an official duty any other compensation or reward than that which is permitted by law." "The statute makes it the duty of a sheriff to keep and preserve the peace of his county, for which purpose he is empowered to call to his aid such person or persons of his county as he deems necessary. He shall also pursue and apprehend felons, execute all warrants, writs and other processes. And whether a sheriff arrests a party, under a warrant or not, he acts in his official capacity * * * * For making an arrest in such case the sheriff is entitled to the same compensation as for making an arrest under a warrant. And the conclusion is, if the arrest is made by the sheriff, or his deputies, he or they were but doing their duty and are not entitled to a reward." *Warner v. Grace.* 14 Minn., 489; 24 Wis., 279; 4 Conn., 479; 1 Bailey (S.C.), 71; 10th Pa. St., 40; *Ring v. Devlin*, 32 N. W. Rep. (Wis.), 121.

2. SAME.

The judgment is reversed and the cause is remanded for further proceedings.

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FORDYCE V. MCCANTS.

1. EVIDENCE: *Hearsay: Res gestae.*

In an action against a railway company brought to recover damages for killing the plaintiff's intestate, the court permitted a physician to testify to the contents of a telegram sent him by the plaintiff, stating that there had been an accident on the defendant's road and that the deceased had been seriously injured and required the witness's attention. The same witness was also allowed to testify that after driving twelve or thirteen miles, he arrived at the home of the plaintiff to which the deceased had been carried, and that after his arrival the deceased stated to him that he had been thrown heavily across the corner of a seat and had thus received an

injury from which the witness found him suffering. *Held:* That the contents of the telegram were hearsay and the statements of the deceased were not part of the *res gestae*. It was therefore error to admit them.

2. PRACTICE IN SUPREME COURT: *Admission of incompetent evidence: Reversible error.*

Where it is manifest that the appellant was prejudiced by the admission over his objection, of incompetent testimony, a verdict against him which has only slight support from other proof, will not be sustained by the supreme court.

3. DAMAGES: *To father from death of son: Measure of.*

In an action against a railway company to recover for the benefit of a father, damages for the killing of his son, where it is shown that the latter's expectancy of life exceeds that of his father, an instruction to the jury that the measure of damages is the probable earnings of the son during his expectancy of life, less his expenses, etc., is erroneous, since it permits the father to recover as a pecuniary loss to himself, accumulations of the son for a period after he (the father) is presumed to have died.

4. SAME: *Same.*

In an action against a railroad company [under secs. 5223, 5226 Mansf. Dig.,] to recover the damages resulting to a father from the killing of his son, who was of age but unmarried, substantial damages can be recovered only by showing that deceased gave assistance to his father, contributed money to his support, or that the father had reasonable expectation of pecuniary benefit from the continued life of his son—the reasonable character of such expectation to appear from the facts in proof. In the absence of such proof only nominal damages can be recovered.

APPEAL from *Monroe* Circuit Court.

M. T. SANDERS, Judge.

J. C. Hawthorne, for appellant.

1. The testimony of Dr. Youmans as to contents of telegram was hearsay, and as to statements made by deceased not part of the *res gestae*, and inadmissable. 9 N. E. Rep., 505; 42 Ill., 438; 95 N. Y., 774; 3 Conn., 250; 7 Cush., 586; 9 Cush., 41; 43 Ark., 102; 101 N. Y., 126; 48 Ark., 333. They were not dying declarations. 48 Ill., 475; 6 Brad., (Ill.) 569; Pierce on R. R., p. 400; 2 Ark., 246; 97 Ill., 101; 24 Kan., 89.

2. McCants was not competent to testify as to the probable future value of decedent's services. 33 Ark., 350.

3. Tables of mortality must speak for themselves. 21 N. W. Rep., 711.

4. The court erred in its instructions as to the measure of damages. They should be *compensation* only. Mansf. Dig., sec. 5226. Where no pecuniary injury is shown, nominal damages only are recoverable. Patterson Ry. Acc. Law, p. 482, sec. 400; 43 Ill., 338; 45 Id., 197; 52 Ill., 290; 75 Ill., 468; 33 Kan., 543; 21 A. & E. Ry. Cases, 418; 51 Wis., 599. See also Patterson Ry. Acc. Law, p. 490, sec. 404; 55 Penn. St., 499; Pierce R. R., (1881 ed.) p. 399; 28 Minn., 103; 30 Id., 126; 32 Id., 518. There must be reasonable expectation of a pecuniary benefit. *Supra.*

5. The damages are excessive. Opinions are of no great value. 33 Ark., 350. See following cases: 21 A. & E. R. Cases, 176; 84 Ill., 483; 43 Id., 338; 27 N. W. Rep., 305; 83 Ill., 204; 15 N. Y., 432; 55 Penn. St., 499. These enunciate the true rule.

Palmer & Nichols, for appellee.

The declarations of deceased to Dr. Youmans were admissible as part of the *res gestae.* 57 Mo., 93; 8 Wall., 397; 3 Cush., 181; 48 Ark., 333; Whart. Ev., secs. 268-9 and 1102; Wood's Pr. Ev., sec. 147, and notes; Ib., secs. 153, 155; 1 Head, 373; 17 Ala., 618.

There is no doubt as to admissibility of the testimony of Cage and the mortality tables. 2 Rorer R. R., 1099, 1168, 1176; 1 Gr. Ev., sec. 440, and notes; 1 Redf. Rys., 554-5; Wood's Ry. Law, sec. 228; 3 Bush., 667.

The instructions embodied the law. 33 Ark., 350; 39 Id., 491, 511; 39 Iowa, 237; 2 Rorer on R. R., 1167; 3 Wood Ry. Law, sec. 414.

Damages not excessive. 39 Iowa, 247; 44 Ark., 258.

There was sufficient evidence to sustain the verdict. Mansf. Dig., sec. 5162; 68 Tex., 370; 41 Ark., 342; 48 Id., 344; Mansf. Dig., secs. 5225-6.

SANDELS, J.

The appellee, as administrator of the estate of R. Lee Connor, deceased, sued appellant Fordyce as receiver of the Texas and St. Louis Railway Company, to recover damages for the killing of his decedent. It was alleged that deceased was a passenger upon said railway, and that by reason of the negligence, etc., of defendant's servants, the car in which deceased sat was thrown from the track, whereby deceased was killed. Defendant denied that deceased was killed by reason of said car being thrown from the track. It is alleged that the deceased left him surviving his father, L. D. Connor, his sole heir at law, who had suffered pecuniary loss and damage from the death of his son. While there is a singular absence of proof identifying the time, place and circumstance of the accident, it *does* appear that plaintiff, on September 25, 1885, found deceased lying about sixty yards from where there had been a wreck on a railroad, suffering much. That he caused him to be carried to his (plaintiff's) house, and sent for a physician. That the doctor, after driving some twelve or thirteen miles, arrived at McCants' house and saw deceased about 7 o'clock p. m. Deceased complained of pain in the stomach and was vomiting blood. He died seven or eight hours after the doctor arrived. The court permitted the physician, Youmans, against the objection of the defendant, to testify to the contents of the telegram received by him from McCants; that Connor had been injured; that there had been an accident on the railroad, and that he had been seriously hurt and required the wit-

ness's assistance; and, further, to the statements made to him (Youmans) by Connor, after his arrival at McCants' house. That he (Connor) had been thrown heavily across the corner of a seat, and so received the injury. Deceased was an adult, 22 years of age and unmarried. The action was for the benefit of his father. There was verdict and judgment against defendant for six thousand dollars and he appealed.

The appellant, among other causes for new trial assigns as error: The admission of the testimony of witness, Youmans, as to the contents of the telegram and the statements of the deceased to him as to the cause and manner of the injury; and also the giving of instructions prayed by plaintiff and that prepared by the court.

1. The contents of the telegram were hearsay and the statements of Connor to the witness were not part of the *res gestae*. It was error to admit them. It does not follow in all cases that a reversal should ensue because improper testimony has gone to the jury. In this case, however, there is not, beyond the statements of Connor to Dr. Youmans, a scintilla of *direct proof*, and very little *circumstantial*, from which to conclude that deceased received his injuries by reason of the car being thrown from the track. And while, in the absence of this testimony, this court might sustain a verdict upon the other facts proved, it cannot measure the cogency of this statement with the jury, and think the admission of Connor's statement manifestly prejudicial to the defendant.

1. EVIDENCE: Hearsay: *Res gestæ.*

2. Reversible error.

2. Lord Campbell's act, 9 and 10 Vict., ch. 93, has been substantially re-enacted in many of the American States; and to obviate the difficulties which early beset the construction of that act, as to the character of the loss for which a

recovery might be had, and as to the principle upon which an action was maintainable, many legislatures provide that the damages shall be *compensation*, with reference to the pecuniary injuries resulting to the wife or next of kin of such deceased, from the death. It is so provided in this State. Mansf. Dig., secs. 5223, 5226. The liability of carriers, particularly under similar statutes, has been so stubbornly contested in the various States that every imaginable phase of the law has been somewhere and at sometime presented. And upon a thorough examination of the authorities it is a matter of no little concern that we find the opinions of the courts as divergent and unsatisfactory as the verdicts of the juries upon which they passed. The chief difficulty seems to lie in their failure to recognize the impossibility of laying down a fixed rule by which damages are to be measured in all cases.

Some courts say that the earnings of the deceased during his or her expectancy of life, less necessary expenses, should be the measure of damages. Others say that sums proportioned to those habitually given, the value of assistance habitually rendered, or amounts promised, which rearonably may be expected to be paid, should be the measure. While others despairing, apparently, of a satisfactory formulation of a rule, say to the jury: "It would perhaps be a fair way to estimate the amount of damages, to take the probable amount of his (deceased's) accumulation for the time he might reasonably have been expected to live, and find *that* for the plaintiff; *but if you can find a better rule, you are at liberty to adopt it.*" *Penn. R. R. Co. v. McCloskey*, 23 Penn. St., 526.

There may be great differences between the pecuniary loss sustained by different persons who are next of kin.

The pecuniary loss to a child of tender years, arising from the death of its father, is different from its pecuniary loss upon the death of the mother. In the latter case the care, moral, intellectual and physical culture bestowed by a mother have been held to have a pecuniary value. *McIntyre v. N. Y. Cent. R. R. Co.*, 37 N. Y. Rep., 287. The loss of a husband produces still a different pecuniary injury to the wife; while the loss of an adult son to a father, as in this case, involves other elements of damage. By the fourth instruction given to the jury in this case they were told that the measure of damages was the probable earnings of deceased during his expectancy of life, less his expenses, taking into consideration his age, business capacity, habits, health and energy. How do we arrive at expectancy of life of deceased? Properly by tables compiled from mortuary reports. The expectancy of life of deceased was shown to be 42 years. By the same table the expectancy of life of his father, for whose benefit this suit is prosecuted, is 14 years. The vice of the instruction becomes apparent when we reflect that there is recovered by the father as a pecuniary loss to himself, the accumulations of the son for a period of twenty-eight years, after he (the father) is presumed to have died. In this case the plaintiff can recover substantial damages for the father of deceased, only by showing that deceased gave assistance to his father—contributed money to his support, or that the father had a reasonable expectation of pecuniary benefit from the continued life of the son; the reasonable character of this expection to appear from the facts in proof. These should furnish the measure of damages. In the absence of such proof only nominal damages can be recovered. Pierce on Railroads, pp. 393 to 399, and cases cited; 3 Hulstone and Norman, (Exchequer) 211;

3. DAMAGES: To father from death of son.

4. SAME.

Dalton v. S. E. Ry. Co., 4 C. B. N. S., 296; 4 Jur. N. S., 711; *Penn. R. R. Co. v. Brooks*, 37 Penn. St., 339; *Little Rock & Fort Smith Ry. v. Townsend*, 41 Ark., 382, and many other cases. For the errors indicated let the judgment be reversed and the cause remanded for further proceedings.

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EQUALIZATION BOARD V. LAND OWNERS.

1. TAXES: *Assessor's return: Injunction.*

The failure of a county assessor to append to his return of real property assessed, an affidavit in the form prescribed by the statute, is no ground for enjoining the clerk of the county court from extending the assessment on the tax books. *Moore v. Turner*, 43 Ark., 243.

2. SAME: *Equalization of assessments: Notice of raised valuation.*

The jurisdiction of the county board of equalization, to raise the assessor's valuation of property, is not affected by their failure to give the notice required by section 52 of the act of 1887, which provides that when the board shall raise the valuation of any property, they shall give notice thereof to the owner "by postal card or otherwise through the mails;" and it is error to enjoin the clerk because of such failure, from extending the board's valuation on the tax books.

APPEAL from *Ashley* Circuit Court.

C. D. WOOD, Judge.

This suit was brought by certain tax payers of Ashley county to restrain the county clerk from extending upon the tax books of that county for the year 1887 an increased or "raised" valuation of their lands made by the county board of equalization. After the action was commenced all the other land owners of the county were made parties plaintiff and the board were made defendants. The complaint states: That the assessor appraised the plaintiffs' lands at their true market value; that the board of equalization proceeded to raise the assessor's valuation and gave to the plaintiffs no notice

of such increase in value, by postal card or otherwise through the mails, as provided by statute; and that the clerk was about to extend the increased valuation on the tax books. The complaint, as amended, also alleged that the assessor failed to affix to his assessment the affidavit required by the statute. The answer admits that the statutory notice was not given, but alleges that "timely notice was given by personal communication and by publication in a newspaper published in the township;" that none of the plaintiffs were aggrieved by want of sufficient notice, and that four of the original plaintiffs had appealed from the action of the board to the county court where, upon a hearing of the appeal, the valuation of the board was sustained. The answer also alleged that the board had only raised the valuation of the land to its actual value. A demurrer to the complaint was overruled and a demurrer to the answer sustained. The court having found that the board raised the valuation of plaintiffs' lands and neglected to give notice thereof as required by sec. 52 of the act of March 28, 1887, decreed that the extension of the board's valuation on the tax books should be perpetually enjoined. The board appealed. Section 52 of the act referred to provides that the board of equalization, "where it raises the valuation of any property, personal or real, shall give to the owners of the property so raised in valuation or their agents, notice by postal card or otherwise through the mails, of such increase in value, stating the valuation as returned by the assessor and the valuation as fixed by the board," and advising such owners that they may appear before the county court and show cause "why the valuation of their property should not have been raised." Acts 1887, pp. 172, 173. Section 31 of the same act (p. 163) provides that the assessor shall append to

his return of the assessment of real estate an affidavit that the foregoing is correct, and that he has "appraised each tract or lot of land * * * at its true value in money, and not at what it would bring at auction or at a forced sale." The affidavit of the assessor referred to in the complaint in this case was that "the foregoing is correct," and he had appraised "each tract * * * at its true value as it was rendered to" him "*under oath* by the tax payers, owners, agents and all other sources of information that" he "had been able to ascertain."

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellant.

1. Failure to give notice as required by statute does not invalidate the proceedings of the board. 49 Ark., 518; 43 Wis., 620; 42 Id., 502; 42 Ark., 563; 41 Id., 531; Acts 1887, sec. 52; 76 Ill., 201.

2. The remedy was by appeal to the county court. Injunction was not the remedy. 49 Ark., 518; High on Inj., secs. 486-7.

3. A plain remedy is also pointed out by secs. 5857-8, Mansf. Dig.

G. W. Norman, for appellees.

1. No notice having been given, the increase of valuation by the board was *void*. Mansf. Dig., sec. 5201; Acts 1887, p. 172, etc., sec. 52, etc. Equity will restrain the execution of void judgments. Mansf. Dig., p. 770, sec. 3731; 33 Ark., 633. It is the only forum for land owners having *no notice* to get relief. 30 Ark., 279, 284-5; Ib. 594; 33 Ib., 778; 30 Ib., 609.

PER CURIAM.

It was not a ground for injunction that the assessor had

failed to append the proper oath to his return. *Moore v. Turner*, 43 Ark., 243.

The failure to give the notice required by section 52 of the act of 1887, does not affect the jurisdiction of the board of equalization. Pulaski County Equalization Cases, 49 Ark., 518; *Howard v. State*, 47 Ib., 431.

Reverse the decree and dismiss the bill.

ROGERS V. BLYTHE.

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1. PROMISSORY NOTE: *Made to procure dismissal of criminal prosecution.*

A promissory note made to procure the dismissal of a criminal prosecution, although given for the amount of a debt due to the payee, is contrary to public policy and void.

2. SAME: *Same: Evidence.*

W. was agent for an insurance company and having failed to pay over money collected as premiums, J., who was his surety on a bond to the company, caused him to be arrested for embezzling the company's funds. It was then agreed between W. and R., the company's manager, that the criminal charge against W. should be dismissed on his giving a note with acceptable sureties for the sum which he admitted to be due to the company. R. informed one of the sureties of this agreement—one of the others was informed of it by W., and all of them subsequently signed the note sued on with the understanding that W. would not be further prosecuted. After the note was given the prosecution was dismissed on the order of J., or that of the acting prosecuting attorney—the latter having previously promised that he would consent to its dismissal if the debt was secured. In an action against the sureties, the principal not being sued, *held:* That the evidence was sufficient to sustain the finding of the court that the note was given to procure the dismissal of a pending criminal prosecution.

APPEAL from *Sebastian* Circuit Court, Fort Smith District.

J. L. HENDRICKS, Sp. Judge.

This action was brought by Rogers for the use of the Ger-

man Insurance Company, against Blythe, Cravens and Falconer, to recover a balance due on a promissory note, executed to him by the defendants, as sureties of Jerry Wolf, for the sum of $186.99. It was begun in a justice's court from which it was taken by appeal to the circuit court, where it was tried by the court sitting as a jury, and without formal pleadings. On the trial, the plaintiff introduced the note. The testimony on behalf of defendants was in substance as follows:

James A. Yantis testified that while he was acting as prosecuting attorney for the Fort Smith District, Dr. Johnson visited him and stated that defendant, Wolf, (who it seems was an agent of the insurance company,) had collected for said company premiums amounting to about $300, which he had failed to pay over, and that he (Johnson) desired to be released from Wolf's bond as a surety thereon, or to cause Wolf to be punished for converting the company's funds. The witness advised a prosecution for embezzling the company's funds, and Johnson made an affidavit charging Wolf with that offence. Under a warrant issued by a justice of the peace, Wolf was arrested and the company was notified of the proceedings against him. About the same time information was received that Rogers, the company's manager, would go to Fort Smith, to settle the matter, which was "passed over" for his arrival. In company with Johnson and by himself, Rogers called on the witness several times, and stated that he desired the company to get its money without injury to Johnson on his bond, and by giving Wolf an opportunity to earn the amount he had failed to pay over. Wolf claimed a number of credits on his accounts and it was finally agreed that he owed the company one hundred and eighty and odd dollars. Rogers told the witness that Wolf had

offered to make a good note for this balance, with probably Cravens and Tabor as sureties, and witness informed him that such a note would be good. Rogers then asked what would be done about the prosecution, if the matter was settled in that way, saying he did not desire to prosecute Wolf —that all he desired was his money. Witness replied that it was a matter of indifference to him and he was willing to have the prosecution dismissed. The witness in this connection testified that the prosecution was begun to protect Johnson and that he doubted whether it could be sustained, because there was a dispute between Wolf and the company as to the amount due to the latter. He advised Rogers and Johnson to get the note executed as the best thing they could do, and it was agreed that if Wolf made the note the prosecution should be dismissed. The witness was afterwards informed that the note had been given, and the prosecution was ordered to be dismissed. The witness also stated that it was conceded that Wolf owed the sum for which the note was given. The justice of the peace who issued the warrant testified that the charge was dismissed by the order of Yantis or Johnson, and that he made no entry of the proceeding in his docket.

Defendant Cravens testified that Rogers told him that if the money due the company was paid or secured, Wolf would not be prosecuted further. He also stated that when the note was executed, he had no thought that it was given for compounding a felony.

Defendant Blythe testified that Wolf, while in custody, called at his office and told him that the agent of the company had agreed to suspend the prosecution if he could give a satisfactory note, and that he (Blythe) stated to Wolf that he would sign the note if that would save him from going to

jail. Blythe also testified that he and the other sureties on the note, all signed it with the understanding that Wolf would not be prosecuted further, but that he had not himself had any conversation with Rogers up to the time he signed the note.

On this evidence the court found that the note was given to procure the dismissal of a criminal prosecution, pending against the defendant Wolf, and gave judgment for the defendants. The plaintiff appealed.

Caruth & Erb, for appellant.

The evidence not sufficient to sustain the judgment. The note was not given for the compounding of a felony, but the consideration was the amount justly due to the insurance company by Wolf. 52 Ill., 313; 20 Am. Rep., 288.

E. E. Bryant, for appellee.

A note given to procure the dismissal of a criminal prosecution is void. Sec. 1715 Mansf. Dig.; Dan. Neg. Inst., vol. 1, p. 169; 22 Am. Rep., 121, and notes; 1 Hale P. C., 619; even though it be given also for a *bona fide* debt. 1 Dan. Neg. Inst., 168, 169; 1 Chitty's Crim. Law, 4; 1 Smith's Led. Cas., 153, 165, and note; 2 Kent's Com., 366; *Collins v. Blanton*, 2 Wils., 347—leading Eng. case; *Williams v. Bailey*, L. R., I. H. L., 200; *Fivas v. Nicholls*, 2 C. B., 501; *Wallace v. Hardacre*, 1 Camp., 45. Numerous other English cases are cited in the authorities, *supra*.

The following Arkansas cases might be looked at: *Tatum v. Kelly*, 25 Ark., 201; S. C., 94 Am. Dec., 717; *Lindsay v. Rottaken*, 32 Ark., 619; 25 Ark., 349; 25 Ark., 350; 27 Ark., 379.

Bibb v. Hitchcock was a "reconstruction" decision, to protect a federal office-holder who was responsible to the

government for the embezzled funds. *Ford v. Cratty* was decided on the proviso in the Illinois statute allowing a party to obtain compensation for any loss.

Reed v. McKee, 42 Iowa, 689; S. C., 20 Am. Rep., 631; *Sumner v. Sumners*, 54 Mo., 340; *Brick Co. v. Cook*, 44 Mo., 29; *Porter v. Havens*, 37 Barb., 343, and cases cited; *Bank v. Matthewson*, 5 Hill, 249; *Brown v. Padgett*, 36 Ga., 609; *Chandler v. Johnson*, 39 Ga., 85; *Godwin v. Crowell*, 56 Ga., 566; *McMahon v. Smith*, 47 Conn., 221; *Shaw v. Reid*, 30 Me., 105; *Kimbough v. Lane*, 11 Bush, 559; S. C., 15 Am. Law Reg., 389; *Gardner v. Maxey*, 9 B. Mon., 90; *Swan v. Chandler*, 8 B. Mon., 97; *Plumber v. Smith*, 5 N. H., 533; S. C., 22 Am. Dec., 478; *Clark v. Richter*, 14 N. H., 44; *Coburn v. Odell*, 30 N. H., 540, 553; *Shaw v. Spooner*, 9 N. H., 197; S. C., 32 Am. Dec., 348, and cases cited in text and note; *Buck v. Nat. Bank*, 27 Mich., 292, and cases cited; *Snyder v. Willey*, 33 Mich., 495, and cases cited; *Woodruff v. Hinman*, 11 Vt., 592; S. C., 34 Am. Dec., 712, and cases cited; *Hinesburg v. Sumner*, 9 Vt., 23; S. C., 31 Am. Dec., 599, and note; *Lindsay v. Smith*, 78 N. C., 328; S. C., 24 Am. Rep., 463; *King v. Winant*, 71 N. C., 469; 73 N. C., 563; *Partridge v. Hood*, 120 Mass., 403, and cases cited; *Commonwealth v. Pease*, 16 Mass., 91; *Racquet v. Roll*, 7 Ohio, 77; *Pierce v. Wilson*, 111 Penn. St., 14; S. C., Am. Rep., 243.

The argument of appellant's counsel that there was no evidence to show that Wolf was guilty of a crime is an avoidance of the reason of the rule. 1 Dan. Neg. Inst., 168, says: "It is not necessary to stamp the transaction with illegality that a felony should have been committed. It is sufficient if it be charged, for the investigation of the charge

is the policy of law which is sought to be protected." Such is the doctrine of all the cases. *Chandler v. Johnson*, 39 Ga., 85; *Bank v. Matthewson*, 5 Hill, 249; *Bigelow v. Woodward*, 15 Gray, 560; *Fivas v. Nicholls*, 2 C. B., 501, and the majority of the cases cited, *supra*.

The argument that the plaintiff did not institute the proceedings but merely wanted its money is fallacious. Whether it began the proceedings or not it was directly connected as a party with the agreement by which they were discontinued.

PER CURIAM.

The court below found that the note in controversy was given to procure the dismissal of a pending prosecution. The evidence sustained the finding.

Affirmed.

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DESHA COUNTY V. JONES.

1. COUNTIES: *Claims against counties: Itemizing account.*

On a claim against a county it is error to allow charges which are not itemized and show no liability on the county. (Mansf. Dig., sec. 1413.)

2. SAME: *Same:*

Where an officer's account for fees, presented for allowance against the county is itemized obscurely in an abbreviated form, so that it is not sufficiently intelligible to show that the services charged for were of the character for which fees are allowed by law and that the county is liable, the claim should be rejected unless the defect is supplied by evidence.

3. SAME: *Same: Statute of limitations:*

Where the claim of a county clerk against the county, for expenses incurred in his office in 1881, 1882 and 1883, was not presented to the county court for allowance until July 1887, it was barred by the statute of limitations.

APPEAL from *Desha* Circuit Court.

J. A. WILLIAMS, Judge.

At the July term of the Desha county court, the appellee Jones, presented for allowance two claims against that county. The first of these claims was upon an account stated in the following form:

CIRCUIT COURT ACCT.

Desha county in account with J. P. Jones, late clerk, for fees due at the Watson district, Feby. and August terms, 1886.

To opg order 20, adjg order 20, Law 2 indexes..... 60

* * * * * * * * *

To filing 2 grand jury lists 20, Ent. 7 orders etc., grand jurors, 1.40.....1 60

Following these, are items in a similar abbreviated form, covering several pages and amounting in all to the sum of $378.80. A number of them are placed under the title of criminal cases written above them, thus:

"State vs. Joe Stroud—Grand Larceny."

The second claim was styled, "Expense Account," and like the first, purports to be stated between the county and the appellee as clerk. It is for stationery, etc., charged in numerous items, beginning with the date, "Mch 1st, 1881," and extending to 1886. The charges after 1884 are as follows:

Jany. 1885,	To stamps, paper	25
Feby. "	" Ink " "	2.10
Mch. "	" " " "	1.60
Apl. "	" " " " pens	1.85
		5.80
1886		5.10

Both accounts were verified by affidavit as the law requires.

On the first account the county court allowed the sum of $362.15 and on the second the sum of $17.00. H. Thane, a tax-payer of the county, appealed from the order of allowance and on a trial in the circuit court, objected to the introduction of both accounts, and set up the statute of limitations as a bar to the second. His plea and objection were both overruled and the court allowed on the first account, $346.30, and on the second, $63.50, and gave judgment accordingly. Thane was refused a new trial and appealed. Section 1413 of Mansfield's Digest, provides that, "in all cases the county court shall require an itemized account of any claim presented to them for allowance." * * * And by section 1414 the court is "prohibited from auditing and allowing to any officer any fee or allowance not specifically allowed such officer by law." * * *

David A. Gates and *Jas. Murphy*, for appellant.

The claim for $378.80 is wholly unintelligible, made up of *abbreviations* or senseless words. See sec. 3292, Mansfield's Digest. There is no proper showing that the county is liable for the items charged for. 32 Ark., 50–55. There was no evidence to show that the fees charged in State cases had been adjusted by the circuit court. Sec. 2345, Mansf. Dig., 32 Ark., 55.

2. The claims for the years 1881–2–4 were barred by limitation. Mansf. Dig., sec. 4478; 27 Ark., 343. The claim for 1884 was paid. The charges for 1885–6, are not itemized.

X. J. Pindall, for appellant.

1. The claim was a continuous, running account for several years and was not barred by limitation.

2. All the objections made by Thane to the items of the

account were sustained. All the others are for fees allowed by law. The claims were sworn to, and not being denied under oath, the court properly rendered judgment. Mansf. Dig., sec. 2915.

There is no evidence that Jones did not keep the record required by sec. 3292, Mansf. Dig. Thane and the court both knew what the abbreviations meant, and there was no ground to exclude the accounts.

Thane should have moved to make the account more definite, but having failed to do so, he cannot object in this court for the first time.

PER CURIAM.

The appellee can recover only in pursuance of the express provisions of the law. *Craighead County v. Cross County*, 50 Ark., 431; *Fanning v. State*, 47 Ib., 442. The first itemized account upon which judgment was rendered is not sufficiently intelligible to show that the services charged for were of that character. No evidence was offered to supply the defect.

The plea of limitation is valid against the claim for expenses preferred by the second account even if it was sufficiently proved. The items in that account for 1881, 1882 and 1883 are barred by limitation. The items for 1884 were paid. The charges after that time are not itemized and show no liability on the county.

The judgment is reversed and the cause remanded.

ORR V. DOUGHTY.

HOMESTEAD: *On land jutting into village.*

Where a tract of land not within the limits of any incorporated town, is used only for agricultural purposes in connection with a contiguous farm, and has never been surveyed into blocks and lots or dedicated to village

uses, it may be claimed as a rural homestead, "outside any city, town or village," within the meaning of the constitution, although the land on which the claimant's residence is situated juts into a village.

APPEAL from *Izard* Circuit Court.

R. H. POWELL, Judge.

Orr and Lindsley recovered judgment against the appellee, Doughty, in the Izard circuit court in March, 1884, and sued out execution thereon in February, 1887. The execution was levied on two tracts of land, one containing fifteen and the other eighty acres. Doughty filed with the clerk a schedule, claiming the exemption of the lands as a homestead, outside any city, town or village, and obtained a *supersedeas* staying any sale under the execution. Orr filed a motion to quash the *supersedeas*, on the ground that said lands are not wholly outside any city, town or village, but that the fifteen acre tract, embracing Doughty's residence, is in the town or village of Newburg. On the hearing of the motion, the evidence showed that the two tracts of land described in the schedule are contiguous and have been used only for purposes of agriculture. No part of either tract has ever been laid off into blocks, lots or streets as town property. But Doughty's residence is on the fifteen acre tract, and about the time the house he occupies was built, a survey of lots and streets was made on land adjoining that tract on the west; and on the land which adjoins it on the east, other lots and streets were laid off at a later period. There were buildings on both surveys on either side of Doughty's residence, and the whole settlement there, including his house, was known as the town of Newburg, a village that contained more than one hundred inhabitants, but which had never been incorporated. The fifteen acre tract was described in the deed conveying it to Doughty, as "part of the N.E." etc.,

"situated in Newburg, in the county of Izard, State of Arkansas," and it was shown that he always spoke of his home as being "in Newburg." He was postmaster at the village and kept the office in the store house where he was engaged as salesman.

The court found that the homestead of Doughty was not situated in any city, town or village; overruled the motion to quash the *supersedeas* and rendered judgment sustaining the exemption claimed by the schedule. Orr and Lindsley appealed.

The constitution (article ix, sections 3 and 4) provides that "the homestead outside of any city, town or village * * * * * * shall consist of not exceeding one hundred and sixty acres," and that "in any city, town or village" it "shall consist of not exceeding one acre of land."

Jno. H. & S. W. Woods, for appellants.

1. The homestead claimed was not a rural homestead, but was within the limits of a town or village. For definition of "town" or "village" see Webster's Dic.; Thomp. Homest. and Ex., sec. 161; 27 Ill., 48; 72 Ill., 568; 25 Ark., 103; 20 Id., 564, 572. The constitution does not contemplate that the place shall be incorporated, laid out into streets and alleys, or platted, or laid off into lots, but merely that it be a town or village. The evidence conclusively shows that appellee's residence was in "Newburg," and he was entitled to only *one acre*.

S. W. Williams, for appellee.

The laying off the rural homestead into lots and blocks is essential to produce a change from a rural to a town homestead. 17 Texas, 74; Thomps. on H. and Ex., sec. 160.

The statute and constitution being silent as to what constitutes a town, the courts look to the uses to which the land is put, even where laid off into lots. Thompson on Homest. and Ex., sec. 161.

The land was used for agriculture, and the fact that Doughty was postmaster, or had a store, or that certain residents of the village lived around on either side of him, does not change its character. 12 Iowa, 516; 38 Texas, 425; 20 Ark., 561; 21 Fla., 362; 1 Gen. Dig., 1886-7.

PER CURIAM.

The premises claimed as a homestead are not within the limits of any incorporated town. The tract had never been surveyed into blocks and lots or dedicated to village uses. It has been and is now used for agricultural purposes in connection with defendant's contiguous farm, and is therefore a country homestead within the meaning of the constitution, notwithstanding the land upon which the defendant's residence is situated juts into the village.

Affirm.

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EASTHAM V. POWELL.

1. ADVANCEMENT: *Presumption of: Rebutting evidence.*

Where a father purchased land and caused it to be conveyed to his imbecile daughter, declaring at the time of directing the conveyance to be made to her, that he did so in order to make provision for her on account of her infirmity, proof that he stated as an additional reason for the conveyance that he wished to exclude his second wife and her children from the benefits of the land, and expressed the opinion that as his daughter's natural guardian he would be able to enjoy the use of the property, is not sufficient to overcome the presumption raised by the law of an advancement to the daughter, but, on the contrary, confirms it—such exclusion of the wife, etc., being consistent with a gift to the daughter.

2. DEEDS. *Conveyance to imbecile: Delivery.*

Where the grantor in a deed conveying land to a person who is *non compos*, delivers it to the latter's father, intending by such delivery to pass the title to her, the father's acceptance of the deed for the daughter is a sufficient delivery to her, and the conveyance being for her benefit, her assent thereto will be presumed.

APPEAL from *Madison* Circuit Court in Chancery.

J. M. PITTMAN, Judge.

The appellant, *pro se*.

1. While in most cases delivery of a deed should be shown, yet if the deed is found in the grantee's hands, a delivery and acceptance is always presumed. Wash. Real Pr., p. 294. A conveyance may be made to a minor or lunatic, and the law presumes acceptance by or for them. Ib., p. 291.

2. The facts in this case clearly sustain the presumption of law that an advancement was made by the father to his child. Story's Eq. Jur., pp. 445–6, sec. 1202–3. Even if the daughter had been of sound mind an advancement would be presumed. 41 Ark., 301; 48 Id., 1.

3. The intention of the parties controls. 27 Ark., 77, and the presumption is that it was intended to be an advancement. 40 Ark., 62.

C. R. Buckner, for appellee.

The evidence discloses the fact that while Eastham was living on the land and exercising acts of ownership over it and without ever having had the deed recorded, he obtained credit on the faith of his being the owner in fee to the land, thereby placing the mortgagee in the attitude of an innocent purchaser for value. See 2 vol. Sugdon on Vendor (7th American edition), page 507, secs. 2 and 4.

If the conveyance of land to a child is proved to be for a

particular purpose, as in this case, (to keep the wife and his creditors from taking any interest and to have it so that the party paying the purchase money can control and sell it at pleasure) the child will be a trustee. 2 vol. Sugdon on Vendor (7th Am. Ed.), page 400, sec. 30; *Strimpfler v. Roberts*, 57 Am. Dec., page 606; Perry on Trusts, vol. 1 (2nd ed.), secs. 133, 137–9; Teidman on Real Property, page 500 and note 1.

We recognize the rule that in general there is no resulting trust were the parties are so closely related as parent and child, husband and wife, etc.

But there are marked exceptions to the rule, which is, if the land is taken in fraud of some one, or with the intention that the party paying the purchase money should have the equitable interest, the trust will result as in any other case. See note 1, page 500, Teidman on Real Property and the authorities there cited.

Mr. Perry on Trusts, vol. 1, (2nd ed.), sec. 147, says it is purely a question of intent, which has also been fully passed upon by our own supreme court in *Milan v. Freeman, et al.*, 40 Ark., 62; *James, as Admr., v. James, et al.*, 41 Ark., 301, and in *Bogy v. Roberts*, 48 Ark., 1; Story Eq., vol. 2, sec. 1202, (7th ed.)

Upon the subject of delivery we beg to call the attention of the court to page 814 of Teidman on Real Property, also 3rd Washburn on Real Property, (3rd ed.,) pp. 254 and 265.

If Eastman had a right to have the land conveyed to his daughter as a gift he also had a right to revoke the gift before delivery, which he did by mortgaging the land.

COCKRILL, C. J.

Laura Eastham, who is *non compos*, and her guardian,

were made defendants to a suit by the appellee to foreclose a mortgage executed by Laura's father, T. J. Eastham, the complaint alleging that she claimed an interest in the mortgaged premises.

The guardian filed a cross complaint setting up paramount title in his ward. The cause was heard upon the pleadings and depositions, and the court decreed that Laura had no interest in the land.

1. ADVANCEMENT: Presumption of: Rebutting evidence.

The proof showed that the father had purchased the land and taken the deed in Laura's name. The contention is that the evidence establishes a resulting trust in favor of the father, and that the mortgage attached to his equitable interest. But the proof, so far from overturning the presumption of an advancement which the law raises when a father purchases land and causes it to be conveyed to his child, (*Robinson v. Robinson*, 45 Ark., 481,) confirms it. The daughter was *non-compos*, and the father when he gave directions for the conveyance to be made to her, declared that it was done as a provision for her on account of her infirmity. The proof relied upon by the appellant is that he also assigned as a reason for the conveyance to Laura that he wished to exclude his second wife and her children from the benefits of the property, and expressed the view that as the natural guardian of his daughter, he would be able to enjoy the use of the land. But the exclusion of the second wife and her children was consistent with the idea of a gift to Laura, and the fact that the father expected to reap only such benefit as his guardianship would afford him, was confirmatory of his expressed wish to confer the estate upon her.

2. Deed to imbecile: Delivery.

It is further argued that the deed to the land was never delivered to Laura, and that the title for that reason never

vested in her. The contention is that delivery of the deed to the father, who was the natural guardian of his imbecile daughter, was not a delivery to the daughter. The proposition can not be sustained. There is no question about the intention of the grantor to pass the title by the delivery. The assent of the imbecile could not be demanded, for she was incapable of assenting. But the conveyance was beneficial to her, and the presumption of assent under such circumstances is a rule of law. The father's declaration, at the time of the execution of the deed, shows, as we have seen, that his intention was to accept it for the daughter's benefit, and, as she was *non compos*, it was like the acceptance of a deed by a parent for an infant child which has always been deemed a sufficient delivery. Tiedeman on Real Property, sec. 814.

If Laura was an improper party to the suit to foreclose the mortgage, the appellee cannot be heard to complain, (*Adams v. Edgerton*, 48 Ark., 419,) but the full measure of the relief to which he is entitled should be granted. The judgment against her interest will be reversed, and, as she is in possession, a decree will be entered here quieting her title against the appellee's mortgage.

VAHLBERG V. KEATON.

1. USURY: *Reserving interest in advance: Act of 1875.*

The provision of the act of Feb. 9, 1875, (Mansf. Dig., sec. 4736), to the effect that it shall be lawful for all persons loaning money in this State, to reserve or discount interest upon any commercial paper, mortgage or other securities, at any rate of interest agreed upon by the parties, not exceeding ten per cent., does not violate section 13, article 19, of the constitution, prohibiting usury, and is valid as far as it relates to transactions of a commercial kind, in short time paper.

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2. SAME: *Same.*

Where a note for loaned money is made payable in three months without interest until due, it is not usury to reserve in advance out of the sum for which it is given, interest thereon at the highest legal rate, from the date of the note to its maturity.

3. SAME: *Bonus paid to agent of borrower.*

A sum paid by the borrower of money to his own agent for procuring the loan, is not paid for the loan or forbearance of the money thus obtained, and will not, although in excess of the highest lawful interest, constitute usury.

4. SAME: *Bonus paid to agent of lender.*

A lender cannot lawfully receive for the forbearance of his money more than ten per cent. per annum. And where his agent receives from the borrower a bonus in excess of the highest lawful interest, either with his knowledge or under circumstances from which the law will presume he had knowledge, the transaction is usurious. But if the agent receives such bonus without the lender's knowledge and under circumstances from which his knowledge can not be reasonably presumed, then it will not make the loan usurious.

APPEAL from *Garland* Circuit Court.

J. B. WOOD, Judge.

R. G. Davies, for appellant.

The evidence in this case shows that the broker was the agent of the borrower. If a greater amount than ten per cent. was exacted, it was for the broker's commissions, notary's fees, etc., and did not constitute the loan usurious. See 9 Ark., 23; 25 Id., 190, 258; 116 U. S., 98; 23 Fed. Rep., 162; 46 N. J. Law, 35; 106 Ill., 549; 31 Minn., 495; 91 N. Y., 324; 92 N. Y., 34; 13 Neb., 157.

J. M. Harrell, for appellee.

The evidence in this case makes a clear case of usury, and no pretence that Smith the broker, was the agent of the borrower can validate the loan. While it may be contended that there must be a *corrupt intent*, yet is it true that the law pre-

sumes that one intends the necessary consequences of his acts, and *presumes, even, in opposition to the fact,* that he knew those acts were usurious and unlawful. 25 Ark., 190; Ib., 258; 5 Am. Dec., 424; 24 Neb., 527. See, also, Tyler on Usury, secs. 393 and 395.

2. Every subsequent security given for a loan originally usurious, however remote or often renewed, is subject to the plea of usury. 11 Neb., 465; 9 N. W. Rep., 648; 9 Iowa, 354; 11 Rep., 847.

3. An undisclosed principal is liable though agency not known. The usurious acts of the broker are the acts of his principal. 34 Am. Dec., 530.

4. But it is contended, even if the broker was the lender's agent, if he exacted unlawful interest without authority or knowledge of his principal, the loan is not usurious, citing 116 U. S., 98. This was an Iowa case, whose statute differs from ours. But see 100 Ill., 611; 13 Neb., 157; 32 N. Y., 165, reviewing 21 N. Y., 219; Abb. N. Y. Dig., vol. 8, p. 950.

Our constitution makes usurious contracts *void,* and no agency can validate them under any circumstances.

HEMINGWAY, J.

The appellant, claiming title under the appellee, brought ejectment in the Garland Circuit Court to recover of her two parcels of land. The lands had been sold under the power contained in two deeds of trust executed by her, and the appellant had purchased them. She seeks to defeat the title thus acquired, upon a plea that the deeds of trust were each given to secure usurious loans from the appellant to her.

The case was tried by a jury. There was verdict and judgment for the appellee, defendant in the court below. The appellant assigns as grounds to reverse the judgment,

that the court erred in instructing the jury. It is contended on the other hand, that such error, if committed, was without prejudice to the appellant, for the reason that upon the evidence no other verdict than the one found by the jury, could have been rendered. The evidence conclusively establishes the following facts:

The appellee applied to one O. F. Smith, a broker in Hot Springs, for a loan of three hundred dollars; Smith procured that amount from the appellant, and delivered to him one of the notes and deeds of trust to which the taint of usury is now imputed; the note was for $300, due in three months, without interest until due; Smith paid to the appellee $261 of the amount procured from appellant, and returned to the appellant the amount of the interest on the note for three months at ten per cent. per annum. Smith retained the amount of his own commissions, and the cost of acknowledging and recording the deed of trust. Whether this exhausted the balance or not, is left in doubt. Afterwards the appellee applied to Smith for a loan of one hundred dollars; Smith procured from appellant one hundred and twenty dollars, and delivered to him the appellee's note for that amount, due in three months without interest until due, with a deed of trust on part of the land in controversy, to which note and deed of trust the defendant imputes the taint of usury. Smith gave to appellee one hundred dollars of the amount thus procured, returned to the appellant the amount of the interest on the note for three months at ten per cent. per annum, and retained out of the balance the amount of his own commissions with fees for acknowledging and recording the deed of trust. Whether this exhausted the balance or not, is left in doubt.

The appellant contends that upon each loan he received

interest in advance at the rate of only ten per cent. per annum, while the appellee contends that he received more.

The notes were not satisfied. The lands were sold under the power in the two deeds of trust, and the appellant purchased them.

Usury is charged, First, because the lender reserved interest in advance, upon the face of the note at the highest lawful rate of interest, and second, because in addition to the highest lawful interest, paid directly to the lender, interest in excess thereof was paid, by way of bonus, to Smith.

As the notes were given for the entire amount applied for, and as the amount actually received by the borrower was less than such amount, by the amount deducted for interest, it is contended that this constitutes usury to a mathematical certainty.

1. USURY: Reserving interest in advance: Act of 1875.

The constitution denounces the taking of usury, and upon all contracts for its payment, impresses the stamp of absolute nullity. This blight covers the entire transaction; it extends to the principal, as well as to the unlawful interest contracted for. Besides this, the constitution requires the general assembly to prohibit usury by law. Con. 1874, Art. 19, sec. 13. The general assembly which convened within a few weeks after the constitution was adopted, in the attempt to execute the mandate above, enacted a statute against usury. In it, it is provided among other things, that all persons loaning money in the State, shall be authorized to reserve or discount interest, upon any note, bond, bill, draft, acceptance or other commercial paper, mortgages or other securities, at any rate stipulated or agreed upon by the parties, not to exceed ten per cent. Acts 1874–5, page 145; Mansfield's Digest, sec. 4736.

Unless the legislative interpretation of the terms of its man-

date was in violation thereof, it is clear that usury can not be imputed to the reserving in advance of the highest lawful rate of interest. Although the statute was intended to enforce, if it in fact violates the provisions of the constitution, it is void. The language of the constitution, as of other similar instruments, is general and comprehensive. It deals with large topics couched in broad phrase; it attempts neither minute definition or enumeration. It should be so construed as to subserve its broad purposes, and in the accomplishment of this end, it should not be subjected to the application of arbitrary rules of construction, which it is said, are more often resorted to as aids in ingenious attempts to make the constitution say what it does not, than with a view to make it express its real intent. Endlich Int. of Stat., sec. 506; Cooley's Con. Lim., 101.

As a constitution does not deal in detail or enumeration, we should not give it so broad a meaning as will carry it beyond its true sense and spirit, nor apply to it such narrow or constrained views as to defeat the object of those who framed it. Cooley's Con. Lim.; *People v. Fancher*, 50 N. Y., 291; *People v. Cowles*, 13 N. Y., 350; *Temple v. Mead*, 4 Vt., 535.

It has been said by a court distinguished for its learning and ability, that conventions do not always use language with mathematical accuracy, and that in them exceptions and qualifications are sometimes implied when not expressed. *Kennedy v. Gies*, 25 Mich., 83.

It is also said to be a correct rule in constitutional interpretation, to construe it not according to its technical meaning, but according to the acceptation of those who adopted it. The *State v. Mace*, 5 Md., 337–51.

Mathematical scope and technical signification, should each

yield to the purposes of the instrument, to be ascertained upon an examination of its provisions, and a consideration of the evils it was intended to remedy, and the benefits it was intended to secure. The meaning may be drawn from all these sources, and should be in consonance with each of them. It must be presumed that it was framed and adopted in the light and understanding of prior and existing laws, and with reference to them. When the framers of a constitution employ terms, which, in legislative and judicial interpretation, have received a definite meaning and application, which may be either more restricted or more general, than when employed in other relations, it is a safe rule to give to them that signification sanctioned by the legislative and judicial use. *Dailey v. Swope*, 47 Miss., 367–83.

Nor will it be presumed, that the constitution intended to destroy or change the existing laws, except as such intent is manifested by its spirit and letter. Endlich Con. Int., sec. 520.

Applying these rules to the construction of the clauses under consideration, it becomes material to ascertain, whether its terms had received judicial interpretation before it was incorporated into the constitution.

The statute of 12 Anne provided in substance, that no person should take directly or indirectly for loan of money, etc., interest at a higher rate than five per cent. per annum; and that all contracts whereby there was reserved or agreed to be paid, interest at a higher rate; should be utterly void. The question came before the court of common pleas under this statute, and Sir Wm. Blackstone "conceived that interest may as lawfully be received beforehand for forbearing, as after the term is expired, for having forborn." *Lloyd v. Williams*, 2 Wm. Blackstone, 792.

The same principle was approved under the same statute in so far as it applied to commercial transactions in bills and notes. *Auriol v. Thomas*, 2 T. R., 52; *Marsh v. Martindale*, 3 B. & P., 154; *Floger v. Edwards*, 1 Cowp., 112.

In the case last above, the court say, "upon a nice calculation it will be found that the practice of the banks in discounting bills, exceeds the rate of five per cent.; for they take interest upon the whole sum, but pay only part of the money, viz: by deducting the interest first, yet this is not usury." Although this practice was held lawful under the usury laws, it was not permitted to become a cover for usury. In the case of *Marsh v. Martindale, supra.*, the court after approving this construction of the law, to the extent indicated, says, "No shift will enable a man to take more than legal interest upon a loan."

If any English court ever gave to the statute of 12 Anne any other construction, it has not come within our knowledge. Its construction is of the highest importance in construing all subsequent legislation upon the subject, because it has been taken as the model for such subsequent legislation. Usury laws differ widely as to the effects of usury, but there are slight differences in defining its elements. As the American States have adopted the English statute as a model, so the American courts have adopted the construction given it by English courts. So we find the statement, that "the courts uniformly hold, at the present day, that the interest for ordinary paper, having the usual time to run, such as is the custom of banks, may be taken in advance, by way of discount, and not subject the paper to the taint of usury." Tyler on Usury, pp. 298–338; 3 Par. Con., pp. 131, 132 and note; Morse on Banks and Banking, p. 133; *Bank v. Johnson*, 31 Me., 414; *Bank v. Butts*, 9 Mass., 49; *Fleck*

ner v. Bank, 8 Wheat, 354; *Bank v. Osgood*, 15 Johns., 162. Although this relaxation of the prohibition against usury was first sanctioned in the transaction of banks and other corporations authorized to make discount, a distinction could not be made against individuals and it became universal. 3 Par. Con., p 131; *Bank v. Butts*, 9 Mass., 49; *Marsh v. Martindale, supra; N. Y. F. Ins. Co., v. Ely*, 2 Cowen, 703; *Cole v. Lockhart*, 2 Cart. (Ind.), 631; *Parker v. Cousins*, 2 Grat., 372.

The question has never been expressly ruled by this court. In an action on a bond, bearing ten per cent., payable semi-annually in advance, given to the Commissioner of Internal Improvements, for borrowed money, the court held the instrument void for usury. Although not decided, the principle of the cases herein cited, seemed to be approved by the court, which held it inapplicable to the case under consideration, because the bond was not intended to circulate as a negotiable instrument for the benefit of trade. *Hogan v. Hensley*, 22 Ark., 413. It was not within the rule for the further reason, that the bond was not "ordinary paper, having the usual time to run, such as is the custom of banks" to deal in. As the Arkansas statute then in force, was in all essential features like the similar statutes of England and the other states, which had been fully and uniformly construed, it can not be doubted that a similar construction would have been given. The like usage certainly obtained and was acquiesced in in this State.

The first prohibition against usury in Arkansas was contained in the act of 1838. It was in force continuously until 1868. Then the administration of the State government changed hands, and a constitution was adopted which provided that no law limiting the rate of interest for which per-

sons might contract, should ever be passed. In 1874, after the administration of the government had been restored to those from whom it was taken in 1868, the present prohibition against usury was incorporated into the constitution. There was no intent to change the usury laws that for thirty years rested upon the statute books of the State; but rather to remove the inhibition against such laws, and to restore them upon a safer, more permanent and stable basis. The clause of the constitution is no broader in its terms, and seems to reach no further in its purpose than the act of 1838, the act of 12 Anne, or the acts of the other states, upon the subject. The framers of the constitution intended only to make the prohibition against usury, as it had formerly been understood, a part of the organic law, and not leave it to depend on the discretion of the legislators or the chances of party ascendency. Such being the purpose of the constitution, and such the meaning given statutes embodying its terms by previous judicial construction, it follows that it will receive the same construction placed upon the similar statutes. This conclusion receives support in the fact, that the legislature meeting very soon after its adoption, dominated by the purpose that controlled in its adoption, and charged with the duty of carrying it into effect, enacted the statute referred to. We consider the act valid so far as it relates to transactions of a commercial kind in short time paper.

2. SAME.

The appellant collected the highest lawful rate of interest; in addition to this, Smith, who acted as agent either of appellant or appellee, received a bonus for his services. It is controverted whether he acted as the agent of the one, or of the other; this involves a question of fact to be submitted to a jury, and upon its finding would perhaps depend the decision of the case.

3. Bonus paid to agent of borrower.

If he acted as the agent of the borrower alone, whether he received or did not receive, a bonus, is immaterial to the plea of usury. What the borrower pays to his own agent for procuring a loan, is no part of the sum paid for the loan or forbearance of money. *Merck v. A. F. L. Mfg. Co.*, 7 S E. Rep., 265; *McFarland v. Carr*, 16 Wis., 276; *Ballinger v. Bourland*, 87 Ill., 513; *Philo v. Butterfield*, 3 Neb., 256; *Gray v. VanBlarcom*, 29 N. J. Eq., 454; *Eddy v. Badger*, 8 Bis., 238.

If he acted as the agent of the lender, the effect is involved amid a mass of conflicting judicial utterances, embarrassing and irreconcilable.

Some courts hold, that if the agent collect the bonus for his own exclusive benefit, and the lender receives no part of it, that this will not constitute usury, whether the lender knew of it or not. *Conover v. VanMeter*, 18 N. J. E., 481; *Acherson, et al., v. Chase*, 9 N. W. Rep., 734. See, also, *Mackey v. Winkler*, 29 N. W. Rep., 337; *N. E. M. S. Co. v. Gay*, 32 Fed. Rep., 636.

Others hold that, although the lender had no knowledge that his agent received a bonus from the borrower, still it will constitute usury if he did receive it. *Philo v. Butterfield*, 3 Neb., 256; *N. E. M. & S. Co. v. Hendrickson*, 15 C. L. J., 132; 13 Neb., 157; *Olmstead v. N. E. M. Sec. Co.*, 11 Neb., 487; *Cheney v. White*, 5 Neb., 261; *Austin v. Harrington*, 28 Vt., 130.

4. Bonus paid to agent of lender.

We will not discuss what we deem to be obvious vices in each doctrine above stated, but announce the rule which we consider most in consonance with reason and justice, and best sustained by authority. The lender may receive for the forbearance of money ten per cent. per annum and no more. In excess of that his agent can receive no bonus from the

borrower. If the agent do receive from the borrower a bonus in excess of the highest lawful interest, either with his knowledge, or under circumstances from which the law will presume he had knowledge, then the transaction is usurious; while, if the agent received the excessive bonus without his knowledge, and under circumstances from which his knowledge could not be reasonably presumed, the transaction would not be usurious. What circumstances will raise the presumption of knowledge must be determined in each case, in accordance with the principle by which knowledge is imputed to persons, in controversies generally. We will add now, that where a lender places money with an agent to be loaned, with the understanding that he must receive the highest lawful interest, and that the agent must look to the borrower for his commissions, the circumstances necessarily impute knowledge to the lender, of an usurious bonus received by the agent upon each loan. And if the money was so placed and nothing said as to the compensation of the agent, but the lender demanded for himself the highest lawful rate of interest, the same result would follow, unless the relations between the lender and his agent were such as reasonably to justify the belief that the agent would act solely for the accommodation of the lender and without expectation of reward. It would not be right to punish the principal for the unlawful acts of his agent, done without his authority or knowledge, either express or implied; but although the acts be unlawful, if they are done by the authority or with the knowledge, express or implied, of the principal, they are the acts of the principal, for which upon correct principle he is and should be held responsible. To hold otherwise, would be to permit the lender to exact the highest lawful interest, and the payment of a debt for which he is bound; if this

could be done, why not permit the lender to collect excessive interest and excuse his misconduct by showing that he had used the excess in paying a debt he owed? *Payne, et al., v. Newcomb, et al.*, 100 Ills., 611; *Condit v. Baldwin*, 21 N. Y., 219; *Bell v. Day*, 32 N. Y., 165; *Rogers v. Buckingham*, 33 Conn., 81; *McFarland v. Carr*, 16 Wis., 276; *Call v. Palmer*, 116 U. S., 98.

The instructions were given under a mistaken view of the law, and state it incorrectly; for that reason the judgment must be reversed and the cause remanded for a new trial in accordance with the law as herein announced.

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THOMPSON V. INGRAM.

USURY: *Reserving interest in advance: Bonus paid to agent of lender.*

Where money is placed with an agent, to be loaned, with the understanding that the owner shall receive the highest lawful rate of interest, and that the agent will look to the borrower for his commission, a loan of the money made by the agent is usurious, if he reserves in advance the highest lawful interest, and, in addition thereto, receives a bonus from the borrower. *Vahlberg v. Keaton, ante*, 534.

APPEAL from *Faulkner* Circuit Court.

J. W. MARTIN, Judge.

S. W. Williams, for appellant.

1. The facts proven do not warrant the finding that W. J. Thompson was the owner of the note, and Walton making the loan for him. The money was placed in Walton's hands as John F. Thompson's money, to buy notes, and his action in loaning at usury could not affect Mr. T.'s right, nor could it affect W. J. Thompson's rights if the money was his. The taking of a bonus by the agent or lender from the borrower does not make usury, unless the principal knew it.

12 Cent. Rep., 631; reported 109 N. Y., *Stillman v. Northop*. See, also, 81 Am. Dec., 736 and notes.

2. Thompson merely shaved the notes and was an innocent holder for value.

J. H. Harrod, for appellees.

The facts show that W. J. Thompson was the *principal* in the loan and the *owner* of the note, and the loan was clearly usurious.

Even if Walton exceeded his authority as an agent, Thompson ratified his usurious acts by taking the note, collecting the interest and other payments.

Here the principal knew that the agent was to obtain a bonus from the borrower, and 12 Cent. Rep., reported *Stillman v. Northop*, 109 N. Y., is not applicable. Our Constitution and laws make such loans usurious and citations are unnecessary. The notes were void even in the hands of an *innocent* purchaser.

HEMINGWAY, J.

This is an action brought by appellant on a promissory note. Appellees interposed a plea of usury. The court found that the defendants executed the note sued on, payable to the order of Walton, as agent, for $300, with interest from date until paid at ten per cent. That the principal maker of the note received but $285; that W. J. Thompson, who advanced the money to Walton, only furnished him that amount; that W. J. Thompson was the owner of the note, and continued its owner until just before the suit was brought, a period of near three years, when Walton, as agent, by his direction, endorsed it to plaintiff. That the plaintiff knew nothing of the dealings between Walton and the defendants. That there was received for the loan more than lawful interest.

It is assigned for error, that the court erred in finding the facts; and, also, that the court erred in holding upon the facts that the commissions paid by Ingram to W. J. Thompson and Walton constituted usury. The finding complained of is that the loan was made by W. J. Thompson, when the contention is that it was made by plaintiff. Walton testifies that fifteen dollars of the $300 was paid W. J. Thompson as commissions for making the loan, which Thompson admits.

He, W. J. Thompson, testifies that plaintiff, who is his brother, lives in Missouri; that money there commands only six to eight per cent. interest; that he induced plaintiff to place money in his hands for loan, upon a promise that he would realize for him upon it ten per cent., and look to the borrowers for his commissions.

Such being the evidence for plaintiff, he could not be prejudiced by the findings of the court. If W. J. Thompson made the loan, the note is usurious and void, because, in addition to the highest lawful interest, he reserved fifteen dollars in advance. If plaintiff made the loan through W. J. Thompson, as his agent, the same result follows, because his agent received a bonus in addition to the highest lawful rate of interest in accordance with the understanding with which the money was placed for loan. No other judgment could have been rendered under the law and facts.

It is affirmed.

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BAIRD V. MILLWOOD.

USURY: *Reserving interest in advance: Bonus paid agent of borrower.*

Reserving interest in advance at the highest lawful rate on money loaned for three months, does not constitute usury. Nor will such loan be made usurious by the fact that a broker who procures it for the borrower re-

retains for his commissions a sum in addition to the interest reserved by the lender. *Vahlberg v. Keaton, ante*, 534.

APPEAL from *Garland* Circuit Court in Chancery.

J. B. WOOD, Judge.

Geo. G. Latta, for appellant.

1. The taking of interest in advance is not usurious. 8 Wheat., 338, 364; 87 Ill., 51. Nor is the taking a commission or brokerage by the agent of the borrower. 51 Iowa, 397; 26 Ark., 191; 25 Id., 195; 26 Id., 352; 18 Id., 463; 25 Id., 258; 21 N. Y., 531 to 539; 2 Tenn., 52; 1 Hilton, 532.

41 Ark., 331, sustains our position, pp. 337, 342-3.

HEMINGWAY, J.

This is a suit to foreclose a mortgage. The mortgagor answered, setting up usury in the mortgage debt. The court found that the mortgagee loaned two hundred dollars for three months, taking the note and mortgage sued on. That he reserved interest in advance, at ten per cent. per annum; that a broker, who procured the loan for the mortgagor, retained twelve dollars out of the sum for his services, and also the fees for acknowledging and recording the mortgage. Upon these facts the court declared the law to be that, the note was usurious and void, and rendered judgment for the mortgagor. As decided in the case of *Vahlberg v. Keaton, ante*, the lender could reserve the interest in advance; and commissions paid to the agent of the borrower, by the borrower, form no part of the sum paid for the use or forbearance of money.

The judgment will be reversed and the cause remanded, with instructions to render judgment for a foreclosure of the mortgage, and further proceedings in accordance with law.

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BERNING V. STATE.

1. LIQUORS: *Aiding and abetting sale of: Burden of proof.*

On the trial of an indictment for the unlawful sale of intoxicating liquors, where the prosecuting attorney, to sustain the charge, relies on evidence that the defendant aided and abetted another person to make the sale, the burden is on the State to prove that it was made by such person without a license.

2. SAME: *Same: Evidence.*

On a trial for selling liquors without a license, the evidence showed that the defendant kept cigars and tobacco for sale in the front room of a house, in the back room of which R. sold intoxicating liquors—each renting his room from the same landlord; that R.'s customers had to and did pass through the defendant's room; that the defendant had purchased liquors of R., and had twice advanced money for the latter when it was demanded of him by the police for the privilege of selling whisky. *Held:* That this was not sufficient to warrant the defendant's conviction, as it showed nothing beyond the mere acquiescence of the defendant in the sales made by R., and failed to show that the latter had no license.

APPEAL from *Saline* Circuit Court.

J. B. WOOD, Judge.

G. W. Murphy, for appellant.

There was no evidence that Rexhouse had or had not paid his license tax, nor as to whether appellant had any notice or knowledge as to this. The State should have been required to prove that Rexhouse had no license, in order to make out a case. 1 Gr. Ev., secs. 79, 80.

John McLure, for appellant, argued the case orally.

W. E. Atkinson, Attorney General, for appellee, argued orally, and contends that the instructions are sustained by the authorities. 25 Oh. St., 381; 83 Ill., 431; 38 Ark., 518.

HUGHES, J.

The appellant was convicted and fined fourteen hundred dollars for engaging in the business of selling liquors with-

out first having paid the State and county taxes. He moved for a new trial, which was denied, and he excepted and appealed. The evidence shows that appellant kept cigars and tobacco for sale in the front room of a house, in the back room of which Geo. Rexhouse carried on the business of selling liquors; that the appellant and Rexhouse rented their rooms from the same landlord; that the customers of Rexhouse had to and did pass through the room of appellant to reach the room where Rexhouse sold liquors; that liquors were purchased in the said back room by putting money on a wheel and calling for what was wanted; that appellant had purchased it in said room, in this way; that appellant had twice advanced twenty-five dollars for said Rexhouse, to the sergeant of police of the city of Hot Springs, said sergeant having been directed by the chief of police of said city to collect that sum monthly, as he understood, for the privilege of selling whiskey in said city, from several persons whose names were furnished said sergeant by said chief of police.

1. SALE OF LIQUORS: Aiding and abetting: Burden of proof.

This evidence was not sufficient to warrant the conviction of the appellant, because it shows nothing more than mere acquiescence of appellant in the action of Rexhouse, or mere failure of appellant to object to persons passing through his room to buy liquors from Rexhouse; and because there was no proof that Rexhouse had no license. It is a general rule that every allegation, affirmative or negative, necessary to constitute the offence charged, must be established by the prosecutor. This general rule is sometimes departed from by the courts, but only in cases where the negative averments in indictments have reference to some personal qualification peculiar to the defendants, or where the proof thereof depends upon some written document committed to the sole custody of the person accused, or where the negative

averment is particularly within the knowledge of the other party, when, if not disproved by that party, it is taken as true. *Wellbourne v. State*, 87 N. C., 532; *Hopper v. State*, 19 Ark., 146; *Williams v. State*, 35 Ark., 430; *Flowers v. State*, 39 Ark., 210; 2 Jones, (N. C.) 276.

In *Hopper v. State*, *supra*, the court said: "This solitary exception is confined to indictments for selling liquors, exercising a trade or profession and the like, without license, and these cases are put upon the ground of comparative inconvenience to the one party, without the least convenience to the other."

If one indicted for selling whiskey undertake to justify on the ground that the liquor belonged to another, and that he sold merely as an agent, the burden is on him to make out his defence whatever it may be. He becomes the actor, and the duty is on him to make good by proof the points he asserts. If the person for whom he sells has a license, that is matter of defence upon the trial. Sec. 331, Whar. Cr. Law, (8 ed.); *State v. Devers*, 38 Ark., 518.

"All who procure, participate in or consent to the commission of a misdemeanor are punishable as principals." 4 Denio, 129; *Foster v. State*, 45 Ark., 361; *Fortenbury v. State*, 47 Ark., 188.

2. SAME.

But where one is charged with aiding in an offence committed by another, the State must show that the act done was criminal and that he aided, abetted, or assisted in the commission of it.

The defendant in the case at bar did not come within the exception to the general rule above discussed, and it devolved on the State to prove that Geo. Rexhouse, whom he is charged to have aided and abetted in the unlawful sale of whiskey, did sell without license.

Reversed and remanded.

FOREHAND V. STATE.

NEW TRIAL: *For misconduct of jury.*

On a trial for murder, the defendant having testified that the deceased made such an attempt to shoot him with a pistol as would have justified the killing, the jury after retiring obtained the pistol and cartridges used by the deceased and experimented with them, apparently for the purpose of testing the truth of the defendant's statement. *Held:* That this was taking evidence out of court and in the defendant's absence, and was such misconduct on the part of the jury as entitled him to a new trial.

APPEAL from *Pope* Circuit Court.

G. S. CUNNINGHAM, Judge.

The appellant was indicted for murdering W. C. Marberry by shooting him with a gun and was convicted of murder in the second degree.

Among other grounds set forth in his motion for a new trial is the following: "9. That the defendant was prejudiced by the misconduct of the jury after they had retired to consider of their duties, in that they did not rest their deliberations on testimony * * adduced on the trial, but in his absence * * * proceeded with the further investigation of the charge against him by boring out the ammunition of one of the pistol cartridges and snapping the pistol on the cap of the cartridge." * * * This ground of the defendant's motion was supported by the affidavit of James R. Oates, in which it is stated: "That the jury after they had retired to consider of their verdict, requested that the pistol of deceased which the evidence identified as 'his and which was' found lying at his left side when his body was discovered, together with the cartridges it contained at the time, be sent them;" that affiant "was bailiff of the jury and made their request known to the court," and also to the attorneys both for the State and the defendant; that pursuant to the request of the jury he delivered to them the pistol and cartridges referred

to; that when the pistol and cartridges were returned to him by the jury the lead had "been bored out of one of the cartridges and the powder taken out and the cap of the cartridge so bored, had the appearance of having been snapped on;" that this was done after the articles were delivered to the jury; that one of the jurors, naming him, stated to affiant "that after said pistol and cartridges were delivered to them, they bored the lead and ammunition out of one of the cartridges and put such cartridge * * * * into the pistol and snapped it;" and that the cap exploded.

On the trial there was evidence to show that an improper intimacy had existed between the defendanf's wife and the deceased for about two years next before the latter's death. The defendant testified that an altercation had occurred between him and the deceased a few months before the killing and that subsequently he had several times seen the deceased in the woods near his (defendant's) house with a gun; that on one of these occasions the deceased had presented a double-barreled shot gun at him and compelled him to throw up his hands; that on Friday, the 22d of March, his wife told him the deceased had visited their house on the day before and presenting his gun had compelled her to go to the edge of the woods and talk to him and that in that conversation the deceased had told her that he would kill the defendant if the latter did not leave before the grand jury met and that he would, in a certain event, return on the Monday following—March 25th; that early Monday morning he (the defendant) took his shot gun and concealed himself in some fallen tree tops about sixty yards from his house and in front of his gate so, as he expressed it, that he "would have the advantage of the defendant if he did come;" that about noon the deceased approached stealthily to within 35 or 40 yards

of the defendant's place of concealment, when the latter ordered him to throw up his hands; that the deceased did not obey the order, but drew a pistol and the defendant shot at him; that deceased wheeled to run and the defendant shot at him a second time; that deceased ran off out of sight and the defendant not knowing whether he had wounded him, put his dog on his track and presently heard the dog baying and the deceased calling him; that having reloaded his gun, he went cautiously out to where he had heard the deceased calling him; that he found the deceased at a "branch," and as he approached him the deceased said: "Charley, I love you, come to me; I don't blame you for this; I thought I would get you first, but you have got me;" that after further conversation in which the deceased spoke of the wound he had received, he requested the defendant to procure a wagon and take him home and also to give him some water; that after dipping water from the branch in his hands and giving it to the deceased, he "started to Sam Battenfield's to get a wagon to take deceased home and as he stepped across the branch and had gone some little distance, say six or eight steps, he heard a pistol cock and turning saw deceased with a pistol in his left hand, coming up or raising it on defendant;" that deceased was "raised up or sitting up a little," and that he, defendant, shot at him again and then ran off without looking to see whether the third shot had taken effect.

The evidence also showed: that the defendant surrendered himself to a deputy sheriff on the day the killing was done and stated to that officer and several other witnesses for the State the circumstances of the killing substantially as stated above; that the body of Marberry was found near a small branch; that a five-shooting pistol was found on the ground.

about six or eight inches from the body; that it was cocked and the muzzle was pointing from the body, but a little inclined towards the feet; that the hammer of the pistol seemed to be caught or hung and one of the cartridges had been "snapped on;" that the body when found did not appear to have been disturbed and showed a number of wounds in the chest, head and other parts of the body.

The testimony of D. D. Wortham, alluded to in the opinion of the court, was as to certain conduct of the defendant's wife indicating an improper intimacy with the deceased; and that of Mrs. Simpson related to Mrs. Forehand's reputation for unchastity because of her relations with the deceased. The testimony of W. H. West detailed obscene remarks made by the defendant in his wife's presence or indecent allusions made to her in her absence.

James Fry was permitted to testify that while he was guarding the defendant pending the coroner's inquest, the defendant's wife stated to him in the presence of the defendant, that she knew the deceased would go out to defendant's house as soon as he learned that defendant had gone to Fort Smith; that she told her husband when he shot the deceased that he had missed him with both barrels and that defendant replied "no, it was the fault of the d—d gun," and that she knew the defendant had not gone to Fort Smith, but was in the tree top.

R. C. Bowden testified that over a year before the killing of deceased, he and others were engaged in a conversation concerning the case of a man who had then recently killed another for criminal intimacy with his wife, and that in the course of the conversation the defendant remarked that he "did not care who drank at his spring so they left the dipper." The witness also stated that he had heard the de-

fendant make the same remark more than once and that it was generally known that he made such remarks.

E. B. Henry and *J. G. Wallace* for appellant, argue the case orally and submit that:

It was error to admit the evidence of Simpson, Bowden, West, Fry and Wortham. The declarations of defendant were not part of the *res gestæ*. Wood's Pr. Ev., p. 413, sec. 146; Whart. Cr. Ev. (9th ed.), sec. 484, note 6; 1 Gr. Ev. (11th ed.), secs. 52 and 448. For the rejection of Wortham's testimony, see Whart. Cr. Ev. (9th ed.), secs. 29 and 30, note 1; Thomps. Trials, vol. 1, p. 350.

The declarations of defendant's wife were inadmissible. Wh. Cr. Ev. (9th ed.), sec. 699, notes 2 and 3; sec. 700, note 5; 1 Gr. Ev. (11th ed.), sec. 111; 20 Ark., 225; 45 Id., 166; 43 Id., 99.

Defendant had the right to prevent and defend his premises against force or fraud or to prevent the act of adultery with his wife. 4 S. W. Rep., *Estep v. Commonwealth;* 7 S. E. Rep., 611; 64 Ga., 453.

The 8th instruction is cumbersome, misleading and not the law. *Bumley v. State*, 21 Tex. Ct. Ap.; 20 Ib., *Bell v. State*; 43 Ib., 242; Whart. Hom.———

There was evidence to support the seven instructions asked by defendant. 87 Ill., 553–4.

The cause should be reversed for the misconduct of the jury, and it is not necessary for defendant to show prejudice. 2 Thomp. Trials, sec. 2611, page 1974, note 3; Thomp. & Mer. on Juries, secs. 438–9; Hayne New Tr. & Ap., sec. 386; 30 N. W. Rep., 681; 68 Mo., 202; Mansf. Dig., sec. 2297.

W. E. Atkinson, Attorney General, for appellee.

Argued orally.

The appellant sought and brought on the difficulty and he cannot justify under the circumstances. 40 Ark., 454. The facts make a clear case of murder. Whart. Cr. Law, sec. 459 and note.

The 6th instruction not objectionable. Adultery contemplated or consummated does not justify or excuse killing.

The 8th instruction should be construed with sec. 1553, Mansf. Dig., which was read to the jury, and the 6th instruction.

The privilege of confidential communications between husband and wife does not apply to close the mouth of a third party who heard them. Wh. Cr. Ev., sec. 398.

It is not every irregularity or misconduct of a jury that will entitle a defendant to a new trial. There must be prejudice to his rights. *Palmer v. State*, 29 Ark., 253–4–5, 269. Can the defendant raise this objection after permitting it to occur without objection? Hayne New Tr. & Ap., sec. 27; see Id. 2; 49 Ga., 105; 39 Ib., 661; 44 N. H., 385; 53 Me., 535; 30 Ark., 328, has been modified by 105 Ind., 269.

PER CURIAM.

If the defendant's statement of what took place at the branch is true, then the killing was in self-defence after the defendant had really and in good faith abandoned the pursuit of his victim. The jury's misconduct in taking the deceased's pistol and cartridges to the jury room and there experimenting with them apparently for the purpose of testing the truth of the defendant's statement, was prejudicial to him. It was evidence taken by the jury out of court in the defendant's absence which is prohibited by the statute and con-

trary to the idea of fair and orderly proceedings. The facts are proved by the bailiff who had the jury in charge. For the error in that behalf the judgment must be reversed.

The testimony of D. D. Wortham, W. H. West and Mrs. J. T. Simpson and that of Jas. Fry, in so far as it related to the statements made by the defendant's wife, had no tendency to prove the issue and should have been excluded from the consideration of the jury.

The testimony of R. C. Bowden could become competent only to rebut some theory developed by the evidence for the defence: as, that the killing was done in a sudden heat of passion brought about by information of the wrong the deceased had done him.

There is serious question as to the sufficiency of the 8th instruction to put the law of self-defence fully before the jury and give proper qualification to the 6th instruction.

There was no error in the refusal of the court to give the seven instructions asked by the defendant.

Reverse the judgment and remand the cause for a new trial.

GLIDEWELL V. MARTIN.

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1. STATUTES: *Presumption as to constitutional enactment.*

Where a legislative journal recites the final passage of a bill in legal form—by a vote taken by yeas and nays—but does not affirmatively show how it was read, this court will presume that the reading was had in conformity to the Constitution, (art. 5, sec. 22), which provides that every bill shall be read at length, but does not require the fact of such reading to be shown by an entry on the journal.

2. SAME: *Repeal by implication.*

The act of January 23, 1875, section 71, [Mansf. Dig., sec. 2722], conferring on the county court jurisdiction to try contests for county and township offices, is not repealed by implication by the act of February 5, 1875,

entitled: "An act fixing the regular terms of the county courts," etc. [Mansf. Dig., sec. 1407]. *Babcock v. Helena*, 34 Ark., 499; *Coats v. Hill*, 41 Ark., 149, and *Chamberlain v. State*, 50 Ark., 132, approved and followed as to repeals by implication.

3. ELECTION CONTESTS: *Jurisdiction of county court: Act January 23, 1875, constitutional.*

The Constitution, by sec. 24, art. 19, required the legislature to designate a tribunal before which contests for county and township offices should be tried. The act of January 23, 1875, (sec. 71) conferring jurisdiction of such contests on the county court, was passed in obedience to that requirement, and is, therefore, as conclusive against constitutional objection as though written originally in the Constitution itself.

PETITION for *Writ* of *Prohibition*.

W. L. Terry, *F. T. Vaughan* and *T. B. Martin*, for petitioner.

1. The act of January 23, 1875, was never constitutionally passed. The journal affirmatively shows the second reading *by title only*. When the journal speaks presumptions cannot be indulged. 31 Ark., 718; 32 Id., 518; 33 Id., 25; Lawson Pres. Ev., p. 569, *et seq.*

2. Said act, in so far as it confers jurisdiction upon the county court to try contested election cases, is unconstitutional. Art. 7, secs. 1, 11, 28, 32, 33, as construed in 34 Ark., 193, 198. Sec. 52 was simply directed to the purpose of guaranteeing *the right of appeal* in contested election cases. Right of appeal exists only by statute—not at common law. 14 Mass., 419; 4 Neb., 572; 11 Id., 531; 19 Id., 450. This is certainly true as to contested elections, and but for sec. 52 the legislature could have cut off the right of appeal. The implication, if any, that there may be an inferior tribunal, which it is competent to clothe with jurisdiction to try these cases, is satisfied by the court of common pleas. Art. 7, secs. 1 and 32.

An election contest is a "civil case." 36 Ark., 139, and

not a "local concern." Ib., 140. If who shall fill an office is a "local concern," then 50 Ark., *Wheat v. Smith*, is wrong, for the jurisdiction of the county court would be *exclusive*.

Sec. 24, art. 19, made it simply the duty of the legislature to provide the *mode* of contesting elections, *i. e.*, the manner—method of procedure, time, terms, conditions, etc. 29 Ark., 183.

In answer to the contention that the Constitution only fixed the "exclusive jurisdiction" of the county court and that it was therefore competent to confer other jurisdiction on it, see 4 Ark., 149; 7 Id., 173; Constitution, 1836, art. 6, sec. 15.

3. Said act is repealed by the act of February 5, 1875.

F. M. Fulk and *Blackwood & Williams*, for respondent.

1. The act is not repealed by act of February 5, 1875, because they are not on the same general subject and are not inconsistent. 50 Ark., 132. Repeals by implication are not favored. 41 Ark., 149; 34 Id., 499.

2. *On jurisdiction.* The county court has jurisdiction. Art. 7, sec. 28; 33 Ark., 191; 43 Id., 66; 50 Id., 271; art. 19, sec. 24; art. 7, sec. 52; 32 Ark., 557. As to modes specifically provided for, see art. 6, secs. 4, 14, 23; art. 19, sec. 19. This court has certainly recognized the jurisdiction of the county court in 32 Ark., 557, and 50 Id., 271. See, also, 29 Ark., 185.

The following cases were commenced in the county court, appealed to the circuit and thence to this court: 32 Ark., 554; 39 Id., 551; 41 Id., 239.

Unless the act is plainly and beyond a reasonable doubt unconstitutional, the courts will uphold it. 99 U. S., 718;

107 U. S., 766; 50 Penn. St., 150; 24 Ind., 194; 13 Mich., 483; Cooley Const. Lim., 194.

If "local concerns" is broad enough to give the legislature the right to give jurisdiction to county courts, then, if the circuit court as the "great residuum," could also be chosen as such forum, an act conferring exclusive jurisdiction on the county court would not be void, but both courts might be made separate forums. 34 Ark., 199. But if the Constitution simply made it the duty of the legislature to provide *some* board, * * * tribunal before which contests should be had, when that was done it became exclusive. Cases *supra*, and 29 Ark., 186; 15 Oh. St., 114.

3. On the passage of the law. 33 Ark., 17; 28 Id., 320; 44 Id., 536; 40 Id., 208; 25 Ill., 183; 2 Minn., 337; 10 Nev., 176; Cooley Const. Lim., 164.

Compton & Compton and *Samuel R. Allen, Amici Curiae.*

1. The act is Constitutional and valid. The jurisdiction given is nowhere in the Constitution expressly prohibited, nor even impliedly. On the contrary, the Constitution expressly directs the legislature to provide for the mode of contesting elections. Art. 6, sec. 4; art. 19, sec. 24; art. 7, sec. 52; art. 7, sec. 28; art. 7, sec. 11.

When jurisdiction in contested elections is conferred upon a particular tribunal, it is exclusive. 28 Ark., 129; 29 Id., 173. Considering this principle in connection with sec. 24, art. 19; sec. 28, art. 7, and sec. 11, art. 7, it follows: The jurisdiction conferred by the act, pursuant to sec. 24, art. 19, is exclusive. It is the same as if written in the Constitution itself. 15 Oh. St., 114, and the jurisdiction so vested does not belong to that residuum conferred on circuit courts by sec. 11. art. 7.

The framers of the Constitution evidently contemplated

that the legislature, under sec. 24, art. 19, might confer jurisdiction, as to county and township officers, on a tribunal inferior to the circuit court, for, by sec. 52, art. 7, an appeal is expressly provided for, which would be without meaning and inoperative if they intended that the circuit court should have original jurisdiction in such cases.

Sec. 24, art. 19, does not relate only to the mode of procedure, but also to the tribunal, and this is manifest from the clause: "In cases not specifically provided for in this Constitution," which necessarily refers to sec. 4, art. 6.

2. It needs no argument to show that the act was not repealed by act of February, 1875.

3. The legal presumption is that the act of January 23, 1875, was passed in accordance with the requirements of the Constitution, notwithstanding the journal of the senate shows that a motion was made and adopted to read the bill a second time by title. The journal does not affirmatively show that it was so read, but is silent as to whether it was, in fact, read in any way; and this silence warrants the presumption that the bill was read according to the requirements of the Constitution. 40 Ark., 200; 44 Id., 536; 27 Id., 278; 42 Tex., 641; 3 Oh. St., 475; 11 Ind., 424.

To uphold the act, this court will presume that the senate receded from its motion to read by title. 40 Ark., 213, 214.

SANDELS, J.

Petitioner H. E. Glidewell, alleges that the circuit court of Pulaski county is proceeding in a matter beyond its jurisdiction; that it is about to try and determine upon an appeal from the county court of Pulaski county, an election contest for the office of county treasurer of Pulaski county, brought against petitioner by one T. H. Jones, under the pretended authority of the pretended act of the legislature of Arkansas,

entitled: "An act providing a general election law," approved January 23, 1875.

The circuit judge responds and demurs to the petition. From the petition (the statements of fact being conceded by the demurrer) and from the journals of the senate and house of representatives of the general assembly the following matters appear:

Glidewell holds the office of county treasurer. Jones began a contest for the office in the Pulaski county court; Glidewell objecting.

The contest was tried and an appeal was taken to the circuit court. Petitioner moved to dismiss, because the county court having no jurisdiction, the circuit court acquired none on appeal.

The circuit court overruled said motion and ordered that the trial proceed.

By the journal of the senate, it appears that the act of January 23, 1875, was introduced in the senate as senate bill, No. 54, on November 27, 1874, when it was read the first time. The journal thereupon says: "Senator Hicks moved a suspension of the rules, and the reading of the bill a second time by title. Adopted."

"Senator Hicks then moved that the bill be referred to committee on elections, and that 240 copies be printed. Carried."

On December 16, 1874, the journal shows:

"Mr. Hicks, under the regular order of business, moved that senate bill No. 54, an act providing a general election law, be read a third time, and placed on its final passage, which was adopted."

"The question being put: 'Shall the bill pass?' it was decided in the affirmative. Yeas, 24. Nays, none. Not

voting, 7. So the bill was passed." The yeas and nays are entered on the journal. The act was approved January 23, 1875.

Section 71 of said act, being section 2722 of Mansfield's Digest, is as follows:

"When the election of any clerk of the circuit court, sheriff, coroner, county surveyor, county treasurer, county assessor, justice of the peace, constable, or any other county or township officer, the contest of which is not otherwise provided for, shall be contested, it shall be before the county court, and the person contesting," etc.

Petitioner presents three objections to the jurisdiction of said circuit court, viz:

1st. Said general election law was never constitutionally passed in this, that it was never read *at length* three times in the senate.

2nd. That if said act *was* ever legally passed, it was repealed by the act of February 5, 1875, entitled: "An act fixing the regular terms for holding the county courts of the State, and for fixing the salaries of the county judges, and the *per diem* pay of the associate justices of the several counties of this State."

3rd. That the legislature had no constitutional power to confer jurisdiction upon the county courts to try election contests.

We will consider the questions in their order:

1. Sec. 22, art. 5, of the Constitution (1874) is as follows:

"Every bill shall be read at length on three different days, in each house, unless the rules be suspended by two-thirds of the house, when the same may be read a second or a third time on the same day; and no bill shall become a law unless

on its final passage, the vote be taken by yeas and nays; the names of the persons voting for and against the same *be entered on the journal and a majority of each house be recorded thereon as voting in its favor.*"

1. STATUTES: Presumption as to constitutional enactment.

This is the only requirement as to what shall go upon the journals. The bill must be read at length, but the journal is not required to show conformity to this requirement.

From considerations of public policy and because of the respect due the action of a co-ordinate department of government, the courts long since began to supply the omissions of journal clerks by presumptions as to the regularity of the proceedings of the general assembly. This has been found most salutary; and the attitude assumed by the judiciary in this regard, has gone far toward establishing and maintaining public confidence in the stability of legislative action. Many cases of flagrant hardship are thus prevented, while, by the operation of the rule, few, if any, have sustained substantial injury. The courts are gravitating toward the English rule, so thoroughly discussed by Mr. Justice Smith, in *Chicot County v. Davis*, 40 Ark., 200; for, while they say that the enrolled bill is not conclusive of the valid enactment of a law, and that we may look beyond it to the journals, they supply by presumption everything necessary to its validity, save where the journal *affirmatively* shows a violation of the Constitution.

In this case the journal shows affirmatively but *one* reading of the bill No. 54 in the senate. It was argued that the journal shows the second reading, and shows it to have been by title and not at length. The entry is: "Senator Hicks moved a suspension of the rules and a reading of the bill a second time by title. Adopted."

This is not an affirmative showing of the *fact* of reading

by title or otherwise; for, while from the adoption of the motion, it might be *presumed* that the reading followed, the court will not indulge the *presumption* that the senate acted in violation of its sworn duty.

It will indulge, rather, the presumption, arising from the recitals of a final passage in legal form, that the readings were had in accordance with law. *Vissant v. Knox*, 27 Ark., 279; *English v. Oliver*, 28 Ark., 317; *State v. L. R., M. R. & T. Ry.*, 31 Ark., 717; *Worthen v. Badgett*, 32 Ark., 516, 518; *Smithee v. Garth*, 33 Ark., 25, 26; *Chicot Co. v. Davis*, 40 Ark., 200; *Webster v. City, etc.*, 44 Ark., 536; *Blessing v. Galveston*, 42 Texas, 641; *Miller v. State*, 3 Oh. St.; 475; *McCulloch v. State*, 11 Ind., 424; *Weyand v. Stover*, 15 Pac. Rep., 229. Upon these and many other authorities, we hold that the act of January 23, 1875, was constitutionally passed.

2. Repeals by implication.

2nd. The act of January 23, 1875, was not repealed by the act of February 5, 1875. The rule by which we are guided is well stated in the following cases: *Babcock v. City Helena*, 34 Ark., 499; *Coats v. Hill*, 41 Ark., 149; *Chamberlain v. State*, 50 Ark., 132.

The implication by which a repeal is sought to be established, is forced and strained—not "necessary."

3rd. Had the legislature power to confer jurisdiction upon the county court to try contested election cases, as provided in section 71, of the act of January 23, 1875?

Sec. 9, art. 6, Const. 1836, and sec. 11, art. 7, Const. 1864, were as follows:

"There shall be established in each county in this State, a court to be holden by the justices of the peace, and called the county court, which shall have jurisdiction in all matters relating to county taxes, disbursements of money for county

purposes, and in every other case that may be necesssry to the internal improvement and local concerns of the respective counties."

Sec. 28, art. 7, Const. 1874, is as follows:

"The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except in cases otherwise herein provided."

Sec. 11, art. 7, Constitution of 1874, is as follows:

"The circuit court shall have jurisdiction in all civil or criminal cases, the exclusive jurisdiction of which may not be invested in some other court provided for by this Constitution."

Sec. 4, art. 6, Const. 1874, is:

"Contested elections of governor, secretary of state, treasurer of state, auditor of state and attorney general, shall be determined by the members of both houses of the general assembly in joint session, who shall have exclusive jurisdiction in trying and determining the same, except as hereinafter provided in the case of special elections; and all such contests shall be tried and determined at the first session of the general assembly after the election in which the case may have arisen."

Sec. 24, art. 19, and sec. 52, art. 7, are as follows:

"The general assembly shall provide by law the mode for contesting elections in cases not specifically provided for in this Constitution." Art. 19, sec. 24.

"That in all cases of contest for any county, township or

municipal office, an appeal shall lie at the instance of the party aggrieved, from any inferior board, council, or tribunal to the circuit court, on the same terms and conditions on which appeals may be granted to the circuit court in other cases, and on such appeals the case shall be tried '*de novo.*'" Art. 7, sec. 52.

Sec. 9, art. 3, provides that in contested election cases, witnesses shall be compelled to testify without regard to whether they thereby be subjected to public infamy.

The right to try contests in election cases is thus clearly recognized by the Constitution. Where shall they be tried?

Just after the adoption of the Constitution of 1836, containing the section above quoted, the legislature passed an act providing that all contests for county offices, naming them, except county judge and school commissioner, should be in the county court.

So far as we are aware, but one case, under that act, came to this court. *Vance, et al., v. Gaylor, et al.*, 25 Ark., 32.

In that case, a county judge, sheriff, county clerk, county treasurer and school commissioner gave joint notice to their several opponents for these offices, and made a joint contest in the county court. It was held, *first*, that the notices should have been several, and, *second*, on objection to the jurisdiction of the county court, that, while the county court *had* jurisdiction as to the *sheriff*, *clerk* and *treasurer*, it had none as to the county judge and school commissioner, because they were not included in the act. The law stood for nearly forty years without further challenge in this court.

The provision of the constitution of 1874, defining the jurisdiction of the county court is in all matters of substance, identical with the provisions on the same subject in the constitutions of 1836 and 1864. And section 71 of the act of 1875 is identical with the act of 1838.

The intent and meaning of those who frame constitutions and statutes is often most satisfactorily ascertained by reference to the history of antecedent legislation on the same subject, and the interpretations put upon it by the courts. Endlich on Interpretation of Statutes, sec. 520; *Baker v. State*, 44 Ark., 137; Board of Equalization Cases, 49 Ark., 525.

In framing the section giving the county court its jurisdiction the convention of 1874 had in view the history and interpretation of similar provisions in former constitutions, and knew that the grant of jurisdiction to the county courts under them, to try contested elections, had been sanctioned by this court.

Influenced by this view, it would not be strange that the grant of such jurisdiction, as the county court had previously exercised, was contemplated by the framers of this constitution. "The essential qualities of all constitutional courts are indestructible and unalterable by the legislature. But an extension of the jurisdiction of a court, such extension being in harmony with its character, and not being a usurpation on the inherent powers of any other court, is not within the constitutional *prevention*." *Harris v. Vanderveers, Ex.*, 21 New Jersey Eq., 428.

3. ELECTION CONTESTS: Jurisdiction of county court.

By the constitution but one forum is designated in which a contested election may be tried, *i. e.*, the legislature, in contests for the office of Governor, Sec. of State, Treasurer of State, Auditor of State and Attorney General. Sec. 4, art. 6.

But by sec. 24, art. 19, it is required that the legislature provide a *mode* of contesitng elections.

It is patent that the legislature was expected to confer this jurisdiction upon some *board, council or tribunal* which might be inferior to the circuit court. Sec. 52, art. 7.

If the section last quoted means anything, it means this; and with this meaning all questions as to the signification of the word "mode," in sec. 24, art. 19, vanishes. It means *place* as well as manner of trial. It is urged that it was intended that the legislature should give this jurisdiction to the courts of common pleas, but it can never be presumed that the execution of the mandate of section 24, was to be dependent upon the creation of a court which might never be called into being.

It is not necessary to consider the question raised and argued upon some expressions in the opinion in *Devers v. State*, 34 Ark., 188, as to inability of the county court to receive additional jurisdiction by grant from the legislature.

It cannot be questioned that the convention might have included in the jurisdiction of the county court, the right to try election contests, nor can their power to require the legislature to do so, be doubted. For some good reason the convention required the legislature to name the court, council or board before which these trials should be.

Act of 1875 constitutional.

The act of 1875, sec. 71, was a compliance with this requirement. The act does not stand upon the same footing with ordinary legislation emanating from general powers, but rests upon the specific mandate contained in sec. 24, art. 19.

As such it became as conclusive against constitutional objections as though written originally in the constitution itself. *Grissell v. Marlow*, 15 Ohio State Reports, 114.

This court has held the jurisdiction to be in the county court. *Govan v. Jackson*, 32 Ark., 556.

And it has been tacitly conceded in many cases. *Wheat v. Smith*, 50 Ark., 266, and many other cases.

Holding that neither of the three grounds stated in the petition is tenable the writ is denied.

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1. *Jurisdiction of equity over settlement of administrator.*

On a bill to impeach the settlement of an administrator, the inquiry of the chancery court is limited to such items of the account as are affected by charges of fraud, accident or mistake, and all other parts of the account should be left to stand as they are. McLeod v. Griffis, 1.

2. *Same.*

A matter which the probate court has passed upon in the settlement of an administrator's account, cannot, in a chancery proceeding to falsify and surcharge such account, be assigned as fraudulent or as the result of accident or mistake, except upon the statement of some fact or circumstance which the probate court did not consider. Ib.

3. *Same: Allegations and proofs.*

A bill to impeach the settlement of an administrator, which contains only general charges of fraud, accident or mistake, without specifying in what the fraud or mistake consists, states no cause of action; and the consent

of the defendant that such charges may be investigated, will give to a court of equity no jurisdiction to grant relief thereon, except upon such proofs as would sustain specific charges amounting to a cause of action. Ib.

4. *Same: Surcharging accounts.*

On a bill to surcharge and falsify an administrator's accounts, he will not be charged with the value of notes and lumber belonging to the estate, alleged to have been unaccounted for, when it is not shown that the notes were collected, or that the lumber was sold and the money appropriated by the administrator to his own use, and where, so far as the proof shows, such notes and lumber still belong to the estate. McLeod v. Griffis, 14.

5. *Same.*

In a proceeding to falsify and surcharge the settlement accounts of an administrator, the chancellor referred the case to a special master to state an account. The defendant excepted to the master's report and his exceptions were sustained to all the paragraphs of the report except the fourth and fifth. A decree based on those paragraphs was reversed, on the defendant's appeal, and the case was referred to a special master appointed by the supreme court. As there was no appeal by the plaintiff, the inquiries of the master were confined, by the order of this court, to the statement contained in the fourth and fifth paragraphs of the report made by the master in the court below. The master appointed here allowed credits amounting to a large sum, which the administrator had neglected to take in his probate settlements, and charged him with a smaller sum, with which his answer admits he was erroneously credited in such settlements. *Held:* That although the item thus charged is not contained in the statement submitted to the master, yet, as the credits he allows the administrator can only stand upon the principle that whoever demands equity must do equity, their allowance should, by the same rule, be upon terms of charging him with the item which he admits to be due from him to the estate. Ib.

6. *Action for waste of assets: Rights of distributees and creditors.*

The distributee of an estate is not entitled to maintain an action against the administrator for waste or conversion of assets, without showing that the claims of creditors have been satisfied; but if such suit is sustained a judgment obtained therein by the plaintiff is not binding on absent parties in interest, and he is only a trustee for the benefit of those entitled to the fund recovered. Brice v. Taylor, 75.

7. *Same: Right of administrator de bonis non.*

When it becomes necessary to remit to the probate court for administration, a balance recovered from the administrator in chief in an action on his

bond, brought under the statute, [Mansfield's Digest, sec. 199,] by a creditor or "other person interested," it should be paid to the administrator *de bonis non* as assets of the estate—although he could not, under the statute, nor at common law, have maintained the action in which it was recovered. Ib.

8. *Same.*

An administrator *de bonis non* may maintain a bill in equity to prevent, by injunction and other appropriate orders, the loss or misapplication of a fund recovered by an insolvent distributee from the administrator in chief, and which is required for the satisfaction of creditors. Ib.

9. *Payment of debt before grant of letters.*

The plaintiff's intestate at the time of his death was justly indebted to the defendant in the sum of $300, on which interest had accrued. His estate consisted of personal property of the value of $900, to one-third of which the plaintiff was entitled as his widow. Before the grant of administration she paid the defendant out of the assets of the estate the sum of $300, which he accepted in full satisfaction of his claim. She subsequently obtained letters of administration on the estate and brought this action as administratrix to recover the money paid to defendant. The deceased owed no other debt—there were no debts due to him and the plaintiff administered on the estate solely for the purpose of recovering in her representative capacity the sum she had paid to the defendant. *Held:* That the plaintiff is not entitled to recover, as the payment she made to the defendant discharged in the interest of the estate, a debt which she would have been bound to pay in the regular course of administration, and the settlement thus made should not be needlessly disturbed. Rainwater v. Harris, 401.

10. *Allowance for expenses of deceased administrator.*

When an administrator expends money in preserving the estate of his intestate and dies without having presented an account thereof to the probate court, leaving his accounts unsettled, the sum thus expended may be allowed as expenses of administration on a final settlement of his accounts which may be had at the instance of his personal representative. But until such settlement and until it is shown thereby that a balance is due the deceased administrator, his administrator can collect nothing from the estate he has administered, on account of such expenditure. Smith v. Davis, 415.

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2. *Same: Certifying transcript of record.*

Where an appeal is allowed from the judgment of a county court, the circuit court acquires jurisdiction of the proceedings on the filing there of the original papers, and may cause the clerk of the county court to certify a transcript of that court's record entries. Ib.

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2. *Preference of assumed debts: Recitals of deed.*

L. sold a stock of merchandise to W. & F., in consideration of which they assumed the payment of his indebtedness for the goods. They afterwards executed a deed of assignment for the benefit of their creditors, which

recites that they are indebted to the parties who sold the goods to L., giving the amount due to each, and making them, with others, preferred creditors. *Held:* That the preference given to the debts assumed for L., not being for his benefit, will not avoid the assignment on the ground that he was a party to the assignor's fraud; and that until proof of fraud, *prima facie* sufficient to set aside the deed, its recitals are sufficient to show that the assumed debts are genuine, and the assignee is not called upon to produce other evidence of that fact. Ib.

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A plaintiff in attachment is not liable for an injury resulting from the sale of the defendant's property under executions sued out by other creditors and levied upon it simultaneously with the order of attachment, although the issue of the executions may have been precipitated by the example of the plaintiff. Ib.

3. *Same; Levy upon books of account.*

A debtor's credits can only be levied upon by garnishment or judicial proceedings; and the seizure of his books of accounts under an order of attachment—being a levy only upon the materials of which the books are composed—will not render the plaintiff in attachment liable for the loss of debts through a supposed inability to collect them while the books were held by the sheriff. Ib.

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The personal expenses of a defendant in attachment, incurred, not in resisting the attachment, but in prosecuting his suit for the injury it has caused, cannot be included in the amount of damages to be assessed on the bond of the plaintiff. Ib.

BAILEE.

Conversion of money by, see EMBEZZLEMENT, 1.

BETTERMENT ACT.

Constructive notice of title.

The constructive notice of title which is implied from the registry of a deed, is not in itself sufficient to preclude a defendant who has improved land in good faith, under the belief that he is the owner, from recovering for his improvements under the betterment act. Shepherd v. Jernigan, 275.

BILL OF EXCEPTIONS.

1. *Certificate of judge.*

Pursuant to an order of the court made during the term at which a cause was tried, a bill of exceptions taken therein by the defendant was presented to the court at the next term, and the judge's certificate thereto, after referring to the order proceeds as follows: "No counsel appearing for the plaintiff, I am unable to remember the testimony as given upon the hearing, but I have no reason to doubt it is correctly set forth in the foregoing bill of exceptions. Therefore, the said bill of exceptions is now by me signed and made part of the record in this cause with this explanation." *Held:* That since the judge was unwilling to accept the bill as true and did not sign it for the purpose of evidencing the fact of its correctness, it was not sufficient to bring the defendant's exceptions upon the record. Kansas City, Springfield & Memphis Railroad Co. v. Oyler, 278.

2. *Allowing time to prepare.*

The practice of allowing time in which to prepare a bill of exceptions is provided for by the statute, Mansf. Dig., sec. 5157, to prevent delay or a failure of justice and is intended to apply only to cases of necessity. Ib.

BONDS.

Of county, see COUNTY INDEBTEDNESS.

See also, COUNTY TREASURER, 1-4; SURETIES, 1-2.

BURDEN OF PROOF.

As to aiding and abetting sale of liquors, see LIQUORS, 17, 18.

As to injury received by employe of railway company, see RAILROADS, 18.

As to notice, etc., of sale made under special statutory authority, see SALES, 2, 3.

CIRCUIT COURTS.

Proceedings before special judge at chambers.

While the regular judge is occupying the bench, a special judge is without judicial power to proceed with the trial of an action at chambers or to appoint a guardian *ad litem* therein. Such proceedings will not be cured by a *nunc pro tunc* order, made afterwards in court by the special judge, entering them of record as of the day on which they were had; nor will the presence of a guardian thus appointed for an insane defendant, estop the latter in a direct proceeding to vacate a judgment entered against him as the result of such trial. Cox v. Gress, 224.

COMMON CARRIERS.

See RAILROADS, 14, 16.

COMMON LAW.

Presumption as to, see RAILROADS, 14.

CONSTRUCTIVE NOTICE.

Of title, see BETTERMENT ACT.

CONTRACTS.

Disaffirmance of, see INFANCY.

Void as against public policy, see PROMISSORY NOTES, 2.

CONTRIBUTION.

As between co-sureties, see SURETIES, 1, 2.

CONTRIBUTORY NEGLIGENCE.

1. *Proximate cause of injury.*

In order to defeat a right of action on the ground of contributory negligence, it must appear that but for the plaintiff's negligence operating as an efficient cause of the injury complained of, in connection with the fault of the defendant, the injury would not have happened. St. L., I. M. & S. Ry. v. Rice, 467.

2. *Same.*

The plaintiff sued the railway company to recover for an injury to his hand, sustained while in the employ of defendant as yard foreman. He had been in the employ of railroads as brakeman and yard foreman for twelve

years prior to the date of the injury, and coupling cars was one of his duties. The published rules of the company, of which he had a copy, enjoined the observance of "great care" "in coupling and uncoupling cars," and forbade an attempt to make a coupling unless the draw-bars and other appliances were "known to be in good order." The rules did not require employes to couple cars having uneven draw-heads, with straight links or when the draw-heads were defective. In making couplings it is customary and considered safer to do so with the link in the moving car. The weight of a draw-head is about two hundred pounds. The plaintiff went between a standing and a moving car to couple them. He saw that there was a link in the draw-head of each car. He tried to take the link from the standing car, but found it fast. He saw that the draw-head of that car was one and a half or two inches lower than it should have been and was twisted to one side. While the ordinary play of a link is from six to seven inches, the plaintiff saw that the link in the standing car had no play and that he could not couple with it without raising it up by extra force. He then took the link out of the approaching car and seizing the link of the standing car—which was a straight one—tried to raise it up and his hand was caught and injured. *Held:* That the plaintiff was guilty of gross negligence which contributed directly to produce the injury sustained, and he was not, therefore, entitled to recover. Ib.

CONVEYANCES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; DEEDS; FRAUDULENT CONVEYANCES; INFANCY; MORTGAGES; STATUTE OF FRAUDS.

COSTS.

See SPECIAL ADMINISTRATOR, 3.

COUNTER CLAIM.

For improvements, in action for rent, see LANDLORD AND TENANT, 2.

COUNTIES.

See also COUNTY INDEBTEDNESS; STATUTE OF LIMITATIONS, 3.

1. *Claims against county: Itemizing account.*

On a claim against a county it is error to allow charges which are not itemized and show no liability on the county. (Mansf. Dig., sec. 1413.) Desha County v. Jones, 524.

2. *Same.*

Where an officer's account for fees, presented for allowance against the

county is itemized obscurely in an abbreviated form, so that it is not sufficiently intelligible to show that the services charged for were of the character for which fees are allowed by law and that the county is liable, the claim should be rejected unless the defect is supplied by evidence. Ib.

COUNTY COLLECTOR.

1. *Rates of commission: Payable "in kind."*

The commission of a collector is limited by the statute, (Mansf. Dig., sec. 5749,) to five per cent. upon the first ten thousand dollars of the whole amount of taxes collected, three per cent. upon the next ten thousand and two per cent. upon the excess over twenty thousand dollars, where the aggregate amount collected exceeds the latter sum. Each fund in which taxes are collected must be made to bear its proportion of the whole expense of collection by paying out of such fund the commission on the amount thereof. Wilson v. State, 212.

2. *Restating account: Penalties.*

When a collector credits himself with commissions in excess of the rate which the law allows, and through inadvertence or mistake, the county court approves his account, the court may at any time within two years from the date of such approval restate the account and correct the error. And if the collector fails to pay the balance against him on the readjusted account within the time in which the law requires other balances to be paid, he incurs the penalties prescribed by the statute and he and his sureties may be proceeded against as provided in sec. 5850, Mansf. Dig. Ib.

COUNTY COURTS.

See ELECTION CONTESTS.

Appeal from judgment of, see APPEAL, 1, 2; LIQUORS, 6.

COUNTY INDEBTEDNESS.

When negotiable bonds become part of.

In 1872 bonds of Hempstead county to the amount of $50,000 were prepared by the proper authorities and placed in the hands of commissioners to be negotiated by them for the purpose of raising a fund to build a court house and jail. The county of Howard was created by the act of April 17th, 1873, and part of the territory it embraces was taken from Hempstead. In a proceeding under that act instituted to determine what portion of the indebtedness of Hempstead county at the time Howard was formed, should be paid by the latter, *held:* That before the bonds were nego-

tiated they constituted no part of the indebtedness of Hempstead county, and Howard was only liable for its proper proportion of the amount of such bonds as had been negotiated when the act creating it was passed. *Held, further:* That Howard county's proportion of the interest that had accrued on the bonds to the date of judgment, was properly adjudged against it. Hempstead County v. Howard County, 344.

COUNTY TREASURER.

1. *Informality in bond of: Action against.*

The bond of a county treasurer by the terms of which he and his sureties bind themselves that he shall truly account for and pay over all moneys which may come to his hands by virtue of his office is valid, although it names no obligee; and under sec. 1067, Mansfield's Digest, the State may bring an action on such bond for the use of the county to replace money never legally drawn from the treasury and for the amount of which the treasurer is a defaulter. State v. Wood, 205.

2. *Breach of bond.*

The failure of a county treasurer to bring public funds received by him, and not expended, into court to be counted, under an order of the county court made at a regular settlement of his accounts, is a breach of his official bond, and such failure cannot be excused by showing that the money was lost through the insolvency of a bank in which he had deposited it. Ib.

3. *Same: Measure of damages.*

In an action to recover for the breach of a county treasurer's bond, committed by a failure to keep the public funds to be paid to those entitled thereto, the adjustment of his accounts by the county court, at a regular annual settlement, concludes further inquiry as to the state of such accounts, and the amount thus ascertained to be due with legal interest from the date of the settlement is the measure of damages. Ib.

COUNTY WARRANTS.

1. *Order calling in: Notice, etc.*

In proceedings for calling in county warrants, the statutory authority under which the county court acts must be strictly pursued; and unless notice of the order making the call is given and proved in the manner prescribed by the statute, the order is a nullity as to all warrants not presented in obedience to the call. Gibney v. Crawford, 34.

2. *Same: Proof of publication.*

An affidavit as to the publication of an order calling in county warrants, in which the affiant fails to state he is the editor, proprietor, publisher or principal accountant of the newspaper in which such order was published, or that the paper was a daily or weekly and had a *bona fide* circulation in the county and had been published therein for one month before the first publication of the order, or how long it was published, the number of insertions, or the length of time between the last insertion and the time fixed for the presentation of the warrants, is a nullity and cannot be received as evidence of the publication which the statute requires. [Mansf. Dig., secs. 1148, 4359.] Ib.

3. *Same: Posting notice.*

Under the statute (Mansf. Dig., sec. 1148) requiring the sheriff to give notice of an order calling in county warrants, by posting copies of the order at the court-house door and the election precincts, it is the duty of the sheriff to make a written return, setting out the manner in which he has given such notice; and the testimony of a witness that he was the sheriff's deputy when the order was made, and put up copies of the same at some of the places prescribed by law and that the sheriff, who was not then living, had presented to the county court an account charging for his services in giving notice that county warrants had been called in, is not sufficient to show that such notice was posted as the law requires. Ib.

CRIMINAL LAW.

See also, CRIMINAL PROCEDURE; EMBEZZLEMENT; FORGERY; HABEAS CORPUS; INDICTMENT; LIQUORS; MURDER; NEW TRIAL, 2; PERJURY; PRACTICE IN SUPREME COURT, 2; RAPE; ROADS.

1. *Finding of jury as to accomplice.*

Whether a witness for the state in a criminal prosecution was an accomplice of the accused or not, is a mixed question of law and fact; and where the jury determine the fact against the prisoner, their verdict is final, unless the testimony shows conclusively that the witness was an accomplice. Edmonson v. State, 115.

2. *Accessory after the fact: Wife of accomplice.*

The statute defining an accessory after the fact, (Mansf. Dig., secs. 1507, 1510), does not compel a wife to become an informer against her husband; and the mere fact that she has concealed a crime does not make her the accomplice of one who participated with her husband in its com-

mission, if the the facts within her knowledge were such that she could not inform against one without implicating the other. Ib.

3. HOMICIDE: *Cause of death: Maltreatment of wound.*

Where one unlawfully inflicts on another a dangerous wound which proves to be mortal, he is guilty of murder or manslaughter, according to the circumstances of the case, although it may appear that unskillful or improper surgical treatment aggravated the wound and contributed to the fatal result. Sharp v. State, 147.

CRIMINAL PROCEDURE.

See also CRIMINAL LAW, 1; HABEAS CORPUS; INDICTMENT; INSTRUCTIONS; PRACTICE IN SUPREME COURT, 2; WITNESSES, 3.

1. *Swearing the jury: Waiver.*

In a prosecution for a misdemeanor, it is too late after verdict to object for the first time that the jury, composed of the regular panel and sworn generally for the term, was not also sworn specially as provided in Mansfield's Digest, sec. 2248. The defendant in such case waives his objection to the form of the oath, if he fails to make it before going to trial. Ruble v. State, 126.

2. *Failure to enter plea: Practice on appeal.*

A judgment of conviction for a misdemeanor will not be reversed because the record fails to show that a plea was entered by the defendant, where the court and parties treated the cause as at issue on the plea of not guilty. Moore v. State, 130.

3. *Instructions: Practice on appeal.*

This court will not review the refusal of the trial court to give an instruction asked for by the defendant, where all it contains that could have benefitted him was given to the jury in other instructions. Sharp v. State, 147.

4. *Examination of witnesses: Remarks of judge.*

On the trial of a criminal cause the presiding judge may ask a witness any question which either party has failed to propound, and the answer to which may tend to show the guilt or innocence of the accused. But in doing so he should carefully avoid the use of language which may be taken by the jury to intimate an opinion on any fact which it is their duty to decide. Ib.

5. *Same.*

On the trial of D. and S., jointly indicted for the murder of M., committed by stabbing him, the testimony showed that the wound was inflicted by D. After witnesses had testified that they saw the defendants with knives in their hands a short time before and after the deceased was wounded, a witness was introduced who stated that he saw a difficulty arise between D. and the deceased, which the latter commenced by striking D.; that D. retreated and asked deceased not to cut him; that S., coming into the room about that time, requested them to stop and on their refusal to do so, grabbed at one or both of them; that the defendant D., then fled, the defendant S. and deceased following him; and that as they went through the door he saw a knife in the hands of deceased, but did not see S. with any. He also stated that he made no effort to prevent the fighting. The presiding judge then asked the witness the following question: "Do you mean to say that you remained there and saw these men fighting with knives and did not interfere in any way to prevent it?" Whereupon the attorney for defendants remarked that the witness had not said that he saw them fight with knives; and the judge responded: "The jury will be the judge of that. I am examining the witness and you can object if you don't think it proper." *Held:* That as the guilt of S. depended on his participation in the wounding of the deceased, the question and reply of the judge—which the jury may reasonably have taken to indicate an opinion that he was concerned in the stabbing—tended to deprive him of his constitutional right to have the judgment of the jury in deciding the facts of the case, unaffected by any opinion of the judge. Ib.

DAMAGES.

Recoupment of, in action against landlord for conversion of tenant's crop, see RECOUPMENT, 1; Recoverable on discharge of attachment, see ATTACHMENTS, 1-4. See also RAILROADS, 7, 9-13; REPLEVIN.

1. *Measure of: Conversion of chattel.*

Where a mortgagee of personal property takes and sells it in the exercise of a right existing under the mortgage, and becomes a wrong-doer only by reason of the improper method of exercising his right, he is liable to the mortgagor, in the absence of special damages, only for the value of the property at the time of its conversion, less the amount of the mortgage debt. Jones v. Horn, 19.

2. *To father from death of son: Measure of.*

In an action against a railway company to recover for the benefit of a father,

damages for the killing of his son, where it is shown that the latter's expectancy of life exceeds that of his father, an instruction to the jury that the measure of damages is the probable earnings of the son during his expectancy of life, less his expenses, etc., is erroneous, since it permits the father to recover as a pecuniary loss to himself, accumulations of the son for a period after he (the father) is presumed to have died. Fordyce v. McCants, 509.

3. *Same.*

In an action against a railroad company [under secs. 5223, 5226 Mansf. Dig.,] to recover the damages resulting to a father from the killing of his son, who was of age but unmarried, substantial damages can be recovered only by showing that deceased gave assistance to his father, contributed money to his support, or that the father had reasonable expectation of pecuniary benefit from the continued life of his son—the reasonable character of such expectation to appear from the facts in proof. In the absence of such proof only nominal damages can be recovered. Ib.

DEEDS.

See also FRAUDULENT CONVEYANCES; MORTGAGES; STATUTE OF FRAUDS, 1; VENDOR AND VENDEE. Disaffirmance of infant's deed, see INFANCY, 1-4. Parties in suit to reform, see PLEADING AND PRACTICE, 9.

1. *Uncertain description of land; Reformation of deed.*

Where parties fully execute as they intend and believe, an agreement for the sale of land—on the one part by making and delivering a deed and on the other part, by paying the purchase price, accepting the deed and entering into possession under it, an indefinite and uncertain description of the land, inserted in the deed through a mistake as to the ordinary meaning of the terms used, will not render the contract void. But in such case as against the vendor and subsequent purchasers with notice, an estate in the land intended to be conveyed, will pass to the vendee when the deed is executed, with the right to demand that it be reformed so as to describe the land correctly. Knight v. Glasscock, 390.

2. *Defective acknowledgment: Curative acts.*

The application of the curative acts of 1883 is not limited to the obvious omission of words from certificates of acknowledgment, but extends to every case in which the acknowledgment of a deed is insufficient to give full legal effect to its terms. Johnson v. Parker, 419.

3. *Same: Relinquishment of dower.*

Where a married woman joins her husband as grantor in conveying lands in which she has no estate except a contingent right of dower, the deed, although it contains no clause relinquishing dower, will bar her right thereto if she acknowledges it in proper form; and if it does not have that effect merely because the officer's certificate is not in the form prescribed by the statute, then her acknowledgment of such deed is "defective," and "the proof of" its "execution" is "insufficient" within the meaning of the curative acts. Ib.

4. *Same.*

In 1859 the plaintiff joined her husband as grantor in the execution of a deed which contained no clause expressing a purpose to relinquish dower. The officer before whom the deed was acknowledged certifies that the husband acknowledged it "to be his act and deed and that the wife being privily examined separate and apart from her said husband, declared that she did freely and willingly sign and deliver said * * * without any fear or compulsion from her said husband, as her act and deed," but makes no mention of dower. The deed was recorded soon after its execution. After the death of her husband the plaintiff petitioned for dower in the land thus conveyed. *Held:* That the defective acknowledgment of the plaintiff as a relinquishment of dower, was cured by the healing acts of March 8th and March 14th, 1883, and her petition was properly denied. Ib.

5. *Conveyance to imbecile: Delivery.*

Where the grantor in a deed conveying land to a person who is *non compos*, delivers it to the latter's father, intending by such delivery to pass the title to her, the father's acceptance of the deed for the daughter is a sufficient delivery to her, and the conveyance being for her benefit, her assent thereto will be presumed. Eastham v. Powell, 530.

DELIVERY.

Of deed to person who is *non compos*, see DEEDS, 5; Of goods to carrier, see SALES, 1.

DESCENTS AND DISTRIBUTION.

1. *Statute of: Inheritance per capita and per stirpes.*

When the persons composing the nearest class of kin to an intestate, as fixed by sec. 2522 Mansfield's Digest, die before his death, the next class in order will thus be advanced nearer to him, and the persons composing it

will inherit his estate in their own right as next of kin, equally if equal in degree, and *per stirpes* if in unequal degree—those equal in degree and nearest in degree to the intestate, taking equal shares in their own right, while those of unequal degree and one step further removed from the intestate, take only the shares their ancestors would have taken if alive. Garrett v. Bean, 52.

2. *Same.*

An intestate died without issue and without ancestors, brothers or sisters, surviving him, and leaving thirty-five nephews and nieces—the children of eight deceased brothers and sisters—and four grand-nephews and nieces—the children of his deceased niece—his nearest of kin. At the time of his death he was seized in *fee simple* of certain lands. *Held:* That the nephews and nieces, standing in equal degree and nearest to the intestate, take *per capita* equal shares of his lands, each taking one-thirty-sixth thereof, and the grand-nephews and nieces take *per stirpes*, the share their mother would take if alive—each taking one-fourth of one-thirty-sixth. Ib.

DOWER.

Relinquishment of, see DEEDS, 3, 4.

EJECTMENT.

See also PUBLIC LANDS.

For land occupied by railroad, see RAILROADS, 21.

To recover lands sold for taxes: Tender of taxes, etc.

Sec. 2649, Mansf. Dig., which provides that an action to recover lands held by virtue of a tax title, shall not be maintained unless the plaintiff shall, before any writ issues therein, file in the clerk's office an affidavit setting forth that he has tendered to the person so holding such lands, the taxes, costs, etc., applies only to such sales for taxes as are invalid because of irregularities or omissions on the part of the officers conducting them, and has no application where a sale is absolutely void for want of power to make it. The payment of a tax extinguishes the authority to make a sale for its collection, and where land is sold for taxes which have been paid, an action to recover it may be commenced without filing the affidavit of tender provided for by the statute. Kelso v. Robertson, 397.

ELECTION CONTESTS.

Jurisdiction of county court: Act January 23, 1875, constitutional.

The Constitution, by sec. 24, art. 19, required the legislature to designate a

tribunal before which contests for county and township offices should be tried. The act of January 23, 1875, (sec. 71) conferring jurisdiction of such contests on the county court, was passed in obedience to that requirement, and is, therefore, as conclusive against constitutional objection as though written originally in the Constitution itself. Glidewell v. Martin, 559.

EMBEZZLEMENT.

1. *Conversion of money by bailee.*

B. delivered to the defendant a horse to be sold for him. The defendant sold the animal for $125 and received the money, but failed to deliver it to B. *Held:* That if it was expressly or impliedly understood that defendant should deliver to B. the identical money received for the horse, then he was a bailee of it, within the meaning of the statute, (Mansf. Dig., sec. 1640), and liable as such for its unlawful conversion. But he could not be prosecuted for collecting a check received for the price of the horse, since it was in the line of his duty to make the collection. Dotson v. State, 119.

2. *Indictment: Description of money.*

A defendant cannot be lawfully convicted of embezzling paper currency on an indictment which describes it as "ten bills of the paper currency of the United States of the denomination and value of ten dollars each," as the description is insufficient because of its uncertainty. Ib.

3. *Criminal intent: Instruction.*

On the trial of an indictment for embezzlement the court instructed the jury "that if they found trom the evidence that the defendant converted the money alleged * * to have been embezzled, to his own use," they "would be authorized to infer the criminal intent." *Held:* That the instruction was not erroneous as calculated to mislead the jury, since the effect of it was to tell them that the conversion of the money was a circumstance from which a criminal intent might be inferred. Ib.

EQUITY.

See INJUNCTION, JURISDICTION.

ESTOPPEL.

To maintain ejectment for land occupied by railroad, see RAILROADS, 21.

Acquiescence in sale.

Where a widow, having only a life estate in the lands of her deceased

husband, without power to sell any greater interest, conveyed them in *fee simple*, and her children, who are the devisees of the remainder, were present and assented to, or acquiesced in the sale, they are not thereby estopped from claiming the lands, as against the purchaser, on the termination of the life estate, where it does not appear that he was misled by their conduct, or was ignorant of their reversionary interest, nor that they were then of age, or knew of their interest. Patty v. Goolsby, 61.

EVIDENCE.

See also ASSIGNMENT, etc., 2; BURDEN OF PROOF; CONTRIBUTORY NEGLIGENCE, 2; COUNTY WARRANTS, 2, 3; EMBEZZLEMENT, 3; LIQUORS, 17, 18; MURDER, 3, 4; PERJURY, 2; PROMISSORY NOTES, 3; SALES, 2, 3; RAILROADS, 12, 15, 18; WITNESSES, 1-3.

1. *Of justice's judgment: Docket entry.*

Where a paper purporting to be the docket entry of a justice of the peace, but not certified as a copy of the docket, nor accompanied by proof that it is genuine, is offered in evidence to prove the imposition of a fine, it is not error to exclude it. Moore v. State, 130.

2. *As to transactions with plaintiff's intestate.*

In an action brought by an administratrix to recover a sum of money which she paid to the defendant before administration in discharge of his claim against the estate of her intestate, he offered to prove by his own testimony that he loaned the deceased the money in controversy to pay upon certain land; that he took no note for the amount, but the deceased at the time of receiving it made an entry in his own private memoradum book; and that no part of the debt had been paid except as paid by the plaintiff. *Held:* That such testimony, relating to transactions between the defendant and the deceased, was properly excluded. (Schedule to Const., sec. 2.) Rainwater v. Harris, 401.

3. *Contradicting policy of insurance.*

Parol evidence is inadmissible to contradict the provisions of a policy of insurance. Robinson v. Insurance Co., 441.

4. *Hearsay: Res gestae.*

In an action against a railway company brought to recover damages for killing the plaintiff's intestate, the court permitted a physician to testify to the contents of a telegram sent him by the plaintiff, stating that there had been an accident on the defendant's road and that the deceased had been

seriously injured and required the witness's attention. The same witness was also allowed to testify that after driving twelve or thirteen miles, he arrived at the home of the plaintiff to which the deceased had been carried, and that after his arrival the deceased stated to him that he had been thrown heavily across the corner of a seat and had thus received an injury from which the witness found him suffering. *Held:* That the contents of the telegram were hearsay and the statements of the deceased were not part of the *res gestae*. It was therefore error to admit them. Fordyce v. McCants, 509.

EXECUTION.

1. *Sale of land under: Waiver.*

The statutory requirement, (Mansfield's Digest, sec. 3052), that lands shall be sold under execution, in tracts containing not more than forty acres, is directory; and where the owner of the lands is present at the sale, he waives a compliance with the statute by his failure to demand it. Reynolds v. Tenant, 84.

2. *On judgment against administrator.*

After the removal of an administrator, execution on a judgment recovered against him in his fiduciary capacity, and to be levied of the goods and chattels or lands of his intestate, as provided in ch. 60, sec. 8 of the Revised Statutes, could not be legally issued until the judgment had been revived against a new administrator or against the party in interest in the property of the intestate; and where an execution issued without such revivor, a sale under it passed no title. Meredith v. Scallion, 361.

3. *Same: Repeal of statute.*

The statute which recognized the right to issue an execution against an administrator in his fiduciary capacity [Rev. Stat. chap. 60, sec. 8], was repealed by the provisions of the constitution of 1874, conferring exclusive jurisdiction over the assets of deceased persons on the probate courts. Since the adoption of that instrument, although courts of law still have jurisdiction to maintain an action against an administrator, the power to execute a judgment recovered therein belongs alone to the probate court, to be exercised in the course of administration. An execution issued on such judgment is, therefore, without authority of law and a sale made under it is void. Ib.

4. *Superior to prior unrecorded mortgage.*

The lien on land acquired by the levy of an execution, is superior to that of

a prior unrecorded mortgage, although the mortgage is subsequently filed for record before the sale of the land. Hawkins v. Files, 417.

FORGERY.

1. *Of school warrant.*

It is forgery to make a false school warrant in the name of a majority of the school directors. Claiborne v. State, 88.

2. *By creditor on his debtor.*

It is no defence for a creditor to show that when he executed a forgery on his debtor, he intended to apply the money thus obtained to the payment of his debt. Ib.

3. *Fraudulent intent.*

One who is authorized to sign the name of another to an instrument for the payment of money in a stated amount, or for a legal purpose, will commit forgery if he signs it for a larger amount, or for an illegal purpose, with intent to defraud. Ib.

FRAUD.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2; FRAUDULENT CONVEYANCES, 1, 2.

FRAUDULENT CONVEYANCES.

See also ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2.

1. *Allegations and proof.*

It is not sufficient to charge in general terms that a conveyance of land to a wife, was made to defraud her husband's creditors. The facts constituting the alleged fraud should be stated. And the charge will not be sustained by proof which merely shows that the husband paid for the land and that he owed at the time a small debt, without establishing other indebtedness. Knight v. Glasscock, 390.

2. *Conveyance by husband to wife.*

Although a deed executed by a husband to his wife in fraud of his creditors, may be avoided for their benefit in proper proceedings taken by them for that purpose, it cannot be avoided by the husband; and his subsequent conveyance to the creditors will not divest the wife of her title. Ib.

GUARDIAN AD LITEM.

For insane person, see PLEADING AND PRACTICE, 2.

GUARDIAN AND WARD.

Guardian's sale: Presumption as to order for.

An order of the probate court for the sale of a minor's lands will be presumed to have been regularly made, where nothing to the contrary appears in the record, and its validity cannot be questioned in a collateral proceeding. Curry v. Franklin, 338.

HABEAS CORPUS.

1. *Erroneous proceedings not corrected by.*

The petitioner entered a plea of guilty to an indictment for criminal abortion and the court assessed his punishment as upon conviction of a felony. On the next day, having concluded that the indictment charged only a misdemeanor the court, caused the plea to be withdrawn, quashed the indictment and made an order for the submission of the charge to the grand jury and for admitting the prisoner to bail. After the court had adjourned for the term the prisoner, who remained in jail, presented to the judge at chambers his application to be discharged on *habeas corpus*, which was refused. On petition to review such refusal by *certiorari*, *held:* (1.) That whether the court erred in causing the plea to be withdrawn, could be determined only on appeal or writ of error; (2.) That whether the facts entitle the petitioner to be discharged from further prosecution or not, is a question which might be presented either by a motion for discharge made in the original cause, or by special plea to a new indictment. But such question can not be raised by *habeas corpus*. Barnett, ex parte, 215.

2. *Review of proceedings on: Practice.*

The action of a circuit judge in refusing to discharge a prisoner on *habeas corpus* will be affirmed, where it appears that the petitioner is held to answer a criminal charge, under an order of the circuit court regular on its face, and which that court had power to make. Ib.

HIGHWAYS.

See ROADS.

HOMESTEAD.

1. *Exemption from sale under attachment.*

Where land is not occupied as a residence at the time an order of attachment is levied upon it, the defendant's occupation of it on a subsequent

day, will not enable him to hold it as a homestead exempt from sale under a judgment sustaining the attachment. Reynolds v. Tenant, 84.

2. *Minor's rights to share rents and profits of.*

Where the widow of a decedent holds his homestead to the exclusion of his minor children, who are entitled to share it with her under article 9, sec. 6 of the constitution, she connot defeat an action brought by them to recover their share of the rents and profits, by showing that no dower has been assigned to her in the lands embraced by the homestead. Sec. 2588 Mansf. Dig., which provides that the widow shall possess the chief dwelling-house of her deceased husband together with the farm thereto attached, free of rent until her dower is assigned, has no application to her use of the homestead and is inoperative as against the homestead right of the minor. Winters v. Davis, 535

3. *Order vesting in widow: Rights of minor children.*

Since the adoption of the constitution of 1874, which, by art. 9, sec. 6, provides that when the owner of a homestead dies his widow and minor children shall share the same equally, the power of the probate court to make an order under sec. 3, Mansf. Dig., vesting the estate of a deceased person in his widow where it does not exceed in value the sum of three hundred dollars, is confined to cases where the deceased leaves no minor children, or if he leaves such children, no part of his estate constitutes a homestead. Sansom v. Harrell, 429.

4. *On land jutting into village.*

Where a tract of land not within the limits of any incorporated town, is used only for agricultural purposes in connection with a contiguous farm, and has never been surveyed into blocks and lots or dedicated to village uses, it may be claimed as a rural homestead, "outside any city, town or village," within the meaning of the constitution, although the land on which the claimant's residence is situated juts into a village. Orr v. Doughty, 527.

HOMICIDE.

Cause of death, see CRIMINAL LAW, 3.

HUSBAND AND WIFE.

Conveyance between, see FRAUDULENT CONVEYANCES, 1, 2.

INDICTMENT.

For embezzling money, see EMBEZZLEMENT, 2.

See also PERJURY, 1.

For larceny: Description of property.

An indictment for larceny which describes the property charged to have been stolen, as "two ten dollar bills of United States currency," is bad for the vagueness and uncertainty of the description. State v. Oakley, 112.

INFANCY.

1. *Conveyance of infant: Disaffirmance: Coverture.*

Where an infant wife joins her husband in the execution of a deed to her lands, she may in the absence of any act on her part sufficient to ratify the conveyance, disaffirm it at any time during coverture. Stull v. Harris, 294.

2. *Same.*

The mere passive acquiescence of a married woman in a deed executed by her while she was an infant and covert, will not, though extending through many years, be sufficient during coverture to ratify the contract. Ib.

3. *Same: Return of consideration.*

An infant may in general disaffirm his contract without restoring the consideration received by him; but if it remains in his hands in specie at the time of disaffirmance, he must offer to restore it or its value as a condition to disaffirmance. Ib.

4. *Same.*

The plaintiff joined her husband in the execution of a deed conveying to the defendant lands which belonged to her, but in which her husband had an interest acquired by his marriage. In part payment of the price of the lands the defendant released $400 of a debt due to him from the plaintiff for necessaries furnished her during her minority and before her marriage. The residue of the purchase money was paid to the husband. On a bill to cancel the plaintiff's conveyance on the ground that it was executed during her infancy, *held:* That the plaintiff as a condition of obtaining the relief sought, must pay the defendant the $400 released on her debt to him, with legal interest from the date of the deed. But she will not be required to refund any part of the purchase money paid to her husband. Ib.

INJUNCTION.

To prevent loss of assets, etc., see ADMINISTRATION, 8.

To prevent wrongful appropriation of right of way, see RAILROADS, 3, 8.

Parties plaintiff in action to obtain, see SPECIAL ADMINISTRATOR, 2.

To prevent extension of assessment on tax books, see TAXES, 1, 2.

INSANE PERSONS.

See DEEDS, 5.

Guardian *ad litem* for, see PLEADING AND PRACTICE, 2.

INSTRUCTIONS.

See also CRIMINAL PROCEDURE, 2; LIQUORS, 15; MURDER, 2; PRACTICE IN SUPREME COURT, 1; RAPE, 3; ROADS.

1. *Excluding points raised by evidence.*

It is not error to refuse a prayer for an instruction which, though correct as far as it goes, is so framed as to exclude from the consideration of the jury points raised by the evidence of the adverse party. Claiborne v. State, 88.

2. *Same.*

A charge that a conviction should be had if the jury find the existence of a given state of facts, which do not legally import guilt without a specific intent, is erroneous, and the error of the specific charge upon the facts singled out by the court to the exclusion of others which the jury had the right to consider, is not cured by a correct general charge in regard to the guilty intent necessary to constitute the offence. Ib.

3. *Oral explanation of written charge.*

Where a party demands that the jury be instructed in writing, it is error to make verbal explanations of the written charge; and unless it affirmatively appears that such error was harmless, it is ground for reversal. Mazzia v. State, 179.

INSURANCE.

Promissory note given for, see PROMISSORY NOTES, 1.

INTENT.

Necessary to constitute murder in first degree, see MURDER, 1, 2.

Criminal, inferred from conversion of money, see EMBEZZLEMENT, 3.

Fraudulent, in signing name, etc., see FORGERY, 3.

INTEREST.

See also USURY, 1-6.

On mutual account current.

A mutual account current between the plaintiff, who was engaged in farming and money lending, and the defendants, who were merchants, was begun on the books of the latter in 1871. The plaintiff obtained from the defendants merchandise for himself and supplies for his tenants, and sometimes got from them cash advances. They borrowed money from him from time to time, and in 1873 executed to him their note for $1100, loaned money, which bore interest before maturity. The proceeds of crops raised on the plaintiff's lands, or due from his tenants, were turned over to the defendants year after year, to be credited on the account and the items of debit and credit were entered as one continuous account, without rest or balance until 1884, when the dealings between the parties ceased. The manner of keeping the account, in connection with other evidence, shows that it was permitted to run for mutual convenience, the balance to be paid by the party against whom it should exist on a final adjustment. *Held:* That until the dealings between the parties ceased, or one of them was called to account, neither could claim a balance for which the term of credit had expired, and on which interest could be computed either by virtue of an implied agreement or by operation of law. But the note by its terms bore interest and as it entered into the mutual dealings, the items of the account which are demands in favor of the defendants against the plaintiff should be applied to the payment of the interest and principal of the note after first extinguishing the earlier demands of the plaintiff against the defendants, as in ordinary cases of partial payments under the statute. (Mansf. Dig., sec. 4758.) Rogers v. Yarnell, 198.

JUDGMENT.

Of justice, how pleaded, see PLEADING AND PRACTICE, 8.

Parties in proceeding to revive, see PLEADING AND PRACTICE, 6.

1. *Assignment by trustee.*

When a plaintiff in a judgment is only a trustee thereof, and, as shown by the record, has no beneficial interest therein, his assignment of it will pass no title. Brice v. Taylor, 75.

2. *Recovered by administrator: Assignment.*

Mansf. Dig., sec. 76, provides that the sale of a decedent's choses in action shall be pursuant to an order of court and at public sale. The assign-

ment by an administrator of a judgment belonging to the estate of his intestate, made privately and without an order of court, is therefore void. Winningham v. Holloway, 385.

3. *Same.*

A judgment recovered by an administrator belongs to the distributees of his intestate, subject to the payment of debts and expenses of administration; and where they assign it during the administration their assignee acquires such interest therein as they will be entitled to when the estate is fully settled and the administrator discharged. Ib.

4. *Same: Probating.*

After the death of H. a judgment which had been obtained against him by the administrator of E. was assigned by the latter's distributees to W. After the estate of E. had been fully settled and his administrator discharged, W. presented the judgment for allowance as a claim in his favor, against the estate of H. It was not authenticated by the oath of the administrator or distributees. Sec. 106, Mansf. Dig., is as follows: "If the debt be assigned, after the debtor's death, affidavit shall be made by the person who held the debt at the death of the debtor, as well as the assignee." *Held:* That W. was entitled to probate the judgment and it was not necessary that it should be authenticated by the affidavit of E.'s disdistributees who, as they were not authorized to collect the judgment, are are not, therefore, such assignors as are referred to by the statute. *Held*, further, that the administrator was not required to make the affidavit because he was not the assignor of the claimant, and that in such case the statute provides for no authentication by an assignor. Ib.

JURISDICTION.

Of county court to try contested elections, see ELECTION CONTESTS.

Of Equity: Over settlement of administrator, see ADMINISTRATION, 1-5. In granting new trials, see NEW TRIAL, 1. In the reformation of contracts, see DEEDS, 1. To compel compliance with oral agreement for assignment of interest in patent, see SPECIFIC PERFORMANCE. To enforce lien of equitable mortgage, see MORTGAGES, 5, 6. As to constructive trusts, see TRUSTS. As to contribution between co-sureties, see SURETIES, 2. To cancel conveyance of infant, see INFANCY, 4. In granting relief by injunction, see ADMINISTRATION, 8; RAILROADS, 3; TAXES, 1, 2.

See also GUARDIAN AND WARD; LABORER'S LIEN; WILLS, 4.

JUSTICES OF THE PEACE.

Amendment of justice's docket, see AMENDMENT, 1.

Jurisdiction to enforce laborer's lien, see LABORER'S LIEN.

Judgment of, how pleaded, see PLEADING AND PRACTICE, 8.

LABORER'S LIEN.

Statute gives none for digging well, see MECHANIC'S LIEN, 7.

Judgment of justice enforcing: Notice.

The judgment of a justice of the peace in an action to enforce a laborer's lien, under the act of 1868, [Mansf. Dig., secs. 4425–4440] is void, where the proceedings fail to show that notice thereof was given to the defendant or that he waived notice. Levy v. Ferguson Lumber Co., 317.

LANDLORD AND TENANT.

1. *Liability of landlord for improvements.*

It is only by virtue of the agreement of a landlord to pay for improvements that his tenant can recover of him their value. Gocio v. Day, 46.

2. *Same: Counter-claim.*

When a landlord leads his tenant to believe that the value of improvements he may thereafter put upon the demised premises, will be deducted from the rent or paid to him, a special promise to that effect may be implied; and such promise is the subject of a counter-claim in an action for the rent. But the mere fact that a landlord permits permanent improvements to be made without objection, or warning that he will not pay for them, raises no presumption that he intends to do so. Ib.

3. *Relation of: Giving rent note for purchase money.*

B., owning certain land, agreed to sell it to S., who gave his notes for the purchase money and was let into possession under a bond conditioned for the execution of a conveyance on payment of the notes. After the notes matured, B. conveyed his interest in the land to the defendant. On the trial of this action, B. testified, in general terms, that at the time of such conveyance there was an understanding between him and S. that their contract was canceled. But there was no written agreement to that effect. The notes were transferred to the defendant, the bond for title was not taken up and S., who testified that the contract to purchase was not canceled, was permitted to remain in possession for several years with no claim upon him to pay rent. He subsequently executed a mortgage to

the plaintiff on certain cotton produced on the land and a few weeks afterwards made his note to the defendant for $400, payable in the fall of the same year and specifying that it was for rent of the land. It was for about twice as much as the land would rent for, and S. testified that it was the understanding between him and the defendant that the amount paid on the note should be credited on his purchase. In an action to recover the value of the cotton which the defendant converted to his own use, *held:* (1.) That the evidence was sufficient to sustain the finding of the court that the contract of purchase had not been rescinded, and that the relation of landlord and tenant did not exist between the defendant and S. (2.) That the recital in the note for $400 that it was given for rent did not preclude the plaintiff from proving that it was not in fact given for that purpose. Watson v. Pugh, 218.

LARCENY.

Description of property stolen, see INDICTMENT.

LIENS.

See also EXECUTION, 4;

LABORER'S LIEN; MECHANIC'S LIEN; MORTGAGES; TRUSTS, 2; VENDOR AND VENDEE, 1, 3.

Mortgage and statutory: Priority.

The lien created by statute, (Mansf. Dig., sec. 4468), in favor of the keeper of a jack or stallion, is subordinate to the lien of a prior recorded mortgage executed after the passage of the act. Easter v. Goyne, 222.

LIQUORS.

See also SALES, 1.

1. *Construction of license law.*

The construction placed upon the license law in *Chew v. State*, 43 Ark., 361 and cases there cited, that it forbids a sale of liquor for any purpose whatever, by an unlicensed dealer, is approved. Battle v. State, 97.

2. *Sale for medicinal purposes: "Three Mile Law."*

The act of 1881, known as the "the three mile law," did not change the general license law, so as to permit the sale of liquors for medicinal purposes without a license. Ib.

3. *Who may furnish to the sick.*

Under "the three mile law" a physician who files the oath required by that

act is the only person who can furnish alcoholic stimulants to the sick in a prohibited district; and a sale made therein by a druggist is unlawful, although he sells for medicinal purposes and upon the prescription of such physician. Ib.

4. *Executory contract to sell: "Three Mile law."*

A sale of liquors is not punishable under "the three mile law," unless it is completed within a prohibited district, so that the title to the liquor sold passes there from the vendor to the purchaser. The statute does not apply to a mere executory contract to sell. Herron v. State. 133.

5. *Same: Same.*

The defendant being at B., where the sale of liquors was prohibited under the three mile law, received an order for one-half gallon of whiskey, for which he was then paid by the person giving the order. The defendant had no whiskey within the prohibited district, but at N., beyond its limits, he was a licensed dealer and kept whiskey there in barrels. It was agreed at the time the order was received that the defendant should cause the whiskey to be measured out at N. into a jug and deposited in the express office addressed to the purchaser and for transportation to him at B., he to pay the charges—and this was done. *Held:* That the appropriation of the half gallon of whiskey to the contract was necessary to complete the sale; and that having been done at N., the sale was made at that place. Ib.

6. *Proceedings under three mile law: Appeal from judgment of county court.*

Petitioners for a prohibitory order under the three mile law, may appeal to the circuit court from a judgment of the county court rejecting their petition. And a liquor dealer admitted as a party to contest such petition, may also prosecute an appeal from a judgment awarding the order. McCullough v. Blackwell, 159.

7. *Same: Withdrawal of petitioner on appeal.*

When a petition to put the three mile law in force has been acted upon by the county court, and an appeal from its judgment prosecuted, a petitioner will not be allowed to withdraw his name in the circuit court, except for good cause. Ib.

8. *Same: Allegations of remonstrance.*

The allegations of a remonstrance filed against a petition for a prohibitory order under the three mile law, to the effect that certain signatures were unduly obtained, are not evidence and must be sustained by proof. Ib.

9. *Sale of brandy cherries.*

A conviction of selling liquor without a license, is sustained by proof that the defendant sold brandy cherries in pint and quart bottles containing one-half their capacity of intoxicating liquors. Musick v. State, 165.

10. *Same.*

Where intoxicating liquor is sold intentionally, without a license, in bottles partly filled with brandy cherries, the sale cannot be excused by showing that the vendor believed he had the right to sell it as "brandy fruit." Ib.

11. *Sale to minor: Plea of former conviction.*

A sale of liquor without a license and its sale to a minor without the written consent of his parents or guardian, are separate offences and may both be committed by one act of selling. A conviction of the former offence will not, therefore, bar a prosecution for the latter, although both prosecutions are for the same transaction. Ruble v. State, 170.

12. *Sale in prohibition districts: "Drag net proviso."*

Under the act of 1883, amendatory of the license law, and known as the drag-net proviso, (Mansf. Dig., sec. 4522,) a conviction for selling liquor without a license may be sustained in a prohibition district where no license can be legally issued. Mazzia v. State, 177.

13. *Same: Penalty of revenue law.*

The provisions of the revenue act of 1883, creating the offence of carrying on the business of a liquor seller without a license, amended by implication the general license act of which they thus became a part. By such amendment the drag-net proviso of the license law, (Mansf. Dig., sec. 4522,) was made applicable to the penalty of the revenue act, and that penalty may therefore be imposed on one who carries on the business of selling liquors in a prohibition district. Ib.

14. *Dealing in liquors: Penalty in prohibition districts.*

The penalty of the Revenue Act of 1883, for carrying on the business of a liquor seller without a license, is in force in prohibition districts. Hanlon v. State, 186.

15. *Same: Instruction.*

On a trial for carrying on the business of liquor selling without a license, a police officer testified that he collected money from the defendant on several occasions without explanation as to the purpose of the collection,

but that he was instructed by his superior to collect the same amount from each liquor dealer in the city. There was evidence to show that the defendant was in fact engaged in the business and the court instructed the jury that the fact that the city officials may have permitted the defendant to carry it on and collected money from him for the privilege did not justify a violation of the liquor law. *Held:* That the charge was not erroneous and that there was evidence to justify it. Ib.

16. *Evidence of.*

The testimony of railroad and transfer agents, that during the period in which a defendant is charged with carrying on the business of a liquor dealer without a license, they at different times received and delivered to him large quantities of intoxicating liquors, consigned to him, tended to show that he was engaged in the liquor traffic, and was not therefore irrelevant. Hanlon v. State, 186.

17. *Presumption as to ownership of liquors: Burden of proof.*

On the trial of an indictment for selling intoxicating liquors without a license, where the State proves a sale made by the defendant, it will be presumed in the absence of proof to the contrary, that he was the owner of the liquor sold; and if he made such sale as the agent of a licensed dealer, that is a matter of defence and the burden is upon him to establish it. Rana v. State, 481.

18. *Aiding and abetting sale of: Burden of proof.*

On the trial of an indictment for the unlawful sale of intoxicating liquors, where the prosecuting attorney, to sustain the charge, relies on evidence that the defendant aided and abetted another person to make the sale, the burden is on the State to prove that it was made by such person without a license. Berning v. State, 550.

19. *Same: Evidence.*

On a trial for selling liquors without a license, the evidence showed that the defendant kept cigars and tobacco for sale in the front room of a house, in the back room of which R. sold intoxicating liquors—each renting his room from the same landlord; that R.'s customers had to and did pass through the defendant's room; that the defendant had purchased liquors of R., and had twice advanced money for the latter when it was demanded of him by the police for the privilege of selling whiskey. *Held:* That this was not sufficient to warrant the defendant's conviction, as it showed nothing beyond the mere acquiescence of the defendant in the sales made by R., and failed to show that the latter had no license. Ib.

MARRIED WOMEN.

Disaffirmance of deed made during infancy, see INFANCY, 1, 2, 4.

Relinquishment of Dower, see DEEDS, 3, 4.

Redemption of lands, see TAX SALES, 1, 2.

MECHANIC'S LIEN.

1. *Right of sub-contractor.*

One who labors for a "contractor," in the erection of a building, is a "sub-contractor" within the meaning of the mechanic's lien act. [Mansf. Dig., secs. 4402–4424]; and where his labor is performed after notice to the owner of the improvement, as provided for in the statute, his lien therefor will not be defeated by the subsequent payment of his wages to the contractor. Buckley v. Taylor, 302.

2. *Proceedings to enforce: Construction of statute.*

Where a claim has been established which comes clearly within the purview of the mechanic's lien act, the provisions of the statute regulating proceedings to preserve the lien, will be liberally construed in order to prevent a failure of the remedy. Ib.

3. *Same: Stating account.*

In a proceeding by a sub-contractor against the owner of a building, to enforce a mechanic's lien for labor, the fact that the plaintiff's account on which the claim is based, is erroneously stated, as if it were for services rendered under a contract with the owner, will not defeat the lien, where there is a substantial compliance with the statute in other respects, and it appears that the error has not misled the defendant to his prejudice. Ib.

4. *Same: Waiver.*

The account of a sub-contractor, presented to the owner of a building with the view of asserting a mechanic's lien for labor, as provided for in sec. 4404, Mansf. Dig., should properly be stated in writing. But where it is presented orally, the owner waives a written statement by placing his rejection of the account solely on the ground that payment for the labor has been made to the contractor. Ib.

5. *Construction of act of 1885: Right of sub-contractor.*

Under the Act of 1885, entitled "An act for the better protection of mechanics, artisans, material men and other sub-contractors," where the land-owner fails to reserve a fund for the benefit of sub-contractors, by with-

holding from the contractor one-third of the cost of the improvement, or of the amount agreed to be paid therefor as required by the act, the property improved will be bound to a sub-contractor only for the market value of materials furnished the contractor and not for the price the latter has agreed to pay. Basham v. Toors, 309.

6. *Same: When claim to be presented.*

Under the provision of the Act of 1885 which requires that a sub-contractor in order to assert a mechanic's lien, must present his claim to the land-owner within ten days after the "job or contract" let by the owner "shall have been fully completed," the time allowed for presenting such claim must be computed from the completion of the work to be done under the contract of the owner with the principal contractor, although the contemplated improvement may not then be completed. And where the principal contractor abandons his contract after having done work under it, his sub-contractors must present their claims within ten days after such abandonment and cannot postpone the presentation until the work is completed under a new contract with a stranger to the first one, or is completed by the owner himself. Ib.

7. *None for digging well.*

A well is not an improvement within the meaning of the mechanic's lien law, (Mansf. Dig., secs. 4402-4409,) and neither that statute or the act of 1868, (Mansf. Dig., secs., 4425-4440,) providing for laborer's liens, gives a lien on land for labor performed in digging a well, although the work is done under a contract with the owner of the land. Guise v. Oliver, 356.

MORTGAGES.

See also LIENS.

1. CHATTEL MORTGAGE: *Unrecorded: Lien as against mortgagor's widow.*

The lien of an unrecorded chattel mortgage remains valid after the mortgagor's death, and may be enforced against the mortgaged property after the legal title thereto has vested in the widow, under the statute which gives her the right to her deceased husband's estate when it does not exceed the value of $300. Wolf v. Perkins, 43.

2. *To secure several notes: Precedence of payment.*

The maker of several promissory notes executed a mortgage to secure their payment. The notes matured at different times and the mortgage contained no stipulation as to the order in which they should be paid. The mortgagee assigned them to different parties, and at different dates, without any agreement with either of his assignees as to the precedence of pay-

ment. On a sale of the mortgaged property, the proceeds were not sufficient to pay all the notes. *Held:* That in the absence of any special equities arising out of the assignments, the proceeds of the sale should be applied *pro rata* in part payment of the several notes, irrespective of the dates of their maturity or assignment. Penzel v. Brookmire, 105.

3. CHATTEL MORTGAGE: *Description of property.*

A mortgage which describes the property conveyed as "eight bales of cotton weighing 500 pounds each of the crop" which the mortgagor should raise in a designated locality, is not void for uncertainty where the whole crop did not amount to eight bales. Watson v. Pugh, 218.

4. *Same.*

A mortgage of "all my crop of corn, cotton or other produce that I may raise, or in which I may in any manner have an interest, for the year 1884, in Faulkner county, Arkansas," is not void as to third parties for uncertainty. The description could be made certain by extrinsic evidence, and the record of the conveyance was constructive notice of the mortgagee's lien on the crop mentioned. Johnson v. Grissard, 410.

5. EQUITABLE MORTGAGE: *By instrument intended to secure debt.*

Where an instrument is intended to secure a debt by fixing a charge on land which it properly describes, equity will give effect to the intention of the parties by enforcing the lien, although the writing is not in the form of an ordinary technical mortgage and contains neither words of grant or defeasance. Bell v. Pelt, 433.

6. SAME: *Same.*

The defendant executed and delivered to the plaintiff an instrument in the following words:

"$320.64. On or by the 1st day of November, 1883, I promise to pay James D. Pelt, or bearer, the sum of three hundred and twenty dollars and sixty-four cents, for value received, with ten per cent. interest from the 1st day of November, 1882. This note given as aid for that of the purchase money of parcel of land, the W½ of NW¼, sec. 21 and the SE¼ of SE¼, sec. 17, and the NE¼ of sec. 20, all in township 15, range 20 west, and vendor's lien is hereby reserved on said land for the purchase money, all the above land being in the county of Columbia and State of Arkansas. This 10th day of January, 1883.

Witness my hand: his
JOHN M. x BELL.
Witness: J. D. PELT. mark

Held: That such instrument is an equitable mortgage and constitutes a lien on the land it describes. Ib.

MUNICIPAL CORPORATIONS.

See SALES, 3.

MURDER.

See also CRIMINAL PROCEDURE, 5.

Cause of death, see CRIMINAL LAW, 3.

1. *Murder in first degree: Intent.*

One who commits a homicide is not guilty of murder in the first degree unless there existed in his mind before the act of killing, a specific intent to take the life of the person slain. But it is not necessary that such intent be formed for any particular length of time before the killing; and where it is the result of deliberation and premeditation and reason is not dethroned, it may be conceived in a moment. Green v. State, 189.

2. *Same: Instructions.*

On a trial for homicide the court gave in charge to the jury the statutory definition of murder in the first degree, (Mansf. Dig., sec. 1521,) and instructed them that if the defendant inflicted the wounds on deceased as charged, "with the intent, formed in the mind at the time of the injuries, to take deceased's life and that such wounds did cause the death of deceased," they might convict of murder in the first degree. The court also charged the jury as follows: "An unlawful act, coupled with malice and resulting in death, will not of itself constitute murder in the first degree, but, in order to constitute murder in the first degree, the killing must have been intentional, after deliberation and premeditation." *Held:* That the jury were correctly charged as to the intent necessary to constitute murder in the first degree, since the effect of the instructions was to tell them that such intent must have preceded the act of killing. Ib.

3. *Same: Evidence.*

On a trial for homicide, the evidence showed that the defendants and others combined to take the deceased from his room for the avowed purpose of whipping him; that during the night they entered the room in which he was sleeping and having forcibly carried him out, cruelly beat him; that on the next day his dead body was found wrapped in a quilt and near it a number of switches with "frazzled ends;" that his skull was fractured, one arm, the collar bone and three ribs were broken and the body lacerated with switches. *Held:* That, although there was no evidence to show who struck the fatal blow, the defendants having combined to commit a crime, are all responsible for the killing committed in the prosecution

of the common design and that the verdict convicting them of murder in the first degree is sustained by the evidence. Ib.

4. *Same: Accomplice: Failure to inform against accused through fear.*

Where a witness for the State, in a trial for murder, failed to report what he knew for two days through fear and because the accused had threatened to kill him if he did report it, such failure did not make him an accomplice in the crime. Ib.

NEGLIGENCE.

See CONTRIBUTORY NEGLIGENCE, 1, 2; RAILROADS, 17-21.

NEW TRIAL.

See also PRACTICE IN SUPREME COURT, 1-6, 10, 11.

1. *Bill for: When equity will grant.*

A bill for a new trial at law is not sufficient which merely shows that an accident has deprived the complainant of the benefit of a motion for a new trial based on technical errors, though they might be sufficient to warrant a reversal on appeal. The merits of the controversy must be disclosed by stating the substance of the evidence, and it must appear therefrom that such injustice has been done that it would be contrary to equity and good conscience to allow the judgment to be enforced. Whitehill v. Butler, 341.

2. *For misconduct of jury.*

On a trial for murder, the defendant having testified that the deceased made such an attempt to shoot him with a pistol as would have justified the killing, the jury after retiring obtained the pistol and cartridges used by the deceased and experimented with them, apparently for the purpose of testing the truth of the defendant's statement. *Held:* That this was taking evidence out of court and in the defendant's absence, and was such misconduct on the part of the jury as entitled him to a new trial. Forehand v. State, 553.

OFFICER.

Sale by without judicial warrant, see SALES, 2, 3.

OFFICIAL DUTIES.

See REWARDS.

OVER-DUE TAX LAW.

Redemption of lands sold under, see TAX SALES, 2.

PAROL EVIDENCE.

See EVIDENCE, 3; STATUTE OF FRAUDS, 1.

PARTIES.

Plaintiff in action for waste of assets, see ADMINISTRATION, 6. In action to restrain sale for taxes, see SPECIAL ADMINISTRATOR, 2. In suit to reform deed, see PLEADING AND PRACTICE, 9. In proceedings to revive judgment, see PLEADING AND PRACTICE, 6.

PERJURY.

1. *Assignment of in indictment.*

The defendant was indicted for perjury alleged to have been committed in an affidavit appended to an account for the burial expenses of a pauper. The affidavit stated that the articles furnished were reasonably worth the sums charged for them—thirteen dollars for clothing and ten dollars for a coffin—and that they were charged at their cost prices. The assignment of purjury is "that the said R. F. T. did not furnish the said E. J., deceased, a suit of clothes, pants," etc., "of the value of thirteen dollars as charged and sworn to in said account, and one coffin of the value of ten dollars, as sworn to as above stated." *Held:* That the effect of such assignment, if sufficient for any purpose, is to admit the furnishing of the articles and to deny that they were of the value stated in the affidavit. Thomas v. State, 138.

2. *Evidence to sustain charge.*

On a trial for perjury, the oath of the defendant which is charged to have been false, is to be considered equal to that of a credible witness. One witness is sufficient to prove what he swore, but not to establish its falsity; and where there is only one accusing witness, his testimony must be corroborated, not merely as to slight or immaterial circumstances, but as to some particular false statement. Ib.

PLEADING AND PRACTICE.

See also INSTRUCTIONS; SET-OFF; SPECIAL ADMINISTRATOR; REPLEVIN; RECOUPMENT; PRACTICE IN SUPREME COURT.

1. *Practice: Transfer to equity.*

An action at law brought to recover a disputed balance on a complicated mutual account current, extending through a period of thirteen years, was properly transferred to equity. Rogers v. Yarnell, 198.

2. *Insane persons: Proceedings against.*

The statute regulating proceedings against insane persons, (Mans. Dig., secs. 4960, 4964), adopts substantially the former practice in equity and makes it applicable to all civil cases. It is, therefore, the duty of the court in every action to which an insane person is defendant, to see that he is represented on the record by a competent guardian; and until there is such representation it is error to proceed. Cox v. Gress, 224.

3. *Error in adopting proceedings: Transfer to proper docket.*

An error of the plaintiff as to the kind of proceedings he adopts is no ground for dismissing his action, which may be transferred to the proper docket on the motion of either party. If such motion is not made, the error is waived and the cause should be tried according to the principles involved. Organ v. Memphis & Little Rock Railroad Co., 235.

4. *Misjoinder: Waiver.*

A misjoinder of causes of action is waived unless objected to before defence. Ib.

5. *Parties plaintiff: Action for damages to land of decedent.*

W. and O. were joint owners of certain lands. W. died in 1856, and his executor and devisees held possession of the lands jointly with O. until 1873, when partition was made and thereafter the devisees of W. held possession of the portion allotted to them. Part of such portion was wrongfully appropriated by the defendant in 1873 or in 1874, for railroad purposes. *Held:* That in 1880 the devisees could maintain an action to recover compensation or damages for such wrongful appropriation, although the executor had not then been discharged and was still acting. (Following *Mays v. Rogers*, 37 Ark., 155; *Stewart v. Smiley*, 46 Ark., 373; *Graves v. Pinchback*, 47 Ark., 470.) Ib.

6. *Revivor of judgment: By scire facias: Parties.*

An administrator died pending a proceeding by *scire facias* instituted by him to revive a judgment for a debt due the estate of his intestate. At the time of his death the estate had been fully settled and all the debts against it paid. *Held:* That the distributees of the estate being the real parties in interest, the proceeding by *scire facias* was properly revived in their names, and one of them having assigned his interest in the judgment, it was not error in the order of revivor to make his assignee a co-plaintiff, as the defendant was not thereby prejudiced. Crane v. Crane, 287.

7. *Same: Same· Amendment.*

A judgment recovered before a justice of the peace by B, the administrator of C, for a debt due to the latter, was entered on the justice's docket in favor of "B, administrator," instead of "B, as administrator of C, deceased." A transcript of the judgment having been filed with the clerk of the circuit court and entered on the docket of that court for judgments, a *scire facias* was sued out to revive it. *Held:* That it was not error in the proceedings by *scire facias* to cause the judgment to be amended according to the fact. Ib.

8. *Judgment of justice's court: How pleaded.*

The plaintiff brought an action to enforce the lien of a judgment rendered by a justice of the peace and a transcript of which had been filed and docketed in the circuit court. The amount recovered by the judgment was $306.15, a sum above the justice's jurisdiction—and there was no showing that any part of it was for interest. But the complaint alleged that the judgment was obtained before the justice "in due course of proceedure," and this allegation was not denied by the defendant's answer. *Held:* That the jurisdiction of the justice was sufficiently shown by the complaint, since it is provided by section 5067 Mansf. Dig., that in pleading the judgment of a court of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but the judgment "may be stated to have been duly given," and if such allegation is not controverted it need not be proved. Lazarus v. Freidheim, 371.

9. *Parties: In suit to reform deed.*

In a suit to reform a conveyance of land, the grantor is a necessary party defendant. Knight v. Glasscock, 390.

PRACTICE IN SUPREME COURT.

See also CRIMINAL PROCEDURE, 2; HABEAS CORPUS, 2; WITNESSES, 3.

1. *Instruction assuming undisputed fact.*

A judgment will not be reversed because an instruction to the jury assumes the existence of an undisputed fact. Cline v. State, 140.

2. *Reading law books to jury: Failure to object.*

It is no ground for the reversal of a conviction that the prosecuting attorney read to the jury, in argument, the report of another case, where it does not appear that the report was used in opposition to the court's charge, and no attempt to prevent its use or request for a ruling of the court in relation to it is disclosed by the record. Ib.

3. *Harmless error.*

Where incompetent evidence is given to the jury without objection and is afterwards withdrawn, its admission cannot be assigned as error. Hanlon v. State, 186.

4. *Objection waived in court below.*

That a judgment is for too large a sum cannot be assigned as error in the supreme court, unless a new trial was asked on that ground in the court below. Wilson v. State, 212.

5. *Misconduct of counsel.*

Where a party makes no effort to prevent opposing counsel from making an improper statement in the hearing of the jury, and asks no ruling of the trial court with reference to such conduct, he is in no attitude to complain of it on appeal. Railway v. Combs, 324.

6. *New trial in proceedings to condemn right of way.*

In statutory proceedings by a railroad company to condemn a right of way, as in suits at common law, a verdict sustained by competent evidence will not be disturbed by the supreme court. Ib.

7. *Failure to make issue below.*

In a chancery cause where the defendant fails to plead the staleness of the plaintiff's demand or that it is barred by the statute of limitations, such defence will not be available on appeal. Humphreys v. Butler, 351.

8. *Motion to advance cause.*

To justify a motion to advance a cause upon the docket on the ground that the appeal is prosecuted for delay merely, the absence of error should be apparent upon a short and cursory examination of the record. Where the court cannot determine whether there is probable ground for the appeal without a minute investigation of the record requiring such time that it would operate to delay other causes having precedence on the docket, the motion will be denied. Vaught v. Green, 378.

9. *Objection not made in trial court.*

An objection to the ability of a plaintiff to prosecute an action, will not be entertained in the supreme court where it is not made in the court below. Robinson v. Insurance Co., 441.

10. *Finding of jury.*

It is the settled policy of this court to uphold the verdicts of juries, where

they have passed upon disputed matters of fact, *provided* the evidence be legally sufficient to support their findings. Of this it is the province of the court to judge. St. L., I. M. & S. Ry. v. Rice, 467.

11. *Admission of incompetent evidence: Reversible error.*

Where it is manifest that the appellant was prejudiced by the admission over his objection, of incompetent testimony, a verdict against him which has only slight support from other proof, will not be sustained by the supreme court. Fordyce v. McCants, 509.

PROBATE COURT.

Presumption as to order for guardian's sale, see GUARDIAN AND WARD, 1.

PROMISSORY NOTES.

1. *Given for insurance: Consideration.*

The plaintiff by its policy agreed to insure the defendant from loss by fire from the first of February, 1885, to the first of February, 1890, in consideration of a certain premium. But the policy provided that it should be void during such portion of said period as any past-due note of the defendant, given for any part of the premium and held by the company, should be unpaid in whole or in part. The defendant paid part of the premium in cash and for the balance executed his note due Dec. 1st, 1885. The note recites that it was given in payment of premium and that if it is not paid at maturity, the policy should then cease and be void until full payment of the note. The plaintiff's action on the note was defended on the ground that it was without consideration after its maturity. *Held:* That the insurance being for one indivisible period, in consideration of one indivisible premium, the note was part of the consideration upon which the defendant was insured up to the time of its maturity; and as the policy was thereafter only suspended by the default of the defendant and could be revived at any time by the proper payment, the note was not without a valuable consideration to support it. Robinson v. Insurance Co., 441.

2. *Made to procure dismissal of criminal prosecution.*

A promissory note made to procure the dismissal of a criminal prosecution, although given for the amount of a debt due to the payee, is contrary to public policy and void. Rogers v. Blythe, 519.

3. *Same: Evidence.*

W. was agent for an insurance company and having failed to pay over money collected as premiums, J., who was his surety on a bond to the company,

caused him to be arrested for embezzling the company's funds. It was then agreed between W. and R., the company's manager, that the criminal charge against W. should be dismissed on his giving a note with acceptable sureties for the sum which he admitted to be due to the company. R. informed one of the sureties of this agreement—one of the others was informed of it by W., and all of them subsequently signed the note sued on with the understanding that W. would not be further prosecuted. After the note was given the prosecution was dismissed on the order of J., or that of the acting prosecuting attorney—the latter having previously promised that he would consent to its dismissal if the debt was secured. In an action against the sureties, the principal not being sued, *held:* That the evidence was sufficient to sustain the finding of the court that the note was given to procure the dismissal of a pending criminal prosecution. Ib.

PUBLIC LANDS.

When statute of limitations runs as to land entered under homestead laws, see STATUTE OF LIMITATIONS, 1.

Alienation of homestead.

The provision of the original homestead act of congress, which inhibits the sale of lands entered thereunder, before such entry is completed, applies equally to a soldier's additional homestead, entered under the act of June 8, 1872; and under either act, the conveyance of a homestead under a power of attorney executed before the application for the entry was made, is void and constitutes no defence to an action against the grantee to recover the land, although such action is brought by the homesteader. Nichols v. Council, *26.*

RAILROADS.

See also CONTRIBUTORY NEGLIGENCE; DAMAGES, 2, 3; PRACTICE IN SUPREME COURT, 6.

1. *Appropriating land for right of way.*

The charter under which the Memphis and Little Rock Railroad Company was organized, granted by the legislature January 11, 1853, gave it the right to enter on lands and appropriate a right of way, and limited the owner of the lands to a period of five years after the road was built on his lands, in which to apply for an assessment of damages. In 1873 all the property of the Memphis and Little Rock Railroad Company was sold under a deed of trust and conveyed to persons who in that year organized the Memphis and Little Rock Railway Company. *Held:* That the legis-

lature could not empower the Memphis and Little RockRailroad Company, to appropriate to its use private property without first providing for just compensation to the owner, and that company having failed to secure a right of way over the plaintiff's land, the Memphis and Little Rock Railway Company could only acquire such right in the manner prescribed by the laws under which it was organized. Organ v. Memphis & Little Rock Railroad Co., 235.

2. *Same: Acts 1855 and 1873.*

The act of 1855 prescribing the mode of obtaining the right of way for railroad companies, and authorizing the owner of land taken for that purpose, to apply within a limited period for an assessment of damages, was repealed by the act of April 28, 1873, which embraces the whole subject matter of the former act and prohibits the appropriation of land as a right of way, without the owner's consent, until he is fully compensated therefor. Ib.

3. *Same: Injunction to prevent wrongful appropriation.*

Equity will enjoin a railroad company from taking possession of land in the construction of its road until proper compensation is made to the owner; and will, on timely application, also restrain the continuous, unlawful use of land by operating a railway over it without grant from the owner and without having instituted proceedings under the statute to acquire the right of way. But such relief will be denied to a land owner who acquiesces in the use of his property by a railroad company, until it has constructed across his land a track which at that point has become part of a line in which the public have an interest. Ib.

4. *Same: Claim to compensation; Enforcement against land.*

Where a railway company appropriates land to the use of its road without right acquired by purchase and without statutory proceedings for the assessment of damages, the owner may waive such proceedings and electing to regard the act of the company in taking the lands as done under the right of eminent domain, may demand and recover a just compensation. In such case the land owner assumes to the company the relation of a vendor who sells real estate on a credit, and while he holds the title equity will enforce his claim to compensation against the land, as it would a vendor's lien. Ib.

5. *Same: Alienation of land taken without compensation.*

Where a railway company takes land in the construction of its road without grant from the owner and without compensation, its alienee, mediate or

immediate, can hold such land only by paying the value thereof, unless the owner is estopped to assert his claim to compensation by an equity growing out of his conduct. Ib.

6. *Same: Statute of limitations: When action of land owner barred.*

Seven years adverse possession of land, wrongfully taken by a railway company in the construction of its road, will bar an action to enforce the claim of the owner against the land, or to enjoin the company from using it until compensation is made. Ib.

7. *Same: Damage to riparian rights.*

Where lands bordering upon a navigable stream are partitioned, and by agreement of the owners the riparian rights belonging thereto are not divided, but remain their joint property, they can still maintain a joint action against a railroad company for damages to such rights caused by the company's wrongful construction of tracks and buildings. But no damages can be recovered in such action for the mere transportation of passengers across the river on a boat kept by the defendant for that purpose, unless it appears that the plaintiffs are licensed ferrymen. Ib.

8. *Same: Personal responsibility of company.*

Land bordering on a river and which was wrongfully appropriated by a railroad company, was lost by the caving of the river banks after the owner had commenced an action to recover compensation. *Held:* That, although no action could be maintained after the destruction of such land, to enforce the owner's claim against it or to enjoin its use, the company is personally responsible to him for its appropriation. Ib.

9. *Damages for right of way: Frightening teams.*

Where a railroad is located through the lands of a farm, the frightening of teams used on the farm by the running of trains has a tendency to depreciate the value of the lands and is proper to be considered as an element of damages in proceedings to condemn the right of way. Railway v. Combs, 324.

10. *Same: Instruction.*

In a proceeding instituted by a railroad company to condemn a right of way, a witness based his estimate of damages to the land in part upon the fact that pools of water had been allowed to accumulate in excavations made in constructing the road-bed. The ditching of the road-bed was not then completed and the court refused to instruct the jury that they should indulge the presumption that the road-bed would be properly drained when

completed. *Held:* That the company was not injured by the refusal, as the charge of the court did not include the supposed damage from the pools in the elements of damage to the land enumerated for the jury's consideration and directed them to consider no element not specified in the charge. Ib.

11. *Same.*

Although a railroad company acquires only an easement in land taken for a right of way, the owner is entitled to the full value of the land actually condemned. Ib.

12. *Same: Opinion of witness.*

The opinion of a witness being admissible to prove the value of a tract of land before and after the construction of a railroad through it, he may also state to what extent in his judgment the land is damaged by the right of way, since the amount of damages recoverable by the land owner is the difference between the two values and this is arrived at by mere computation. Ib.

13. *Condemning right of way: Damage to farm.*

In a proceeding by a railroad company to condemn a right of way, the assessment of damages is not necessarily restricted to the injury done to the legal sub-division of land described in the petition. If the tract described is part of a larger connected body of land, the owner may recover for the injury done to the tract as a whole. And where the tract traversed by the road is part of a farm, its use as such is notice to the company that an injury to it impairs the value of the whole farm, and therefore no answer claiming compensation for damage to the residue of the farm is necessary in order to apprise the company of what it is expected to pay for. Railway v. Hunt, 330.

14. *Railroad companies: Liability as common carriers.*

The defendant is a corporation organized under the laws of this State, and the plaintiff while a passenger on its train was injured by an accident which occurred in the State of Missouri, on a connecting road over which the defendant was then operating its trains and which belonged to another corporation organized and existing there. *Held:* That by the common law—which in the absence of proof to the contrary is presumed to be in force in Missouri—the defendant, as a common carrier, is liable for the injury if sustained through its negligence. Eureka Springs Railway v. Timmons, 459.

15. *Same: Evidence of negligence.*

The fact that a car leaves the track is *prima facie* evidence of negligence on the part of the company. Ib.

16. *Same: Bound to utmost diligence.*

Passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and if an injury occurs, by means of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the injury occurs, the carrier is responsible. Ib.

17. *Master and servant: Duty of railway company to employe: Negligence.*

It is the duty of the railway company to furnish its employes safe appliances for performing the services intrusted to them, and to exercise care in maintaining such appliances in good repair. To this end the company should have its inspectors not only at its termini, but at convenient stations along its line. And where it knowingly employs and retains an incompetent inspector it will be liable for an injury resulting from his incompetency, although the person injured is the fellow-servant of such inspector. But the master is not an insurer of the servant's safety, nor does he guarantee that the tools, machinery and instrumentalities which he furnishes may not prove defective. He only undertakes to use reasonable care to prevent such results. St. L., I. M. & S. Ry. *v.* Rice 467.

18. *Same: Same: Burden of proof.*

In an action against a railway company for an injury received by an employe through defective appliances furnished for his work, the plaintiff must show by positive proof that such appliances were defective and that the company had notice of the defect, or was negligently ignorant of it. Ib.

19. *Same: Negligence of fellow-servant.*

Where a yard inspector and yard foreman are not only employed at the same yard by the same railroad company, but their separate services have an immediate and common object—the moving of trains—and neither works under the order of the other, but both are subject to the control of the same yard master, they are fellow-servants and the company is not liable to either for the negligence of the other in the performance of his service. Ib.

20. *Railroads: Right of way over street.*

The use of a street for constructing and operating thereon a railroad, is not

within the scope of the easement which the public have therein as a highway. A city cannot therefore grant to a railway company the right of way over one of its streets; and no validity can be imparted to an ordinance adopted for that purpose, by an act of the legislature confirming it. Reichert v. S. L. & S. Fr. Ry., 491.

21. *Same: Ejectment for land occupied by: Estoppel.*

Where a railway company enters upon land without compensation to the owner and without his consent, and occupies it for a period of more than three years, during which time the owner of the land, with a knowledge of such occupancy, makes no objection thereto, although he knows that the company is expending large sums in laying its track and in erecting depot buildings which can only be reached by passing over his land, he will be held to have acquiesced in the occupancy of the road and will be estopped to maintain ejectment for the land. Ib.

RAPE.

1. *Charge of, includes assault to commit.*

Under an indictment for rape, the accused may be convicted of an assault with intent to commit rape, the latter offence being included in the charge of the former. Pratt v. State, 167.

2. *Trial for: Conviction of assault.*

Where the jury on a trial for rape find the defendant guilty of assault with intent to rape, the judgment will not be reversed on the ground that the evidence showed that the defendant was guilty of rape or of nothing, since the jury had the power to return a verdict for the assault, although the evidence required a conviction of the higher offence in which it was included. Ib.

3. *Charge made under threats: Instruction.*

On a trial for rape, the defendant requested the court to instruct the jury, that if the woman charged to have been assaulted made the complaint against him under the threats of her husband, they should acquit. *Held:* That it was not error to refuse the instruction, as such threats of the husband could only affect the credibility of his wife and not the question of the defendant's guilt or innocence. Ib.

RECOUPMENT.

In action for conversion of tenant's crop.

In an action by a tenant against his landlord, for the conversion of a crop,

the defendant's lien on the crop for rent may be made the subject of recoupment in his favor. Jones v. Horn, 19.

REDEMPTION.

See TAX SALES, 1, 2.

REFORMATION OF CONTRACT.

See DEEDS, 1.

REPEAL.

See EXECUTIONS, 3; STATUTES, 2.

REPLEVIN.

Damages recoverable in.

In an action of replevin the plaintiff may recover not only the damages sustained by the detention of the property before the suit is commenced, but also such as accrue thereafter and to the date of the verdict. Lesser v. Norman, 301.

REVIVOR.

See SPECIAL ADMINISTRATOR, 1, 2; PLEADING AND PRACTICE, 6; EXECUTION, 2.

REWARDS.

1. *For performing official duties.*

The policy of the law forbids an officer, or one called to aid him in the performance of an official duty, to receive for his services any reward or compensation not allowed by law. And the promise of such reward is illegal and without consideration. St. L., I. M. & S. Ry. Co. v. Grafton, 504.

2. *Same.*

Where parties while acting as the *posse comitatus* of a sheriff, called out during a railroad strike to aid him in preventing interference with trains, etc., arrest a person accused of interfering with a "switch," they cannot claim to have acted as individuals, independently of the sheriff, and are not entitled to recover a reward offered by the railroad company for the arrest and conviction of persons thus offending. Ib.

ROADS.

Failure to attend road working: Indictment: Instruction.

The defendant was indicted under the first clause of sec. 5907, Mansfield's Digest, for a failure to attend the working of a public road in obedience to the overseer's warning. On the trial, the court charged the jury that the defendant was entitled to three days' notice of the time and place he was required to attend, but that if he attended in obedience to a shorter notice, this might be taken as a waiver of sufficient notice. *Held:* That the instruction was not applicable to the allegations of the indictment, since, if the notice given the defendant was not sufficient, or if he in fact attended in obedience to it, in either event he was not guilty as charged. Ford v. State, 103.

SALES.

Executory contract to sell liquor, see LIQUORS, 4, 5.

1. *Delivery of goods.*

The delivery of goods to a carrier, when made in pursuance of an order to ship them, is in effect a delivery to the consignee. Herron v. State, 133.

2. *By officer without judicial warrant: Compliance with law: Burden of proof.*

Where an officer sells property under a special statutory authority, without judicial warrant and acting upon a state of facts of the existence of which he judges for himself, a strict compliance with the law is exacted of him, and must be proved affirmatively by all persons who justify under him. Proof of such compliance cannot be supplied by the legal presumption that the officer did his duty. City of Fort Smith v. Dodson, 447.

3. *Same.*

In an action against a city to recover the value of a hog, sold by the marshal under an ordinance prohibiting the running at large of swine, and providing that such stock when found at large in the city limits shall be impounded by the marshal and sold by him at public auction after a prescribed notice, the burden is upon the defendant to prove the fact that the notice required by the ordinance was given. Ib.

SET-OFF.

1. *Plaintiff must reply to without notice.*

It is not necessary to summon or warn a plaintiff to answer a set-off pleaded

by the defendant. He must reply thereto without notice. Heer Dry Goods Co. v. Shaffer, 368.

2. *In effect a cross-action.*

A set-off is in effect a cross-action brought by the defendant against the plaintiff, and an account on which it is based if not denied under oath by the plaintiff may be proved by the affidavit of the defendant, filed under sec. 2915 Mansf. Dig., which provides: "In suits upon accounts, the affidavit of the plaintiff, duly taken and certified according to law, that such account is just and correct, shall be sufficient to establish the same, unless the defendant shall, under oath, deny the correctness of the account, either in whole or in part, in which case the plaintiff shall be held to prove such part of his account as is thus denied by other evidence." Ib.

SPECIAL ADMINISTRATOR.

1. *Revival of suit in name of: Construction of statute.*

The only object of sec. 5231, Mansfield's Digest, providing for the revival of suits on the death of either party, in the name of a special administrator to be appointed by the court where the action is pending, was to prevent the dismissal of actions for the want of a party to prosecute or defend. It was not intended to empower the court in every case to set up a special administrator to represent all the parties in interest. Driver v. Hays, 82.

2. *Same: In action to restrain sale for taxes.*

On the death of the plaintiff in an action to restrain the sale of lands for the non-payment of taxes, the suit should be revived in the name of his heir, and not in the name of a special administrator; and the latter cannot maintain it unless he acts as a substitute for a general administrator where the lands would be required as assets for the payment of debts. Ib.

3. *Liability for costs.*

The statute, (Mansfield's Digest, sec. 5233), exempts from liability for costs a special administrator in whose name a suit is revived, and it is error to render against him a judgment for costs. Ib.

SPECIAL JUDGES.

See CIRCUIT COURTS.

SPECIFIC PERFORMANCE.

Of agreement to assign interest in patent.

A court of equity has power to order the specific performance of an oral

agreement, entered into before the issue of a patent, to assign an interest therein, in consideration of expenses borne in procuring it. And it is not error to decree a direct divestiture of the interest contracted for, instead of compelling the patentee to assign it. Blackmer v. Stone, 489.

STATUTES.

Construction of, see DESCENTS AND DISTRIBUTION, 1; LIQUORS, 1-6, 13, 14; MECHANIC'S LIEN, 1-7; SET-OFF, 2; SPECIAL ADMINISTRATOR, 1.

1. *Presumption as to constitutional enactment.*

Where a legislative journal recites the final passage of a bill in legal form—by a vote taken by yeas and nays—but does not affirmatively show how it was read, this court will presume that the reading was had in conformity to the Constitution, (art. 5, sec. 22), which provides that every bill shall be read at length, but does not require the fact of such reading to be shown by an entry on the journal. Glidewell v. Martin, 559.

2. *Repeal by implication.*

The act of January 23, 1875, section 71, (Mansf. Dig., sec. 2722), conferring on the county court jurisdiction to try contests for county and township offices, is not repealed by implication by the act of February 5, 1875, entitled: "An act fixing the regular terms of the county courts," etc. (Mansf. Dig., sec. 1407). *Babcock v. Helena*, 34 Ark., 499; *Coats v. Hill*, 41 Ark., 149, and *Chamberlain v. State*, 50 Ark., 132, approved and followed as to repeals by implication. Ib.

STATUTE OF FRAUDS.

1. *Agreement to sell land.*

In an action to recover damages for the breach of a contract for the sale of land, an undelivered deed of the defendant to a third person is not sufficient to take the case out of the statute of frauds, where, upon the face of the deed, the plaintiff is a stranger to the contract and there is no memorandum in writing connecting him with it. Nor could the plaintiff rely on such deed, if it could be shown by parol that the title it purports to pass was to be held in trust for him, unless it was also shown that the grantee had, on his part, offered to perform the contract. Henderson v. Beard, 483.

2. *Same: Authority of agent.*

Where an agent is simply authorized to sell land, he has no authority to sell it on credit without retaining a lien by contract for the security of the

purchase money; and his agreement to make such unauthorized sale, although in writing, will not bind his principal. Ib.

STATUTE OF LIMITATIONS.

See also PRACTICE IN SUPREME COURT, 7; RAILROADS, 6.

1. *When statute runs: Homestead laws.*

Where land, entered under the homestead law, is alienated before the right thereto is perfected, the statute of limitations will not run in favor of the enterer's grantee while the title remains in the government. Nichols v. Council, 27.

[QUERE: Will the statute begin to run on the complete performance of every act necessary to perfect the right to the land, although no patent for it has been issued? See 4 Wall, 44; 22 Ib., 444; 117 U. S., 151.] Ib.

2. *Scire facias to revive judgment not barred by.*

The statute of limitations will not bar a proceeding by *scire facias* to revive a judgment. Crane v. Crane, 287.

3. *Claim against county barred by.*

Where the claim of a county clerk against the county, for expenses incurred in his office in 1881, 1882 and 1883, was not presented to the county court for allowance until July, 1887, it was barred by the statute of limitations. Desha County v. Jones, 524.

STREETS.

Right of way over, see RAILROADS, 20.

Fee in soil of: Right of adjacent owner.

Subject to the easement of the public in a street, to use and enjoy it as a highway, the fee therein belongs to the owners of adjacent lots. And any use of the street not contemplated by its original dedication to the purposes of a highway, is an infringement of the reserved rights of such owners, for which they may invoke the ordinary legal remedies. Reichert v. St. L. & S. Fr. Ry., 491.

SURETIES.

1. *On bond of executor: Contribution.*

Where the sureties on an executor's bond are discharged by the probate court and new sureties taken, the two sets of sureties become jointly liable for a breach of the bond which occurred before the discharge, and the

right of contribution exists, as between co-sureties. Dugger v. Wright, 232.

2. *Same.*

After property of an estate had been converted by the executor, his sureties at the time of such conversion were released by the probate court from future liability and others were accepted in lieu of them. The executor was subsequently charged with the value of the property, and the probate court ordered him to pay it over to the distributees. He failed to make such payment, and to recover the amount for which he was thus delinquent part of the distributees brought an action against the sureties on the first bond. Three of the plaintiffs were sureties on the second bond. *Held:* (1.) That the defendants are liable for the property converted by the executor; but the breach of his bond, thus occasioned, was a continuing one and the new sureties are also liable for his failure to pay over the value of the property, and they are therefore co-sureties of the defendants. (2.) That the defendants are equitably entitled to contribution against the three plaintiffs who are their co-sureties and the latter can only recover their distributive shares of the fund sued for, less the sums they are severally bound to contribute, in order to equalize the common burden of all the sureties. Ib.

TAXES.

1. *Assessor's return: Injunction.*

The failure of a county assessor to append to his return of real property assessed, an affidavit in the form prescribed by the statute, is no ground for enjoining the clerk of the county court from extending the assessment on the tax books. Equalization Board v. Land Owners, 516.

2. *Equalization of assessments: Notice of raised valuation.*

The jurisdiction of the county board of equalization, to raise the assessor's valuation of property, is not affected by their failure to give the notice required by section 52 of the act of 1887, which provides that when the board shall raise the valuation of any property, they shall give notice thereof to the owner "by postal card or otherwise through the mails;" and it is error to enjoin the clerk because of such failure, from extending the board's valuation on the tax books. Ib.

TAX SALES.

See EJECTMENT.

1. *Statute governing right of redemption: Exceptions.*

The right to redeem lands from a tax sale depends upon the statute in force

at the date of the sale; and the strict rules that apply to others, apply to persons under disabilities unless the statute in terms makes exceptions in their favor. Thompson v. Sherrill, 453.

2. *Same.*

The overdue tax act, approved March 12, 1881, provided that lands sold under it might be redeemed "within the period fixed by law for the redemption of lands sold for taxes;" and the law then in force fixed the period of redemption at two years from the date of sale, but allowed *femmes covert* to redeem within two years after the removal of their disabilities. The revenue act of March 31, 1883, which took effect from its passage and repealed all conflicting acts, also fixes the period for the redemption of lands from tax sales at two years, but contains no exception in favor of married women. Pursuant to a decree rendered under the overdue tax law, the lands of the plaintiff, a married woman, were sold for taxes on the 16th day of May, 1883, after that law had been repealed. *Held:* That the plaintiff's right of redemption was governed by the act of March 31, 1883, and was therefore limited to the period of two years from the date of the sale. Ib.

TENANT IN COMMON.

Conveyance of interest in separate lots.

Where a single tract of land is held in common by two or more persons, they may by agreement lay it off into town lots, and after thus becoming cotenants of each lot, each may convey his interest in any of the several lots. Shepherd v. Jernigan, 275.

TRUSTEES.

See ADMINISTRATION, 6; JUDGMENT, 1; TRUSTS.

TRUSTS.

1. CONSTRUCTIVE TRUST: *On land bought with money wrongfully converted.*

Where one person wrongfully collects the money of another and invests it in real estate, taking the title in his own name, equity will create a trust on the property thus acquired, in favor of the person with whose means it was purchased, as against the wrong doer and his vendee having notice of the trust. And it is not necessary to the creation of such trust that a fiduciary relation should have existed between the parties. Humphreys v. Butler, 351.

2. *Same: Same: Equitable lien.*

The defendant in paying the purchase money of a certain lot, conveyed to him in consideration of the sum of $400, wrongfully used the sum of $149.52 belonging to the plaintiff and of which he had obtained possession without her authority, knowledge or consent. *Held:* That the plaintiff's money used by the defendant in the purchase, being only a part of the price paid for the lot, she is entitled to an equitable lien thereon for the amount due her, including interest, and to a decree for the sale of the property in default of payment. Ib.

USURY.

1. *Reserving interest in advance: Act of 1875.*

The provision of the act of Feb. 9, 1875, (Mansf. Dig., sec. 4736), to the effect that it shall be lawful for all persons loaning money in this State, to reserve or discount interest upon any commercial paper, mortgage or other securities, at any rate of interest agreed upon by the parties, not exceeding ten per cent., does not violate section 13, article 19, of the constitution, prohibiting usury, and is valid as far as it relates to transactions of a commercial kind, in short time paper. Vahlberg v. Keaton, 534.

2. *Same.*

Where a note for loaned money is made payable in three months without interest until due, it is not usury to reserve in advance out of the sum for which it is given, interest thereon at the highest legal rate, from the date of the note to its maturity. Ib.

3. *Bonus paid to agent of borrower.*

A sum paid by the borrower of money to his own agent for procuring the loan, is not paid for the loan or forbearance of the money thus obtained, and will not, although in excess of the highest lawful interest, constitute usury. Ib.

4. *Bonus paid to agent of lender.*

A lender cannot lawfully receive for the forbearance of his money more than ten per cent. per annum. And where his agent receives from the borrower a bonus in excess of the highest lawful interest, either with his knowledge or under circumstances from which the law will presume he had knowledge, the transaction is usurious. But if the agent receives such bonus without the lender's knowledge and under circumstances from which his knowledge can not be reasonably presumed, then it will not make the loan usurious. Ib.

5. *Reserving interest in advance: Bonus paid to agent of lender.*

Where money is placed with an agent, to be loaned, with the understanding that the owner shall receive the highest lawful rate of interest, and that the agent will look to the borrower for his commission, a loan of the money made by the agent is usurious, if he reserves in advance the highest lawful interest, and, in addition thereto, receives a bonus from the borrower. Thompson v. Ingram, 546.

6. *Reserving interest in advance: Bonus paid agent of borrower.*

Reserving interest in advance at the highest lawful rate on money loaned for three months, does not constitute usury. Nor will such loan be made usurious by the fact that a broker who procures it for the borrower retains for his commissions a sum in addition to the interest reserved by the lender. Baird v. Millwood, 548.

VENDOR AND VENDEE.

1. VENDOR'S EQUITABLE LIEN: *How waived: Accepting note of third party.*

The vendor of land waives his equitable lien for the unpaid purchase money when he accepts therefor the obligation of a third party, intending to rely for payment solely on such obligation, and that his vendee shall take the land unincumbered. Springfield and Memphis Railroad Co. v. Stewart, 285.

2. *Action for purchase money: Failure to make title.*

The plaintiff sold the defendant certain town lots and received from him all the purchase money except $100, the payment of which was by agreement deferred until after the execution of a deed for the lots which the plaintiff undertook to procure from M., who owned the property and had authorized the sale. Before the residue of the purchase money was due the plaintiff obtained a deed executed by M., and delivered it to the defendant who received it without objection, but on examination made sometime after its delivery, discovered that it did not convey any part of either of the lots he had purchased. When payment of the $100 was demanded the defendant refused to make it until he received a conveyance for the lots he had purchased. *Held:* That the plaintiffs were not entitled to recover the $100 until they procured according to their agreemeet, the conveyance of the lots purchased, which was a condition precedent to its payment. McConnell v. Little, 333.

3. VENDOR'S LIEN: *Where land is sold for cotton.*

Where an obligation to deliver cotton is given in the purchase of land, no

lien arises in favor of the vendor to enforce its performance. Bell v Pelt, 433.

WAIVER.

See PLEADING AND PRACTICE, 4; EXECUTION, 1.

WILLS.

1. *Attesting witness may subscribe by mark.*

One may become an attesting witness to a will by making his mark, although the person who writes the name of the witness fails to attest that fact by signing his own name in accordance with section 6344, Mansfield's Digest, which defines "signature" to include a "mark when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness." Davis v. Semmes, 48.

2. *May include after acquired lands.*

When a will manifestly designs to dispose of the whole estate of the testator, as it exists at the time of his death, it will include after-acquired lands of which he dies seized and possessed. Patty v. Goolsby, 61.

3. *Construction: Estate conveyed: Power of sale.*

By the first item of his will a testator gave "his entire estate," real and personal, to his wife, "during her natural life," or until she might "think proper to marry, with full power to sell and dispose of such property as she might think proper." The second and third items are as follows: 2. "It is my desire that, at the death of my said wife, all my worldly effects be equally divided between my children." 3. "If my wife should marry, it is my will and desire that my estate of all kinds whatsoever be equally divided between my wife and children, thereby each one to share each and each alike." By other provisions the wife was made executrix and charged with the payment of the testator's debts and the education of his children out of the estate. *Held:* (1) That the testator gave to his wife a life estate in the real property with remainder in fee to his children. (2) That while, under the power contained in the will, the wife could dispose absolutely of the personal property of the testator, she could sell only her life interest in his real estate. Ib.

4. *Jurisdiction to take probate of, in common form.*

The clerk of a probate court received the probate of a will and admitted it to record. At the next term of the court the will, together with the depositions of the subscribing witnesses which were taken by the clerk, was

presented to the court, which found from the evidence contained in the depositions that the will was "duly witnessed and regular in all things" and declared it to be the last will of the testator. The court also confirmed the action of the clerk. *Held:* That the probate court having jurisdiction to take the probate of wills in common form without summoning any of the parties in interest, its judgment, which goes beyond the mere confirmation of the clerk's act, and admits the will to record on proofs submitted, is not void, and if there is error in it, the same can be corrected only by appeal. Petty v. Ducker, 281.

WITNESSES.

1. *Impeachment of: Reputation for morality.*

A witness cannot be impeached by showing that his reputation for unchastity or other particular immoral habit, renders him unworthy of belief. The impeaching testimony cannot go beyond his general reputation for morality. Cline v. State, 140.

2. *Same.*

It is not admissible to inquire whether from a witness' "reputation for truth and veracity, morality and chastity," he is worthy of belief, since an opinion is thus called for as to the effect of chastity, or a want of it, upon the credibility of his testimony. Ib.

3. *Same: Evidence sustaining.*

When the only objection to evidence introduced by the State to sustain the reputation of an assailed witness is, that it relates to a period twenty-five or thirty years before the trial, a judgment of conviction will not be reversed because of its admission, unless it appears that the refusal to exclude it was an abuse of the court's discretion. Ib

ERRATA.

On page 199, sixth line from top, for "Bur" read "*But.*"

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