ARKANSAS REPORTS,

VOLUME 52.

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

MAY AND NOVEMBER TERMS,

1889.

W. W. MANSFIELD,
REPORTER.

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

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*Resigned March 3, 1890.

**Appointed March 3, 1890, to fill the vacancy occasioned by the resignation of Judge Little.

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4th Circuit	S. M. Johnson.
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9th Circuit	T. E. Webber
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11th Circuit	S. M. Taylor.
12th Circuit	J. B. McDonough.
13th Circuit	H. P. Smead.
14th Circuit	DeRoos Bailey.
15th Circuit	Oscar L. Miles.

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CASES DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

MAY TERM, 1889.

CROWLEY v. MELLON.

1. DOWER: *In choses in action: Judgment assigning.*

The act of March 8, 1867, changing the law as to dower in choses in action, so as to make the right thereto superior to the claims of creditors, applied only to the estates of persons dying after its passage. But where the Circuit Court on appeal, and in a proceeding to which an administrator, whose intestate died in 1863, was a party defendant, assigned dower according to the provisions of that act in promissory notes belonging to the estate of the decedent, on the petition of his widow, the judgment though erroneous cannot be questioned collaterally, and not having been reversed or set aside, is conclusive of the widow's right to such dower, in an action brought by her on the administrator's bond to recover her interest in the proceeds of the notes.

2. SAME: *Same.*

In such case, an attorney employed to collect the notes, having converted and misapplied the proceeds thereof before the judgment assigning dower was rendered, the action on the administrator's bond cannot be defended by showing that the person who effected the collection for the administrator was also the attorney for the widow. That defense should have been made to the suit for dower, and if it was, the judgment there is conclusive that the question was determined against the administrator. And so, the administrator having defended the application for dower, on the ground that the widow had accepted a

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conveyance in fee simple from the sole devisee of her husband's lands, in full of all her dower in the estate, and the question having been adjudicated against him in that suit, he cannot raise it in the action on his bond.

3. SAME: *Conversion of widow's interest in notes.*

Where the attorney of an administrator, employed to collect notes due the estate, receives money thereon and converts it to his own use, the administrator, in his official capacity, is liable to the widow of his intestate to the extent of her dower in the sum converted.

4. SAME: *Same.*

Where the widow of a decedent is entitled to dower in promissory notes payable to him, and a judgment recovered thereon by his administrator, is assigned in the latter's name by his attorney to a creditor of the deceased, in payment of a probated claim, the administrator makes the assignment his own act by reporting it to the Probate Court and obtaining its approval by that court. The title to the judgment being thus vested in the creditor, the widow cannot procure the assignment of her dower therein, and the administrator is liable to her on his bond, for its value.

5. SAME: *Widow's right not affected by probate proceedings.*

Although the final settlement of an administrator showed that a judgment in which the widow of his intestate was entitled to dower had been assigned to a creditor of the estate, in satisfaction of a probated claim, an order of the Probate Court approving such settlement and discharging the administrator from the trust, will not bar a suit by the widow on his bond, to recover the amount of her dower in the judgment assigned. Not being a party to the probate proceedings for the settlement of her husband's estate, her rights were not affected by the administrator's account, and she was not bound by the order confirming it.

6. SUBROGATION: *Of administrator to right of creditor.*

An administrator who is compelled to refund to the widow of his intestate assets with which he has paid a debt of the estate, will be subrogated to the creditor's rights, and may resort to any remedy which the creditor would have against the assets of the estate remaining unadministered.

APPEAL from *Greene* Circuit Court in Chancery.

T. P. McGOVERN, Sp. Judge.

Lucy Mellon, the appellee, brought this suit in chancery against B. H. Crowley, adminstrator of Thomas J. Mellon, deceased, and the sureties on his bond. Her complaint seeks to set aside and restate the final account of Crowley as such administrator, and to recover, as dower due to her, one-half of an amount collected by him on certain notes belonging to

the estate of Mellon. The defendants, by answer, resisted a recovery on grounds which are sufficiently stated in the opinion. From the pleadings and evidence it appears, that Thomas J. Mellon died about the year 1863, leaving the plaintiff, his widow, and no children. P. K. Lester, who claimed to be the sole legatee and devisee of Mellon, was appointed adminstrator (with the will annexed) of his estate. Lester, under an agreement with the plaintiff, and as devisee of her husband's lands, conveyed to her, in fee simple, a certain part thereof, which the complaint alleges was received in lieu of her dower in all the real property of the deceased. The answer of defendants alleges the fact to be, that the conveyance from Lester was accepted by the plaintiff in full of all her dower in the whole estate. The administration of Lester ceased before the estate was settled, and the defendant, Crowley, was appointed administrator *de bonis non.* Crowley filed in the Probate Court an inventory showing that the assets which had come into his hands consisted of five promissory notes executed to the deceased by Lester, each for the sum of $1400. Mrs. Mellon filed her petition in the Probate Court to obtain dower in these notes. Her petition was granted, and the administrator appealed. On the appeal the Circuit Court found, among other things, that Mrs. Mellon, at the time she received the conveyance from Lester, in lieu of dower, was ignorant of the existence of the notes referred to; that they were in the possession of Lester, and that he concealed from her the fact of their existence. That court also rendered a judgment awarding Mrs. Mellon one-half the amount of the notes as dower. While this proceeding was still pending, and before the judgment of the Circuit Court therein, Crowley, in a suit brought on the notes as administrator of Mellon, recovered judgment against Lester's administrator for the sum of $3000. Crowley's attorney collected $1070.50 on this judgment, and assigned the residue of it to A. M. Davis, a creditor of Mellon, in satisfaction of a claim probated against the

estate. Crowley reported to the Probate Conrt the recovery of the judgment against Lester's administrator, and its assignment to Davis. The disposition thus made of the judgment, appears to have been shown by the administrator's final settlement, which was approved by the Probate Court. This action was commenced after his discharge. The court below allowed him for an attorney's fee in the suit against Lester's administrator, for commission on the sum recovered and for actual expenses, credits amounting to $540, and gave judgment against the defendants for one-half of the balance of the sum recovered on the notes ($1230) together with interest thereon at six per cent. per annum.

The defendants appealed.

Sam W. Williams, for appellant, Crowley.

The complaint is fatally defective. It states too little and too much. It fails to specifically charge fraud in procuring the confirmation of his final settlements and final discharge by the administrator. It states too much in setting out that final judgment. It fails to show that the administrator ever received any money in trust for the widow, or that he was bound to her for any sum so received. The widow is not an heir or distributee, and the administrator owes her no duty to collect or protect her dower interest. He is not liable except for money had and received, or specific property in kind. Here Crowley neither had her money nor her property in kind, but her own and his attorney and Davis received the proceeds, and Davis is liable, if any one.

She takes her dower in specific property by way of lien, not as distributee, and her dower is carved out of the specific property. *5 Ark., 608; 8 Ark., 9; 19 Ark., 424.* It is true, if the administrator gets possession of property in which the widow is entitled to dower, he is a trustee for her until her dower is assigned. *Cases supra; 17 Ark., 581.* It is not the duty of the administrator to gather up, collect or save her dower (*Mansfield's Digest, sec. 62*), or make him responsible

for negligence to her, for she, having a specific lien, is able to protect herself by action in her own name as a creditor or distributee can not do.

The court below labored under three errors.

1. That the administrator was bound to protect the widow's dower, as he is that of a legatee or creditor. This is not tenable. *See cases supra.*

2. That the judgment of discharge of Crowley was a fraud on Mrs. Mellon, simply because the proof disclosed that there had been a judgment, by a special judge, that five notes should be divided in kind, an impossibility on its face, if this nondescript were otherwise good, and this too regardless of the facts that appellee's attorney, as well as Crowley's, and through him herself, had assigned the judgment to Davis to relieve her own lands from the lien of the judgment, and that appellee had accepted a fee in lands in full of all dower.

3. That the judgment in discharge was void and did not protect Crowley. Now it is evident that judgment is the last adjudication, and, being of a court of competent jurisdiction, binds the world. *11 Ark., 519, and other cases Ark. Rep.*

4. That discharge cannot be questioned collaterally, by showing that a special judge decreed that five notes should be divided in two; a judge whose election is not shown, and which is void, for consent can not give judicial power. *7 S. W. Rep., 384.*

5. The judgment of discharge could not be avoided by showing that Crowley filed an inventory of the notes, sued Lester and recovered judgment. That does not prove fraud, for the presumption is against fraud. And it was proven, first, that Mrs. Mellon consented, through her attorney, to the transfer of the judgment to relieve her dower lands. Second, that the judgment was not recovered on the notes at all, but on a compromise. Third, that Mrs. Mellon accepted a conveyance of land from the sole devisee, in full of all dower.

6. The judgment discharging Crowley was *in rem.* and

bound the world, and certainly those interested in the estate. *35 Ark., 331.* They should have excepted to the confirmation of the accounts.

7. The notes in this suit accrued before the passage of the act giving the widow dower therein. The act was not retroactive, and the widow's dower was governed by the act of 1839, which postponed the widow until the creditors were paid.

L. L. Mack and *J. N. Cypert*, for appellee.

1. An administrator is a trustee for the widow as well as creditors, and pays out or misapplies the assets at his peril. Crowley is estopped from disputing that the assets came to his hands by his report to the Probate Court.

2. The judgment of the Circuit Court, adjudicating plaintiff's right of dower, can not be attacked collaterally. But if the judgment was void, the Chancery Court had jurisdiction, and there is enough in the complaint to entitle her to dower; Crowley having fraudulently obtained his discharge, he is liable to have his account restated, and a decree against him for the amount found due.

3. The widow was entitled to dower in the specific property, and the Probate Court the proper forum. *Const. Ark., Art. 7, sec. 34; 5 Ark. 608.*

4. The widow could waive her right to dower in the lands and elect to take dower in the notes, the proceeds of the sale of the Lester lands. Equity impresses the proceeds with the character of the property sold.

Even if the judgment was wrong, it is binding unless appealed from, as the court had jurisdiction, and simply committed an error.

The administrator occupied the same trust relation to the widow for her dower in the personalty that he does to creditors, and any act which defeats her rights is as much a fraud as if she were a creditor.

COCKRILL, C. J. It is apparent that Mrs. Mellon was not entitled to have dower assigned to her out of the notes executed by Lester to her husband. Her right to dower was fixed by the law in force at her husband's death. The statute governing the matter at that time did not give the widow an absolute right to dower in her deceased husband's choses in action, but only in what was left after the payment of his debts. *Acts of 1859, p. 299.* The law was changed by act of March 8, 1867, so as to make her right of dower in such property superior to the claims of creditors. After the passage of the latter act, Mrs. Mellon petitioned the Probate Court, where the administration of the estate of her deceased husband was pending, to compel the administrator to assign her dower out of the Lester notes. The court granted the prayer of her petition and the administrator appealed to the Circuit Court, where judgment was again rendered in favcr of the widow. The answer does not deny the validity of the judgment nor is it pretended that it has ever been reversed or set aside. We must then treat it as in force. It is the judgment of a superior court having jurisdiction of the subject matter and parties; and although the court which pronounced it erred in applying the act of 1867 to the assignment of the widow's dower, the validity of the judgment cannot be questioned collaterally. It is, therefore, the insurmountable obstacle to what would otherwise appear to be a fair and just solution of this controversy.

1. DOWER: In choses in action: Judgment assigning.

The proof does not show a suspicion of intentional fraud on the part of the administrator. No part of the proceeds of the notes went actually into his hands. But the attorney whom he had empowered to collect them for the estate, converted what he had collected to his own use, and without previous authority from the Probate Court, assigned, in the administrator's name, the residue of the judgment for their recovery, to a creditor of the estate in payment of his probated claim. The collection of the money by the attorney was in legal contem-

2. SAME: Same.

plation a collection by the administrator, and the latter made the assignment of the judgment his own act by adoption by reporting the fact to the Probate Court in the course of his administration, and obtaining its approval by that tribunal. The title to the judgment was thus vested in the creditor to whom it was assigned, and he was empowered to collect the amount due upon it as he did, thereby depriving Mrs. Mellon of the power to have dower assigned out of the notes (or the judgment into which they had merged) in pursuance of her judgment for dower.

3. SAME: Conversion of widow's interest in notes.

The matter stands as though the full amount of the judgment rendered for the recovery of the notes had been collected by the administrator, and devoted wholly by him to purposes other than the satisfaction of the widow's dower as fixed by her judgment against him. But personal property belonging to the estate out of which the widow is entitled to dower, is held by the administrator in trust for her, to the extent of her interest, (*Menifee v. Menifee, 8 Ark., 9; Bob v. Powers, 19 ib., 440*), and he becomes liable to her in his official capacity for the value of her interest, if he deprives her of the benefit of it. *Howard v. Menifee, 5 Ark., 668*, and cases *supra*.

4. SAME:

But, conceding that to be true, it is argued that the widow is debarred of enforcing her right in this case for several reasons. It is said that the attorney whose mismanagement appears to have involved the parties in this controversy, was the attorney of Mrs. Mellon. The answer so alleges, but the proof does not sustain the allegation. There is no proof to the point except what is found in Crowley's deposition. He says that some time after the year 1871, before suit was instituted by him on the Lester notes, he agreed with Mrs. Mellon and one of the heirs of Mellon's estate to prosecute the suit with them for the benefit of all, the widow and heir to pay the expenses, and that he employed attorneys with that understanding. But Mrs. Mellon and the other party, he says,

failed to comply with their agreement, and the suit was brought in his name alone, as administrator. He thereafter speaks of the attorney who conducted the suit as *his* attorney. He never thereafter recognized Mrs. Mellon's right to dower in the notes, so far as the proof discloses, although her object, he says, in proposing to join him in the suit, was to collect her dower interest. But on the contrary, while he was pressing the suit to collect the notes, he was resisting Mrs. Mellon's suit to recover dower in them; and, although the former suit was pending for several years, it was determined before the widow succeeded in concluding her suit for dower. When the latter was heard and determined, the attorney had already collected a part of the judgment for the recovery of the notes and assigned the residue. But no defense appears to have been made in the suit for dower upon the ground that he was acting as the widow's attorney. If it was, the judgment is conclusive that the question was determined against the administrator

Again, it is argued that Mrs. Mellon had accepted a conveyance in fee simple from the sole devisee of her husband's lands in full of all dower. But that defense was interposed against the widow's right to dower in her petition for its assignment and was adjudicated against the administrator. That adjudication precludes further inquiry into the question.

5. SAME: Widow's right not affected by probate proceedings.

It is further argued that the judgment of the Probate Court approving the administrator's settlement (which showed the disposition he had made of the judgment on the Lester notes), and discharging him from the trust, is a bar to this suit. But it is only persons whose rights are affected by an administrator's settlement who are charged with notice of its filing and are bound by the judgment of confirmation. *Jones v. Graham, 36 Ark., 401.* The widow is not named as one of the parties required to except to his reports (*Mans. Dig., sec. 128*), for the obvious reason that she is not concerned in the administration. Her right is superior to that of creditors and independent of the

administration. She cannot, therefore, be said to be a party to the probate proceedings; and orders made by the court, in the course of the administration, although made in reference to property out of which her dower is to be carved, are void as to her, like the judgments of other courts acting without the jurisdiction of the parties. *Goodman v. Moore, 22 Ark., 196; Webb v Smith, 40 ib., 24; Hutchinson v. Lemcke, 107 Ind., 121; Dieffenderfer v. Eshleman, 113 Pa. St, 305.* Nor did Mrs. Mellon's petition to compel the administrator to assign her dower in the personalty make her a party to the administration. Her judgment for dower was upon its face the end of her litigation; it left nothing open for further action; it consummated her dower right and vested in her the legal title to the property described in it. When the term expired the judgment passed beyond the court's power of interference. Thereafter it could be set aside or annulled only in a superior tribunal, and the subsequent order of the Probate Court confirming the disposition the administrator had made of the judgment, had no more binding force upon the widow than have the orders of that tribunal upon any other stranger to its proceedings. As well might it be said, that one who is without knowledge that his property has been converted into assets by the administrator to be used in the payment of his decedent's debts, is bound by an order of the Probate Court confirming the administrator's disposition of it. But in addition to this, there is nothing to indicate that the court intended to affect the widow's interest by the order of confirmation. The administrator held a part of the judgment as assets of the estate; he reported that he had assigned it to a creditor in payment of his probated claim; the questions of the widow's dower and of her interest in the judgment were not presented to the court for adjudication. The order should therefore be limited as against the widow, so as to apply only to so much of the judgment as was assets in the administrator's hands. *Webb v. Smith, sup.* In no view can it operate as a bar to the widow's recovery.

In so far as the administrator has paid a debt of the estate with assets which he is compelled to refund to the widow, he will be subrogated to the rights of the creditor of his intestate, and may resort to any remedy the creditor would have against the assets of the estate that remain unadministered. Finding no error, the decree is affirmed.

6. SUBROGATION: Of administrator to right of creditor.

INSURANCE COMPANY v. BRODIE.

1. INSURANCE: *Avoiding policy: Waiver.*

The issue of a policy of insurance with a full knowledge or notice of all the facts affecting its validity, is equivalent to an assertion that it is valid at the time of its delivery, and is a waiver of any ground for avoiding it, then known to the insurer. And as to such ground the knowledge of an agent who receives the application on which the policy is issued, is regarded as the knowledge of the company for which he acts, and notice to him is notice to his principal.

2. SAME: *Same: Estoppel.*

Where the agent of a company authorized to fill up a blank application for insurance against fire, does so by writing therein answers as to the condition of the property to be insured, which he knows to be false, the company will be estopped from setting up the falsity of such answers to avoid a policy issued on the application, although the latter contains a clause warranting the answers to be true.

3. SAME: *Action on policy: Time of bringing: Limitation: Waiver.*

A stipulation in a policy of fire insurance that an action thereon shall be brought within a limited time, is valid, but may be waived. Such waiver may be the act of an authorized agent and notwithstanding a declaration in the policy to the contrary, may be proved by oral evidence.

4. SAME: *Same.*

Although a policy of fire insurance stipulates that no action upon it shall be maintained unless brought within six months after the loss or damage occurs, an action brought after the expiration of that time is maintainable where it is shown that the plaintiff did not sue within the time prescribed, because an agent of the insurer authorized to settle the plaintiff's loss, by representations on which he relied, led him to believe that it would be paid without a suit.

APPEAL from *Crawford* Circuit Court.

JOHN S. LITTLE, Judge.

Brown, Brown & Sandels, for appellant.

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The application formed a part of the policy and was a warranty by the assured, and the company was not bound by any acts or statements made to or by any agent, unless inserted in the contract. All answers were warranted to be true. That a flue is not a chimney is clear. *30 N. Y., 136; 6 W. Va., 425; Angell on Ins., sec. 143.* The acts and statements of Danayski (who was not shown to be an agent) were clearly contrary to any authority which he may have had, and could not bind the company. *30 N. Y., 136; 2 Den., 75; 62 N. Y., 47; 11 Vroom, 568; 50 Penn. St., 331; 24 id., 320; 17 Mo., 247; 53 Tex., 61; 102 Pa. St., 335; 46 Me., 394; Angell on Ins., 143; 10 Barb., 285; 15 Wall., 664; 96 U. S., 544; 22 Conn., 235.* The acts of the so-called agent were never brought to the knowledge of the company, and they cannot be estopped by the unauthorized acts of an agent, of which they never had any knowledge; acts and facts which Brodie refused and failed to communicate.

2. No proof of loss was *ever* furnished by Brodie, when by the contract he agreed to furnish same within thirty days. The act of an adjuster in adjusting the loss was no waiver, for it was expressly agreed that it should not be so considered. The notice of loss and proof of loss within the times specified are conditions precedent. *Angell on Ins., secs. 223, 232a.*

3. The acts of Gardner did not amount to a waiver. He was a special agent and his duties and authority were limited to *adjusting* the loss. One who deals with a limited agent does so at his peril. *Keith v. Hirschberger, 48 Ark.* As to what constitutes a waiver see *6 W. Va., 425; 49 Am. Dec., 77; 95 Penn. St., 51; 75 id., 380; 72 Am. Dec., 622; 19 Penn. St., 401; 79 Am. Dec., 833; 80 id., 199; 18 Wisc., 407; 66 Am. Dec., 308.*

4. Any agreement between parties limiting the period within which suit may be instituted is consistent with public policy and binding, and will be enforced. *1 Blatch. C. C., 280; 14 N. Y., 253; 30 N. Y., 136; 6 Gray (Mass.), 596; 6 W. Va.,*

425; 7 Gray, 61; 27 Vt., 99; 56 Ga., 266; 31 Pa. St., 449; 6 Ohio St., 599; 25 Ill., 466; 7 Wall., 286; 20 N. H., 73. The only contrary decisions are *5 McLean C. C., 461*, and *9 Ind., 443.* Plaintiff's action was barred. *91 Ill., 92; 26 La. An., 298.*

5. There was no waiver by the company of the clause in the policy that the suit should be brought within the time limited. *49 Am. Dec., 123; ib., 74; 2 How., 481; 34 Am. Dec., 281; 6 W. Va., 425; 30 N. Y., 136; 20 N. H., 73.*

BATTLE, J. This was an action upon a policy of fire insurance. One of the defenses to it was, that the policy had been issued on the faith of representations made by Brodie, whose dwelling was insured, which were false, and were declared in the policy, by the express agreement of the parties, to be warranties.

Among the questions propounded to Brodie and answered in his application for insurance, was the following: "Do all the stovepipes go directly into brick chimneys?" To which was appended the answer, "Yes." None of the answers to the questions propounded were written by Brodie, but were written by the agent of the insurance company, and signed by Brodie. To this application was appended the following words: "I warrant the answers to each of the foregoing questions to be true," which was also signed by the applicant. There was evidence adduced to prove what answer was actually made to this question, and how Brodie was induced to sign the application, the answers to the questions, and the warranty; but inasmuch as it is not alleged or indicated in the bill of exceptions that it contains all the evidence adduced at the trial, we assume that there was evidence sufficient to warrant the instructions given by the court to the jury, if they state the law correctly.

Among the instructions given was the following: "As to the first defense the court instructs you:—The jury are instructed that in signing the application for insurance the plaintiff warranted all statements to be true, and that the applica-

tion was a part of the policy of insurance; and that if you find that, in answering the question, 'Do all stovepipes run directly into brick chimneys?' in the affirmative, the plaintiff made a false statement, and that the stovepipes ran directly through the roof, and thereby increased the risk, you are instructed that such false statements vitiated the policy, and you will find for the defendant, unless you find that the company's agent inspected the property and informed plaintiff that the facts warranted such answer." The giving of this instruction is assigned as error.

It has been generally held that, where an agent of an insurance company, authorized to fill up blank applications for insurance, does so by writing false answers, with notice or knowledge of the inaccuracy of the answers written, and thereafter procures the signature of the applicant thereto, after he had given correct answers to the questions asked, and the company afterwards receives the premium and issues a policy, the company will, in the case of loss of the property insured, be estopped from insisting on the falsity of the answers, although warranted by the assured to be true, and failing to avoid the policy on other grounds, will be bound to indemnify the assured for the loss to the extent of the insurance. "And this is true even though the policy provides that when the application is made through an agent of the company, the applicant shall be responsible for such agent's representations." *Insurance Co. v. Wilkinson, 13 Wal., 231; American Life Ins. Co. v. Mahone, 21 Wal., 152; Combs v. Hannibal Ins. Co., 43 Mo., 148; Plumb v. Cataraugus, etc. Ins. Co., 18 N. Y., 392; The Commercial Ins. Co. v. Ives, 56 Ill., 402; Michigan, etc. Ins. Co. v. Lewis, 30 Mich., 41; Germania Fire Ins. Co. v. McKee, 94 Ill., 494; Andes Ins. Co. v. Fish, 71 Ill., 620; The Ætna, etc. Ins. Co. v. Olmstead, 21 Mich., 246; Aurora Fire Ins. Co. v. Eddy, 55 Ill., 213; 2 Wood on Fire Insurance (2d Ed.), pp. 832, 835, 846, 850; May on Insurance (2d Ed.), sec. 143, and cases cited; Bacon on Benefit Societies and Life Insurance, secs. 153, 221.*

In *Insurance Co. v. Wilkinson, 13 Wall., 222,* the court said: "It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself as to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send their agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, never sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him? * * * The powers of the agent are, *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must he held responsible to the parties with whom they transact business, for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.

"In the 5th Edition of American Leading Cases, after a full consideration of the authorities, it is said: 'By the interested or officious zeal of the agents employed by the insurance companies in the wish to out bid each other and procure customers, they not unfrequently mislead the insured, by a false

or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers.' The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principal does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it."

1 INSURANCE: Avoiding policy: Waiver.

The issue of a policy by an insurance company, with a full knowledge or notice of all the facts affecting its validity, is tantamount to an assertion that the policy is valid at the time of its delivery, "and is a waiver of the known ground of invalidity." From such conduct, the insured might fairly infer that he was protected. If he does not, it is reasonable to presume that he would procure other insurance. It would not be consistent with fair dealing and honesty for the company to undertake to avoid its policy, under such circumstances, when the assured has rested in the belief he was protected, until his property was destroyed, and when that belief is the result of its conduct. It is estopped from doing so. *Manhattan Ins. Co. v. Weill, 28 Grat., 394; Bevin v. Conn., etc., Life Ins. Co. 23 Conn., 254; Combs v. Hannibal Ins. Co., 43 Mo., 148; Van Schoick v. Niagara Fire Ins. Co., 68 N. Y., 434; Peoria, etc., Ins. Co. v. Hall, 12 Mich., 202; Bidwell v. The Northwestern Ins. Co , 24 N. Y., 302; Rattibone v. City Fire Ins. Co., 31 Conn.,*

193; Phœnix Life Ins. Co. v. Raddin, 120 U. S., 196; Gans v. St. Paul, etc., Ins. Co., 43 Wisc., 108; S. C. 28 Am. Rep., 535; Mechler v. Phœnix Ins. Co., 38 Wisc., 665; Pennsylvania Ins. Co. v. Kettle, 39 Mich., 51; Smith v. Com. Ins. Co., 49 Wisc., 322; Ætna, etc., Ins. Co. v Olmstead, 21 Mich., 246, 254; F. & M. Ins. Co. v. Chesnut, 50 Ill., 111; Geo. Home Ins. Co v. Kinner, 28 Gratt., 88.

In *Van Schoick v. Niagara Fire Ins. Co., 68 N. Y., 434,* "a policy of fire insurance contained a condition, that 'if a building is insured that is on leased land, the same must be specifically represented to the company and expressed in this policy in writing, otherwise the insurance shall be void.' A building insured was on leased land, and this fact was not expressed in the policy; it was known, however, to defendant's agent, to whom the application for the policy was made. It was held that, as the knowledge of the agent was the knowledge of the defendant, his principal, when it accepted the risk, had information the building stood upon leased ground; that it was to be presumed that defendant had overlooked the condition, and so had forgotten to express the fact in the policy, or that it waived the condition, or held itself estopped from setting it up, as, to presume otherwise, would be to impute to defendant a fraudulent intent in issuing a policy known by it to be invalid." Justice Folger, in delivering the opinion of the court, said: "There is no doubt but that, ordinarily considered, this condition in the policy was a warranty that the building did not stand upon leased land; and that the truth of that warranty became a condition precedent to any liability on the part of the defendant; yet, there is no doubt, too, that a condition in a policy may be waived by the insurer, or, as some cases put it, he is estopped from setting it up, and that such result may be worked by parol, or by acts without words. * * * * It would be imputing a fraudulent intent to the defendant in this case to say, or to think, that they did not mean when they delivered this policy to the plaintiff,

to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe. And such imputation can be avoided, only by supposing that it had overlooked this condition, and so forgotten to express the fact as to the building, in writing, upon the policy; or that it waived the condition, or held itself estopped from setting it up. * * * * It is consistent with fair dealing and a freedom from fraudulent purposes, to hold that the one or the other was done; that is, that there was a waiver, or an estoppel."

In *Peoria F. & M. Ins. Co., v. Hall, 12 Mich., 202,* "the question of estoppel upon the ground of the agent's knowledge of the facts, was very forcibly presented. In that case, the defendant's agent took the plaintiff's application, signed in blank, for insurance upon a stock of goods kept by the plaintiff for sale, to be insured in one policy, and for an insurance on certain buildings, among which was the store in which the goods were kept, to be insured by another policy. At the time when the applications were signed, the plaintiff told the agent that he usually sold gunpowder, and everything kept in a country store, and that he intended to do so. The agent took the applications, signed in blank, and the policies were subsequently issued. The applications were referred to as the ground upon which the policies were issued, and, among other things, specially prohibited the keeping of gunpowder or fireworks for sale or on storage, without written permission in the policy. No permission to keep gunpowder was in, or endorsed upon, the policies, and a loss having occurred, the defendants, among other things, set up a breach of this condition in defense, but the court held that notice to the agent that the assured kept gunpowder for sale, and intended to keep it, was notice to, and the knowledge of the company, and estopped them from setting up the same in defense. 'As to the condition in reference to keeping gunpowder,' said Christiancy, J.,

'there was evidence from which the jury was authorized to find, that the agent knew that it was kept at the time, and was to be kept after the insurance, and that he assented to it, and induced the plaintiff to believe that it would make no difference.' Upon this point the court charged that, 'if plaintiff informed the agent that he kept gunpowder in his store for sale, and the agent intended to insure against keeping it, but neglected to endorse the permission on the back of the policy, such neglect would not make the policy invalid.' The condition did not provide for any indorsement of this kind upon the policy, but the keeping of gunpowder was to render the policy void, 'without written permission in the policy.' To this extent the charge was inaccurate, yet we do not think it can be treated as error of which the company can complain, since we think the plaintiff was entitled to a still stronger charge in his favor. He would have been entitled to a charge that, if the agent knew it was kept, and to be kept, the keeping it would not render the policy void, whether the permission was indorsed, or intended, or neglected to be indorsed or not. But the counsel for the plaintiff in error, insists that the printed condition was notice to the assured of the agent's want of authority to assent to the keeping of gunpowder, etc., and that this assent could be given only by the company itself. This, at first view, would seem plausible and might be sound, but for another principle which lies back of it and defeats its application. The principle to which we allude is, that notice to the agent is notice to his principal. The company must be regarded as knowing what he knew. If he knew that powder was kept at the time of the insurance, or to be kept during its continuance, the company must be regarded as having known it also. They had power to waive the condition, and by taking the premium and issuing the policy with such notice or knowledge, they must be regarded as having waived the condition which prohibited its keeping. It would be a gross fraud in the company to re-

ceive the premium for issuing a policy on which they did not intend to be liable, and which they intended to treat as void in case of loss."

In *Bedwell v. The Northwestern Ins. Co., 24 N. Y., 302,* the court said: "Indeed, it is not easy to perceive why an insurance company, by reason of the formal words or clauses (of a general and comprehensive nature) inserted in a policy, intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held to be a breach of such a clause, they are a breach *eo instanti* of the making of the contracts, and are so known to be by the company as well as the insured, and to allow the company to take the premium without taking the risk, would be to encourage a fraud. It would, as a legal principle, be equivalent to holding that a warranty of the soundness of a horse is a warranty that he has four legs, when one has been cut off."

2. SAME: *Estoppel*

We, therefore, conclude that the appellant was estopped from taking advantage of the falsity of the answer appended to the question, "Do all stove pipes go directly into brick chimneys?" if, at the time the policy sued on was issued, it, personally, or through its agent, knew or had notice of, the facts which the question was intended to elicit.

The policy sued on contained this language: "It is mutually agreed that no suit or action against this company upon this policy shall be sustainable in any court of law, or equity, unless commenced within six months after the loss or damage shall occur; and if any suit or action shall be commenced after the expiration of said six months, the lapse of time should be taken and deemed conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding;" and a succeeding clause as follows: "No act or

omission of the company, or any act of its officers or agents shall be deemed, construed or held to be a waiver of a full and strict compliance with the foregoing provisions of the terms and conditions of this policy, nor an extension of time to the assured, for compliance, except it be a waiver or extension in express terms, and *in writing*, signed by the president or secretary of the company."

Appellant pleaded these clauses of the policy in defense, and averred that the action was not brought within six months after the loss occurred, and that the time in which it might have been brought had not been extended in express terms, and in writing, signed by its president or secretary, and insisted that it should not be maintained. The court instructed the jury on this point, in effect, that this condition is valid and binding, and that if they found that this action "was instituted more than six months after the loss occurred, they should find for the defendant," unless they found from the evidence that the "defendant company," through an agent, authorized to adjust and finally settle the loss sustained by the plaintiff, before the expiration of six months next after the loss, by statements and representations made by such agent in the course of his agency, led plaintiff to believe that the loss would be paid without suit, and that plaintiff did not sue within the six months because he believed and relied upon such statements and representations. It is insisted that the court erred in giving this instruction.

3. SAME: Action on policy: Limitation; Waiver.

The condition or stipulation in the policy as to the time in which a suit should be brought on the policy is good and valid. *Riddlesberger v Hartford Ins. Co., 7 Wall., 386.* But it is like any other condition; it can be waived. There is nothing in it to render the insurance company incapable of dispensing with it, or making a new contract. The same power that enabled it to make the contract requiring it, gives it the right to waive it. It may, at any time it sees fit, give authority to any agent to make agreements, or to waive forfeitures; "and it is not bound to act upon the declaration in its policy that they have

no such authority." The waiver is provable by either written or oral evidence, "notwithstanding a declaration in the policy to the contrary." *Insurance Co. v. Norton, 96 U. S., 234, 240; Ins. Co. v. Wolff, 95 U. S, 326, 333; St. Paul F. and M. Ins. Co. v. McGregor, 63 Texas, 399, 404; Home Ins. Co. of Texas v. Meyer, 93 Ill., 271, 275, 277; Gladding v. California, etc., Ins. Assn., 66 Cal., 6, 8; Mickey v. Burlington Ins. Co., 35 Iowa, 174, 182; Viele v. Germania Ins. Co., 26 Iowa, 49, 51, 54, 55; Georgia Home Ins. Co. v. Kinner, 28 Gratt, 88; Gans v. The St. Paul, etc., Ins. Co., 43 Wisc., 108; Blake v. Exchange, etc.. Ins. Co., 12 Gray, 271; Franklin Ins. Co. v. Chicago Ins. Co., 36 Md., 102; S. C. 11 Am. Rep., 469; Carson v. Jessey, etc., Ins. Co., 14 Vroom, 300; S. C., 39 Am. Rep., 584, 591; Bacon on Benefit Societies and Life Insurance, sec. 422; Wood on Fire Insurance (2d ed.) sec. 525; Collins v. Ins. Co., 79 N. C., 279.*

4. SAME: Same.

As said by the Supreme Court of Texas, in *St. Paul F. and M. Ins. Co. v. McGregor, 63 Texas, 404,* "if the course of conduct pursued by the appellant was such as to induce the appellee to believe that the 'loss would be adjusted and paid' without suit, and for this reason suit was not brought within the time prescribed, then, under well-settled principles applicable to such cases, this action may be maintained on the policy even after the expiration of the time therein prescribed." *Ins. Co. v. Lacroix, 45 Texas, 164; Smith v. Ins. Co., 62 N. Y., 86; Ames v. Ins. Co. 14 N. Y., 264; F. and M. Ins. Co. v. Chestnut, 50 Ill., 115; Insurance Co. v. Hall, 12 Mich., 202: Grant v. Insurance Co., 5 Ind., 23; Ripley v. Ins. Co., 17 How. Pr., 445; Killips v. F. Ins. Co., 28 Wisc., 480; Curtis v. Ins. Co., 1 Biss., 487.*

Judgment affirmed.

TOWN OF ARKADELPHIA V. CLARK.

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MUNICIPAL CORPORATIONS: *Nuisance: Power to punish bee-keeping.*

Although bees may become a nuisance in a city, an ordinance which makes the owning, keeping, or raising them within the city limits a nuisance, whether it is in fact so or not, is too broad and is not valid.

APPEAL from *Clark* Circuit Court.

R. D. HEARN, Judge.

The appellee, Clark, was prosecuted in the Mayor's Court of Arkadelphia for violating an ordinance prohibiting the owning, keeping or raising of bees within the corporate limits of that city. He was fined $6.00, and appealed to the Circuit Court, where he demurred to the charge against him on the ground that the ordinance was void and that the Mayor had no jurisdiction to render the judgment appealed from. The court sustained the demurrer and dismissed the charge. The city appealed.

A preamble to the ordinance referred to recites that a petition from many citizens had been presented to the City Council, setting forth that the keeping of bees in the city was injurious to property, such as early fruit, and dangerous to citizens when riding upon the streets and a pest in many houses. The ordinnnce is in substance as follows:

"Be it ordained by the City Council of the City of Arkadelphia: That it shall be unlawful for any person or persons to own, keep, or raise bees in the City of Arkadelphia, the same having been declared a nuisance.

"That any person or persons keeping or owning bees in the City of Arkadelphia are hereby notified to remove the same from the corporate limits of the City of Arkadelphia within thirty days from the date hereof."

Section 2 provides a penalty of not less than $5.00 nor more than $25 for a violation of the ordinance.

Section 751, Mansfield's Digest, provides that municipal corporations "shall have power to prevent injury or annoyance

within the limits of the corporation, from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated." Section 764 provides that such corporations "shall have power to make and publish such by-laws and ordinances not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations, and the inhabitants thereof."

Crawford & Crawford, for appellant.

The ordinance is valid. The city had the power to pass it. *Mansf. Dig., secs. 751, 764; 31 Ark., 462; 4 Wait. Act. and Def., 618.* A thing not a nuisance *per se* may become so by its surroundings. Under the "police power" the city had the right to pass the ordinance declaring the keeping of bees in a populous city a "nuisance." *29 W. Va., 48; 72 Cal., 114; Wood on Nuisances, sec. 1 et seq.; 5 S. E. Rep., 201; 33 La. Ann., 1011; 97 U. S., 659; 5 Martin (La.) N. S., 409; 16 Amer. Rep., 189, note p. 194; 51 Ill., 286; 2 Am. Rep., 301; 20 Am. Dec., 261; 22 id., 421; 10 La. Ann. 227; 1 Gill (Md.), 264; 39 N. W. Rep., 670; 60 Miss., 451; 66 Am. Dec., 326.*

In all doubtful cases, the action of municipal corporations declaring a thing to be a nuisance would be conclusive. *13 N. J. (Law), 196; How. & Bem. on Pol. Ord., sec. 28; 1 Dill. Mun. Corp. (3d ed.) 95.*

See also as to the effects of such ordinances, *59 Vt., 300; 9 Atl. Rep., 571; 1 Dill. Mun. Corp., sec. 308 (3d ed.); 62 Cal., 538; 1 Gill (Md.), 264; 3 Kent's Com., 340; 12 Pick., 184; 22 Am. Dec., 421; 18 Ark, 260; 70 Penn. St., 102; 10 Am. Rep., 669; Dill. Mun. Corp. (1st ed.), sec. 260; 29 Ill., 320; 10 Wall. 505; 57 Miss., 260; 41 Ark., 526; 64 Iowa, 59; 23 Am. Rep., 236.*

The question whether the thing may or may not be a nuisance must be settled as one of fact and not of law. *14*

N. E., 677; 47 N. J. (Law), 286; 49 id., 391; 8 Atl. Rep., 513; 60 Miss., 451.

C. V. Murray and *S. W. Williams*, for appellee.

The power to regulate does not give the power to prohibit, though it does give power to license. The City Council has no power to declare that a nuisance which is not *per se* such. See *Mansf. Dig. secs. 751, etc.; art. 2, sec. 2 Const.; ib., sec. 21; 26 Fed. Rep., 611; 31 Ark., 462; 41 id., 456; 34 id., ——; 45 id., 454: 41 id., 527; 85 W. Rep., 425; 12 West. Rep., 760; 11 Cent. Rep., 219; How. & Bem. Mun. Pol. Ord., sec. 252; 24 N. J. Eq., 169; Alb. Law Journ., March 9, 1889; 63 Mich., 396; 1 Dill. Mun. Corp., sec. 253; 58 Ill., 102; 26 N. J. Law, 298; 12 Penn. St., 318; 5 Cush. 438.*

It is unwarranted, unreasonable and void. *9 Cent. Rep., 360; 9 id., 517; ib., 653.*

See, also, *12 West. Rep., 760; 26 Fed. Rep., 611; 9 Pac. Rep. 141; 4 Black. Com., 169; 1 Bish. Cr. Law, sec. 243; Wood on Nuis., secs. 24, 25, 26, 80, 81, 82; Dill. on Mun. Corp., sec. 308; 29 Md., 217; 2 Green. N. J., 222; Dill. Mun. Corp., sec. 55 and note; ib., sec. 261; How. & Bem., sec. 252; 46 Iowa, 66; 45 Tex., 312; 61 Md., 292; 10 Wall., 497.*

NUISANCE: Keeping bees.

PER CURIAM. Neither the keeping, owning, or raising of bees is, in itself, a nuisance. Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case. The ordinance under consideration undertakes to make each of the acts named a nuisance without regard to the fact whether it is so or not, or whether bees in general have become a nuisance in the city. It is, therefore, too broad, and is invalid.

Affirmed.

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ST. L., I. M. & S. RY. v. BONE.

RAILROAD COMPANIES: *Liability for loss of goods by fire.*

Where a railway company carries a car-load of goods, under a bill of lading stipulating that it shall not be liable for their loss by fire, and they are destroyed by the burning of the car containing them after it reaches its place of destination, the company cannot be made liable either as common carrier or warehouseman, except by showing that its negligence contributed to the loss.

APPEAL from *Independence* Circuit Court.

R. H. POWELL, Judge.

This was an action to recover damages for the loss of goods destroyed by the burning of a car at the depot of the defendant company.

The complaint alleged that on April 15, 1886, the defendant received and undertook, by its written bill of lading, to transport a car-load of furniture from St. Louis, Missouri, and to deliver the same to the plaintiff, at Batesville, Arkansas.

That a car controlled by defendant was loaded at St. Louis with plaintiff's goods on the 15th of April, 1886, and arrived at Batesville on April 19, about 12:30 o'clock p. m.

That plaintiff in anticipation of the arrival of his goods had engaged wagons and teams to carry them from the car to his storehouse.

That in a short time after the arrival of the car, he paid the freight on the goods, as he was required to do, before the car would be opened to him for the purpose of unloading.

That he had on the day previous to the arrival of the car, requested the defendant's agent in charge of the depot at Batesville, that when said car arrived it should be placed on a side track of the railroad so as to be convenient of access to wagons for receiving the goods, which said agent agreed and promised to do.

That said defendant neglected and refused to comply with its promise, and, in disregard of its obligation as a common carrier, neglected and refused to put said car at a place con-

venient of access for the purpose of unloading the freight therein, but placed it on a portion of its main track highly inconvenient of access. That the track was obstructed by other cars at either end of the car containing plaintiff's goods, and so remained for some time after his wagons and teams were ready to haul; that after some delay the plaintiff was enabled by the assistance of defendant's employes to remove the car containing his goods alongside the nearest end of the platform attached to defendant's depot; that plaintiff's teamsters then proceeded to remove his goods from the car to the platform, and then to carry them to the wagons, and that they did so as rapidly as possible, "until the darkness of night made a further continuance of the work burdensome and inconvenient;" that a considerable part of the goods were then left in the car which was locked by defendant's employes; that if the car had within a reasonable time after its arrival been placed on a part of the track convenient of access, the plaintiff could and would have removed his goods before night; that during the night (April 19th) the defendant's depot, which was carelessly left unguarded, was destroyed by fire, and the car containing the plaintiff's goods was also destroyed, together with nearly all of the goods it contained; that the danger from fire to which the plaintiff's goods were exposed, was greatly increased by the necessity he was under of pushing the car containing them, to the platform in close proximity to the depot; and that the defendant neglected and refused to afford him usual, reasonable and necessary facilities for unloading and securing his goods.

The bill of lading was in the usual form, and contained these stipulations:

That "neither of said carriers, or either or any of them, or this company, shall be liable for * * * loss or damage by fire."

"NOTICE.—This contract is accomplished, and the liability of the companies as common carriers thereunder terminated, on the arrival of the goods or property, at the station or depot

of delivery, and the companies will be liable as warehousemen only thereafter."

The answer denied all negligence on defendant's part, but charged that it was plaintiff's own negligence in not removing his goods after they had been delivered to him in time to have prevented the loss by the fire.

The answer further charged that on the arrival of said carload of goods, the freight had immediately been paid by plaintiff, and the goods delivered and received by him, and that by reason of such delivery and receipt, all responsibility on defendant's part had ceased; that from that moment, and when plaintiff left a part of said goods in said car for the night, the defendant was, and became nothing more, than a gratuitous bailee without hire, and was, therefore, in no wise liable except for wilful and wanton negligence; that the defendant was not liable for any loss by fire, and could in no event be held for a greater liability than that of warehouseman.

The answer then denied that the fire was occasioned by any negligence on defendant's part.

The evidence showed that the car containing plaintiff's goods arrived at Batesville about 12:30 p. m on the 19th of April, 1886, and that he immediately paid the freight on it. That the car was moved up to the depot platform about 4 o'clock p. m. That it could not be put there sooner on account of other cars which were being unloaded. That as soon as the car was moved to the platform, the plaintiff commenced unloading and hauling off his goods. That his teamsters worked until dark when their labor was suspended, leaving about half of the goods in the car. The teamster who was hauling the goods testified that he had charge of the car, and closed but did not fasten it. About 3 o'clock a. m. that night, the depot was destroyed by fire, and with it the car containing the plaintiff's goods. There was no evidence tending to show that the fire was caused by the defendant's negligence. There was testimony on the part of the plaintiff which tended to

show that some delay in the work of removing his goods, was caused by the situation of the car; that the work would have proceeded more rapidly if the car had been moved to a place more convenient of access for the purpose of unloading; that the depot agent had promised on the day before the arrival of the car, to have it placed on a part of the track where access to it could have been more conveniently had, and that if left at that point it would not have been exposed to the fire which destroyed the depot. But there was also evidence to show that it was not unusual to unload freight shipped by the car-load, at that depot.

The verdict and judgment were for the plaintiff and the defendant appealed.

Dodge & Johnson, for appellant.

1. Defendant was not liable as a carrier, without proof of negligence on its part, or that of its servants. *39 Ark., 523.*

2. Nor as a warehouseman, is it liable for accidental fires. *42 Ark., 200.*

3. Not having a night watchman, was not want of ordinary care. *40 Wisc., 585-8; 44 N. Y., 511; 44 Icwa, 549; 23 Cal., 273.*

4. A bailee without reward is liable only for gross negligence. *23 Ark., 63; 7 Cow., 278; 1 So. Rep., 139; 17 Mass., 499; 40 Vt., 303; 89 Penn. St., 312; 72 id., 477; 60 N. Y., 289.*

See, also, *Schouler Bailm., p. 28, 11; Story on Bailm., sec. 55; 73 Ill., 357; 1 Cal., 348; 17 Mass., 479.*

Under the proof in this case the bailment was ended, and there was no liability. The goods had been delivered, and the duty of the company ended.

Robert Neill, for appellee.

1. The loss was directly attributable to defendant's negligence in failing to extend plaintiff reasonable, usual and necessary facilities for securing his goods.

Railroads cannot exempt themselves by contract from the consequences of their own employes' negligence. *39 Ark., 148; 17 Wall., 357; Lawson on Car., sec. 132, p. 169.*

2. The second instruction as to *delivery* is supported by authority. *23 How., 28; Hutch. Car., secs. 338, 340, 360 to 369, 376–7;* as also the third and fourth. No. 5 is the law. *17 Wall, 357.*

3. The exemption from responsibility must be reasonable and just. *Hutch. Car., secs. 359 to 369.* There never was a complete delivery. *11 N. Y., quoted in 17 Wall, sup.*

RAILROAD COMPANIES: Negligence.

PER CURIAM. In no aspect of this case can the plaintiff recover of the defendant, except upon proof of its negligence contributing to the loss. Without proof of negligence the defendant, as a common carrier, is exempt from liability for loss by fire, by the terms of its contract; and as warehouseman it is not liable for loss by accidental fire. *L. R., M. & T. Ry., v. Talbot, 39 Ark., 523; L. R. & Ft. S. Ry. v. Hunter, 42 Ark., 200.*

Reverse the judgment and remand the cause for a new trial.

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RICHMOND V. MISSISSIPPI MILLS.

1. ASSIGNMENTS: *For benefit of creditors: Statutory regulations.*

The statute of this State respecting assignments for the benefit of creditors (*Mansf. Dig., secs. 305–309*) regulates the execution of the trust created by the debtor's conveyance, but does not undertake to control the form of his deed, except that it must not direct a mode of executing the trust differen from that enjoined by the law.

2. SAME: *Same: Form of instrument: Intention of parties.*

A conveyance made directly to a creditor by way of paying or securing his own debt is not ordinarily an assignment. But a mortgage in form may constitute an assignment by reason of the intention of the parties and the operation of the instrument. And such intention may be shown by parol evidence of facts collateral to those stated in the instrument.

3. SAME: *Same.*

An instrument executed by a debtor with the intention that it shall operate as an assignment, and that the property thereby conveyed shall pass absolutely to a trustee for the purpose of raising a fund to pay debts, is an assignment for the benefit of creditors within the meaning of the statute of assignments, whatever may be its form or name.

4. SAME: *Same.*

The defendant, a merchant, failed in business, and on the day of his failure executed the following instruments, covering his entire property: (1) A mortgage on a stock of merchandise and store furniture to T. and twelve other creditors named; (2) an assignment "in pledge" of all his notes, accounts, etc., to the same parties as further security for the same debts; (3) a deed of trust in the nature of a mortgage upon other personal property and some land, to H. for the benefit of the same creditors; (4) a mortgage to M. to secure a debt due to him; (5) a mortgage to B. & J. to secure a sum due to them. It was provided in these conveyances that the property should be sold immediately at private sale for cash and the proceeds applied to the payment of the debts secured, which were then past due. Possession of the goods, etc., was immediately given to T. for himself and other beneficiaries, and he on the same day delivered them to W. H., who, it was agreed, should dispose of them under T.'s directions. The defendant on the same day sent orders on T. to each of his non-preferred creditors for the sums due them, respectively, directing their payment out of the surplus proceeds of the property. These orders were accompanied by a circular letter from the defendant informing his unsecured creditors of the conveyances he had executed, and saying: "I regret the necessity, but it protects all from complications." *Held:* That the transactions between the defendant and T. constituted a general assignment which was void as to other creditors because of the provisions requiring the trust to be executed in a manner prohibited by law.

5. FRAUD: *In purchase of goods.*

Where goods are purchased through fraudulent misrepresentations, the vendor may repudiate the contract of sale and sue to recover possession of the goods.

APPEAL from *Nevada* Circuit Court.

C. E. MITCHEL, Judge.

Smoote, McRae & Arnold, for appellants.

1. There is *no* evidence to support the finding of the court that Richmond purchased the goods with the *fraudulent intent not to pay for them. 35 Ark., 483; 47 id., 247; 45 id., 136; 48 id., 70.* Before plaintiff can rescind the contract and recover in replevin, he must show this. *70 Ill., 75; 22 Wisc.,*

392; 18 N. Y., 299; 75 Penn. St., 232; 19 Mo., 36; 43 Conn., 324; 47 Ark., 247; 48 id., 70.

2. The goods being in the possession of the interpleaders, plaintiff could not recover against Richmond. *Mansf. Dig., sec. 5571, 4th sub.; Wells on Repl., sec. 134; 34 Ark., 93; 40 id., 551.* There must be a wrongful detention. Here the goods had passed out of the possession of Richmond before demand.

3. The instrument under consideration was a mortgage, and not an assignment. It is unlike the one in *1 Fed. Rep., 768,* for here there was a *defeasance* clause. But the weight of authority is against the case in *1 Fed. Rep., 768.* See *3 S. W. Rep, 291; 2 ib., 578.*

4. The order and circular letter do not constitute a part of nor are they connected with the contract created by the mortgage, nor mentioned therein; nor does it appear that the interpleaders acted upon or knew of them until afterwards. To hold it an assignment is contradictory of its evident purpose and intention, and not authorized by any principle of law.

5. The interpleaders were innocent purchasers, in possession. *42 Ark., 148; ib., 473; 20 Wend., 267; 25 N. Y., 507; 2 Daly, 148; Wade on Notice, sec. 67; 47 Ark., 247.*

Atkinson & Tompkins, for appellee.

1. The court found that Richmond purchased the goods without a reasonable expectation of being able to pay for them, or with a fraudulent intent not to pay for them. There was evidence to sustain the finding.

2. Under these circumstances the vendor may retake the goods, if they have not passed into the hands of *bona fide* purchasers. *47 Ark., 247; 27 Am. Rep., 501, and notes; 17 N. W., 98; 11 Pac. Rep., 697, and note; 22 Ark., 517; 33 Am. Dec., 700, and note; 83 id., 118.* No demand necessary, cases *supra.* See also, *27 Am. Rep., 501; 6 Pac. Rep., 267; 32 Mum., 171; 19 N. W., 972; 111 U. S., 148.*

3. The interpleaders were not innocent purchasers. There

was no consideration; only an antecedent debt. *17 Am. Rep., 208; 58 N. Y., 73; 6 Am. Rep., 201; 33 Am. Dec., 701.*

4. Replevin would lie against Richmond alone; even after he parted with the possession. *80 Am. Dec., 259, and note; 33 ib., 700, and note; 83 ib., 118; Newman on Pl., p. 134; 40 Ark., 551; 34 Ark., 104; Wells on Repl., sec. 151 (1st ed.).*

5. The several instruments in this case constitute an assignment for the benefit of creditors. *Jones on Ch. Mortg., sec. 1; Burrill on Ass. (3d ed.), sec. 6; 1 Fed. Rep., 768; 14 id., 160; 23 N. W. Rep., 646; 15 N. W. Rep., 558; 8 Iowa, 96; Burrill on Ass., sec. 3; 23 S. C., 405; 31 N. W. Rep., 381; 5 Atl. Rep., 523; 19 Fed. Rep., 70; 28 N. W. Rep., 380; 14 Fed. Rep., 160; 11 id., 297; 37 Ark., 150; 47 id., 367; 9 Sup. Ct. Rep., 309.*

If assignments they are void, because no bond was filed, and the sale was to be made contrary to law. *39 Ark., 66; 107 U. S., 361; 37 Ark., 150; 47 id., 367.*

U. M. & G. B. Rose, Amici Curiæ.

Considerable confusion as to the nature of assignments arises by confounding the term as used in speaking of insolvent laws and its signification under the general commercial law. In the view of the insolvency acts an assignment is any conveyance or act by which a debtor, in contemplation of insolvency, seeks to secure or evade an equal distribution of his assets among his creditors. In this sense confessed judgments, sales, mortgages, pledges, and every other species of act or instrument, designed to secure a preference or advantage to one creditor over his fellows in misfortune, are sometimes spoken of in judicial opinions as being virtual assignments. But as we have no insolvent law in this State, we must turn from this class of misleading decisions to ascertain the nature of an assignment as understood by the law merchant.

An assignment is well defined, and the distinction between it and a mortgage clearly explained by Judge Caldwell in his opinion in *Bartlett v. Teah, 1 Fed. Rep., 768.*

Looking at it we see that an assignment is absolute, a mortgage upon condition; an assignment contains no defeasance, a mortgage contains a defeasance express or implied. An instrument which upon its face would appear to be absolute, may be shown to be a mortgage by the proof of a separate defeasance, sometimes even by parol.

To be an assignment the property must be dedicated absolutely to the payment of debts. No dominion over it can rest in the debtor or his creditors. No redemption can be effected by them. The assignee holds it absolutely; the entire legal and equitable title is in him, and no equity of redemption exists. But that is not the case here. An equity of redemption is expressly reserved.

In other words the difference is that a mortgagor has an equity of redemption until he is foreclosed, while the maker of an assignment has no further interest in the property until after the assignee has sold, and then he can claim the surplus if any is left.

For illustrations and distinctions, see *15 Ark., 160; 31 Ark., 437; 19 Ohio, 216; 5 Oh. St., 130; 26 Iowa, 381; 8 N. H., 536; 13 id., 298; 99 Ind., 548; 21 N. Y., 131; 4 Comst., 211; 2 Keyes, 125; 14 Fed. Rep., 160; 67 Tex., 315; 3 S. W. Rep., 291; 2 S. W. Rep., 578; 67 Tex., 100; 69 Iowa, 605; 29 N. W. Rep., 822; 34 N. W. Rep., 763; 66 Iowa, 237.*

Mortgages like this were upheld in *19 Iowa, 479; 26 id., 381; 58 id., 589*, and cases *supra*. See also, *31 N. Y., 542; 47 Ind., 372; 49 Wis., 486; 11 S. W. Rep., 218.*

2. No conveyance made directly to creditors can be an assignment. *Burrill on Ass., sec. 3.*

A conveyance directly to creditors may be either a sale or a mortgage. If it is made for the *payment* of debts, it is a sale; if to *secure* debts, it is a mortgage. It can never be an assignment. The essential element of a trust is wanting. A trustee is necessary to an assignment.

It is obvious that the framers of our statute of assignments

took the same view of the matter as Mr. Burrill. The statute does not undertake to regulate conveyances directly to creditors. Those do not fall within its purview. They are not technically assignments. It only undertakes to regulate the action of the assignee. It has no application unless an assignee is appointed.

Whether we look at the strict language of the act, or at its object and design, there is nothing in it to impeach the validty of the instrument now before the court. In its plain terms it has no application except where an assignee is appointed. The act was intended to regulate the conduct of the assignee, and make him accountable.

Mortgages direct to creditors do not fall within the evil sought to be remedied. Assignments put the property beyond the reach of creditors; mortgages do not. If more property is mortgaged than is necessary to pay the debt secured, other creditors can redeem. If less is conveyed, other creditors are not interested.

See *65 Penn. St., 492; 57 id., 221; 31 id., 562; 24 id., 432; 42 id., 441; 99 Ind., 548; 4 Comst., 211; 21 N. Y., 131; 2 Keyes, 125; 66 Iowa, 237; 26 Vt., 686; 23 Pick., 446; 1 Iowa, 582; 37 Vt., 229.*

3. The fact that the mortgagees went into possession at once and proceeded to sell, does not constitute an assignment. *22 Wall., 513; 44 Ark., 310; 46 id., 122; 50 id., 97.*

It is also said no further time was given the debtor, and that the debts were due.

We are not advised of any authority which holds that a past-due indebtedness cannot be secured by mortgage.

Delivery to one of several mortgagees is delivery to all. *Hurley v. Hurley, 5 Cush., 516.*

It is said that the mortgage is to more than one creditor. In most of the cases cited there were several grantees, while in one instance there were fourteen, and in another the conveyance was to all the creditors.

Morris M. Cohn, Amicus Curiæ.

The effect of the instruments was an assignment for the benefit of creditors. *24 Wisc., 368; 10 id., 443; 5 Ohio St., 218; 12 Pa. St., 164; id., 167; 32 Pa. St., 458; 40 id., 269; 20 Neb., 566; 6 Ill., App., 366; 16 Mo., 101; 1 McCr., 176; 39 Ark., 66; 45 Barb., 317; 8 Iowa (Clark), 96; 10 Grat., 513; 30 Ala., 193; 8 Oregon, 158; 60 Texas, 483; 66 Wisc., 227.* No particular form of words necessary to create such a trust. *87 Pa. St., 263; 11 Phila., 510; 103 Pa. St., 373.*

When the effect of an instrument is to transfer property beyond the reach of an execution, in trust for the benefit of assenting creditors, it is an assignment. *11 Phila., 510; 21 Fed. Rep., 16; 14 id., 160; 22 id., 693; 26 id., 612.*

SANDELS, J. These two actions were brought by appellee, the one an action at law, with attachment; the other replevin. The first was for debt for goods purchased in the spring of 1886, by Richmond, a merchant. The second was to recover goods sold him on September 13, 1886. In both actions George Taylor & Co., and other creditors of Richmond, interpleaded, claiming the goods seized. In the first, the defendant controverted the grounds of attachment stated by plaintiff, and in the second he gave bond to *retain* the property.

The evidence for plaintiff showed that he had sold goods to Richmond, for which he was indebted to them, and that in the summer of 1886, its agent and salesman called on Richmond to see about the debt; to inform him that rumors affecting his solvency were current, and to inquire after his true condition. He was assured that the debt would be paid at maturity, and that Richmond's condition was this: He owed $10,000, and had assets amounting to $30,000. This statement was twice, after that time, repeated to said agent, the last time being on September 13, 1886, when the last bill of goods was sold That on Oetober 9, 1886, Richmond failed. On that day he executed the following instruments:

First—A mortgage on his entire stock of goods and store furniture to George Taylor & Co., and twelve other creditors named.

Second—An assignment "in pledge" of all notes, accounts and choses in action to the same parties, as further security for the same debts.

Third—A deed of trust, in the nature of a mortgage upon other personal property and some land, to C. C. Henderson, for the benefit of said same creditors.

Fourth—A mortgage to J. E. Mallory on personal property to secure $850 due him.

Fifth—A mortgage to Barthold & Jennings, to secure $20,000 due them.

These instruments covered the entire property of Richmond. The first named was executed and filed for record at 11 o'clock p. m., October 9, 1886. Possession was immediately given to Taylor for himself and other beneficiaries, and he on the same night delivered possession of all the goods and chattels to Wiley Hatley, who had been suggested and recommended to him before that by Richmond. Hatley, from that time, acted under direction and supervision of George Taylor; sold goods at private sale, and, on the orders of Taylor, paid money to himself and others of the mortgagees, and for expenses. The debts secured appear to have been past due. On the day of the execution of these several instruments, Richmond drew orders on George Taylor & Co. in favor of each of his creditors not named in the mortgages, for the amounts due them respectively; a copy of which is hereinafter given. These orders were mailed to various unsecured creditors, with letters from Richmond, explanatory of the situation. There was realized from the sale of goods, and property and collections, the sum of $10,016.94. Barthold & Jennings' debt was about paid from sale of property; Mallory's remained unsatisfied at the time of trial.

The mortgage first mentioned and covering the stock of

goods is as follows: "Know all men by these presents, that I, N. T. Richmond, for and in consideration of the sum of one dollar, to me in hand paid, and the premises hereinafter set forth, do hereby sell, transfer and deliver to George Taylor, doing business under the firm name of George Taylor & Co., J. V. Collins, Mrs. Jane Shanks, Mandeville, Bowling & Taylor, Terry & Young, J. H. Wear, Boogher & Co., Baird & Bright, Sam Scott, Gauss Boot and Shoe Company, Charles Wingfield, George Yroyer, J. R. Harrell and A. E. Stainton, the following described property: All of my stock of general merchandise now in the storehouse occupied by me as a place of business in the Town of Prescott, Nevada County, Arkansas together with the store fixtures and furniture therein. To have and to hold to the said grantees, their heirs and assigns; yet this conveyance is upon condition that, whereas, I am indebted to said Geerge Taylor & Co. in the sum of five thousand nine hundred and seventy-one dollars, (and to the other twelve in various sums, which are specifically mentioned in the instrument).

"Now, if I shall well and truly pay said sums as they fall due, this obligation to be void; otherwise to remain in full force. The said grantees are hereby authorized to take possession of said property immediately upon the execution of this conveyance, and to proceed to sell the same in due course of trade at private sale for cash, for the space of ninety days, and shall apply the proceeds to the payment of said debts. If at the expiration of said period of ninety days said debts, or any part thereof, remain unpaid, the said grantees are to sell the remainder of said goods which may then be on hand, at public auction, in bulk or by the piece, as may be most advantageous, for cash, after ten days' notice of the time and terms of the sale, by advertisement of in some newspaper published in the county, and the proceeds shall be applied, first, to the expenses attending the execution and carrying out of this con-

veyance, and the balance to the payment of said debts, secured hereby.

"Witness my hand this the 9th day of October, 1886.

"N. T. RICHMOND."

It was acknowledged and filed for record at 11 o'clock p. m. on that date.

The circular letter of Richmond to his unsecured creditors was as follows:

"PRESCOTT, ARK., October 11, 1886.

"*Mississippi Mills, Wesson, Miss.:*

"DEAR SIRS: On the 9th inst. I executed to Geo. Taylor & Co., of St. Louis, and others, a mortgage and deed in trust upon my entire property, to be sold at private sale, and closed out in ninety days. Everything now in hands of mortgagees, W. A. Hatley, Esq., manager. Assets about $30,000; liabilities about $15,000; good and ample to pay *all*, and leave a balance for me.

"Enclosed order on G. T. & Co. to pay you amount due you before returning assets to myself.

"*I regret the necessity, but it protects all from complications.*

"Yours truly,

"N. T. RICHMOND."

The order on Geo. Taylor & Co., enclosed in the letter, was in the following words:

"$385.37. PRESCOTT, ARK., 10-9, 1886.

"Out of the proceeds of the property this day mortgaged to you, after the indebtedness which said mortgages are given to secure directly are satisfied, you will please pay to Mississippi Mills $385.37, or should such surplus proceeds fail to pay in full the sum total for which I have *this day made sundry similar orders*, you will place on each order the *pro rata* share in such surplus.

"N. T. RICHMOND.

"*To Geo. Taylor & Co., St. Louis, Mo.*"

Richmond was employed by Taylor to assist Hatley.

Of the $10,000 notes and accounts $2000 was collected by Taylor and his agents. The balance were sold, and Taylor bought them for $100. He turned them over to Richmond for collection, and allowed Richmond to use the proceeds of collections.

Upon this state of facts the Circuit Court held, in the first case, that the various conveyances constituted an assignment for the benefit of creditors, and that the same was fraudulent and void, as being in violation of the statutes in that behalf. And, in the second case, the court found, in addition to the matter above, that at the time Richmond bought the goods in question, on September 13, 1886, he acted fraudulently, and without the intention of paying for the merchandise; that plaintiff had a right to repudiate the sale and sue for the goods. In each case judgment was given for plaintiff, and the defendant, upon these appeals, asks a review of these findings and judgments.

I. ASSIGNMENTS: For benefit of creditors: Statutory regulations.

The statute of Arkansas respecting assignments undertakes to regulate the *execution* of the trust. Except that the deed must contain nothing directing a different execution, the statute has nothing to do with the contents of the deed. Preferences are allowed as at common law. Neither preferences, long since given, nor those recently made, by mortgage or otherwise, are invalidated by the subsequent execution of a deed of assignment. A preference may be by mortgage, by confession of judgment, by pledge, by deed of trust, in the nature of a mortgage, or by stipulation in the deed of assignment. Much confusion in analyzing the authorities arises from a failure to discriminate between the conditions which exist here and in some States where insolvent laws have been passed; and the conditions in such States vary *inter se*. Thus, in Missouri, since the statutes of 1864, it is held that a deed in trust to secure the debts of *two* creditors is an assignment which will inure to the benefit of all the creditors of the debtor. *Martin v. Hausman, 14 Fed. Rep., 160; Crow v. Beardsley, 68 Mo., 435.*

While, in Illinois and Wisconsin, under statutes varying slightly, it is held that the right to prefer a creditor still exists, and may be exercised in any way except by assignment. *White v. Catzhausen, 129 U. S., 329; Wiuner v. Hoyt, 66 Wis., 227.* In Massachusetts, instruments similar in many respects to those under consideration in this case, are not within the prohibition of the statutes of assignments. *Henshaw v. Sumner, 23 Pick., 446.* It results that the decisions of many other courts are pursuasive with us only in so far as they discuss the principles which determine the character of the instruments under consideration. The necessity in other States of considering statutory provisions to determine the nature of the instrument, makes the entire decision worthless here.

2. SAME: Form of instrument.

A deed of assignment contemplates the intervention and agency of a trustee, though none need be named in the deed. *Burrill on Assignment, sec. 3; Burrows v. Lehndorff, 8 Iowa, 96.* Hence, conveyances directly to creditors, in payment or by way of security for their own debts solely, are not, generally, assignments for the benefit of creditors. *Bouchand v. Dias, 1 N. Y., 201, 204; U. S. v. McLellan, 3 Sumner, 345.* Nowhere is the essential character of an assignment (trust deed), as contrasted with that of a mortgage, better stated than by Mr. Justice WALKER, in *Turner v. Watkins, 31 Ark., 437.* He says: "The conclusion reached is that when the grantor parts with his title, giving it to the trustee absolutely, for the purpose of raising a fund to pay debts, this is, properly speaking, a deed of trust, but when a conveyance is to secure a debt, in case of default, thus assimilating the transaction to a mortgage, and where the intent of the grantor, instead of parting with his estate, is to retain it, in case he performs his obligation according to its terms, instruments of this class are also, but less technically, called deeds of trust, but in substance they are mortgages." See, also, *Huffman v. Mackall, 5 Ohio St., 124.* An assignment, then, as Burrill says, is a transfer by a debtor, without compulsion of law, of some or all of his property to

an assignee or assignees, in trust, to apply the same or the proceeds thereof to the payment of some or all of his debts, and to return the surplus, if any, to the debtor. A mortgage is a security against the default of a debtor in the payment of his debts. The true meaning and effect of an instrument determine its character, and ordinarily, but not necessarily, these are gathered from the language of the instrument. We say that the meaning of the instrument is ordinarily gathered from the language in which it is couched, because that is usually the best evidence of the *intention* of the parties to it. But the parol evidence of facts collateral to those stated in the instrument, is admitted to show their *full intention*. It was formerly held that the grounds upon which parol evidence was admissible to show that a deed absolute on its face, was a mortgage, were fraud, accident, or mistake. *Freeman v. Baldwin, 13 Ala., 246; Whitefield v. Coats, 6 JonesEq., 136.* But the doctrine of our own court, as first stated in *Johnson v. Clark, 5 Ark., 321*, puts it upon the broad ground that the bill of sale, though absolute *in form*, was *intended* as a mortgage. *Jones on Mortgages, secs. 285-323; Jones on Chattel Mortgages, sec. 23.* The true character of an instrument, then, is not necessarily discernable on its face. A deed absolute in form, may be conditional and defeasible in fact, while an instrument with formal defeasance may be intended to be, and may operate as an unqualified conveyance. In *Kohn v. Clement, 58 Iowa, 593*, it is held that a mortgage or mortgages in form, may be intended to be and actually constitute an absolute deed of trust. In *White v. Cotzhausen, 129 U. S., 329*, it is held that two mortgages and a confessed judgment constituted an assignment, by reason of the *intention* of the parties and the operation of the instruments. In *Winner v. Hoyt, 66 Wisconsin, 227*, six mortgages to six different creditors were executed on the same day, with an agreement that Hoyt, one of the mortgagees, should take the property and manage it for all the mortgagees, selling it off at once for cash, applying the proceeds to the debts. *The inten-*

Intention of parties.

tion of the parties, as gathered from the whole transaction, was held to determine its character (and as it was contemplated that the conveyances should operate to carry the property absolutely to the mortgagees, to raise a fund to pay debts, it constituted an assignment, with Hoyt as trustee). These and a multitude of other decisions emphasize the statement often made that the law will not be blinded by *forms* or *names*, but will look beyond to the *substance* of the transaction under consideration, and fix its character according to the *intention* of the parties. *Jones, Chattel Mortg., sec. 24; Horne v. Puckett, 22 Texas, 201; Hopkins v. Thompson, 2 Porter (Ala.), 433.*

3. Same.

We do not hold that the giving of one or more mortgages, the confession of judgments or other means adopted to give security or preference constitute necessarily or even ordinarily an assignment. But we do hold that where one or more instruments are executed by a debtor, in whatsoever form, or by whatsoever name, with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, the transaction constitutes an assignment.

4. Same.

Under these rules, what is the effect of the several transactions between Richmond and Taylor, on October 9, 1886? The debts were past due; no extension of time for payment before default is given; the conveyances embraced his entire property, depriving him of the means of making money; it is provided that the property shall be immediately sold at private sale for cash, and the proceeds applied to the debts, thus negativing the idea that Richmond expected to regain his property or expected to pay the debts otherwise than by sale of the security. It was agreed that Taylor should take charge for himself and the other twelve, and as Taylor lived in St. Louis, he and Richmond agreed on a man (Hatley) to do all those things which a trustee is required to do. That is further evidence of his intention to dispose absolutely of the property. Richmond, on the day of the execu-

tion of the several conveyances, drew orders on Geo. Taylor & Co. in favor of each of his non-preferred creditors for the amounts due them respectively, and directed that the same should be paid out of the surplus proceeds of the property, after first paying those whom he had named in the deeds. In his letter to plaintiff, dated October 11, 1886, enclosing this order, speaking of the conveyances just made, he says: "I regret the necessity, *but it protects all from complications.*" There was ample evidence to establish the fact that it was the intention of the parties that the various instruments should operate as an absolute conveyance of the property, to raise a fund to pay debts; and that Taylor, either personally or by Wylie Hatley, should be the trustee for the execution of the trust. The orders drawn on Geo. Taylor & Co. ignored the other mortgagees. It was to the trustee that they were directed. He was expected to honor them.

The transactions between Richmond and Taylor on October 9, 1886, constituted a general assignment, and the provisions in the deeds requiring the execution of the trust in a manner prohibited by law, rendered it void as to the other creditors.

5. FRAUD: In purchase of goods.

The Circuit Court found that the defendant had procured the goods replevined by fraudulent misrepresentations, and declared the law to be that the plaintiff had a right to repudiate the contract of sale and sue for the goods. There was evidence to sustain the finding of fact, and the law was correctly stated.

The judgments are affirmed.

LUCKINBILL v. STATE.

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HOMICIDE: *Self-defense: Retreat of adversary.*

One who kills his adversary while the latter is manifestly seeking to retire from the combat is guilty of murder, or manslaughter, according to the circumstances; but where one is defending himself from an unlawfult attempt to shoot him, it is not incumbent upon him to suspend his defense because his assailant is withdrawing himself from the immediate locality of the attempt, if such withdrawal is apparently for the purpose of securing a position from which to renew the combat with more efficiency.

2. INSTRUCTIONS: *Should be applicable to opposing theories.*

Instructions to the jury should declare the law as applicable to any view of the facts which upon the evidence may be taken by either of the parties to the cause on trial.

APPEAL from *Woodruff* Circuit Court.

M. T. SANDERS, Judge.

J. W. House, for appellant.

1. The State should have been required to introduce the eye-witness to the killing, and if the State refuses the court should call them on its own motion. These witnesses saw the tragedy, were before the Grand Jury, and their names were indorsed on the indictment. *1 C. and P., 84, and note; 9 id., 22; 8 id., 558; 10 Mich., 225; 17 id., 443; 18 id., 327; 25 id., 406; 38 id., 124; 39 id., 312; 37 id., 8; 30 id., 16; 4 Mass., 646; 40 Mich., 716; 50 Vt., 340; Whart. Cr. Ev., sec. 448; Whart. Cr. Pl. & Pr., sec. 565, and note; Roscoe Cr. Ev. Vol., top p. 210; sec. 1520 Mansf. Dig.*, does not change the rule.

2. Reviews the instructions, and contends that they are misleading and do not sufficienly present the defendant's theory of self-defense. *16 Ark., 592; 19 Ind., 48;* and especially did the court err in modifying the seventh instruction asked by defendant.

3. As to insulting language and the rights of one assaulted by reason thereof. See *29 Ark., 248, 266.*

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellee.

1. The State is not bound to introduce all the eye-witnesses of the *res gestæ*, even if they were before the Grand Jury, and indorsed on the indictment. *3 Cox C. C., 82; 1 Fost. & Fin., 79; 2 C. & Kir., 520; 1 Gr. Ev., sec. 446; 2 Ired., 101; 33 Ark., 175; 75 N. C., 106; 57 Ind., 26; 30 La. An., 842; 14 Ark., 563; 15 id., 358; 16 S. & R., 77.*

2. The second instruction is sustained by authority. *Wh. Cr. Law, sec. 476; 58 Ala., 268; 9 Ired., 429; 28 Miss., 688; 24 Cal., 17; Bish. Cr. Law, sec. 717; Russell Cr., 531.*

3. The second instruction by defendant, properly modified, *Wh. Cr. L., sec. 314*, as also the seventh. Appellant had no right to continue the combat any longer than was necessary to repel or overcome the danger.

PER CURIAM. The appellant was convicted of murder in the second degree. The killing was admitted and the plea of necessary self-defense interposed.

The altercation began and ended in a store-room. The defendant and deceased were both armed with pistols. There was testimony tending to show that the deceased made the first demonstration of violence by attempting to draw his pistol; that the defendant first succeeded in getting his pistol in condition for use, and fired while the deceased was attempting to extricate his pistol from entanglement in a handkerchief which he carried in the same pocket; that, while the defendant fired, the deceased slowly moved off, seeking constantly an opportunity to return the fire. He never passed the door of the room, and fell with his pistol in his hand. The court instructed the jury, among other things, as follows:

1. HOMICIDE: Self defense: Retreat of adversary.

"The jury are instructed that the killing of a human being can be justified only in necessary self-defense, and the slayer is guilty of murder when he pursues an adversary and kills him in retreat, unless the proof should show that the deceased at the time had given such provocation as to evidence a sudden and irresistible passion, in which case it would be manslaughter."

The deceased never retreated to a place from which he could not, if he had desired, have shot the defendant. The evidence tended to show that he was not attempting to retire from the combat, but was merely seeking a situation more favorable for waging it. If such was true, it was not incumbent on the defendant to suspend his defense until the deceased had gained the situation he sought, but he had the same right to defend himself as if the deceased were standing and attempting to shoot him. If the deceased was in fact seeking to retire from the combat, and his conduct manifested such purpose, the defendant was not justified in shooting him. The instruction quoted, properly declared the law in the view of the facts taken by the State, but fails to state it in the view taken by the defense. The law should have been declared as applicable to any view that might be taken.

2. INSTRUCTIONS: Should apply to opposing theories.

We do not think it is sufficiently done in any other instruction given. If the seventh instruction asked by the defense had been given without modification, it would have supplied the omission in the instruction quoted. But this instruction as modified, with the instruction quoted, might reasonably have impressed the jury that the defendant could not excuse himself for shooting the deceased while withdrawing, although he were doing so to secure a position from which he might renew the combat more effectively.

For this reason the judgment is reversed and the cause remanded.

SANDELS, J., HUGHES, J., and HEMINGWAY, J., concurred.

COCKRILL, C. J., dissenting. The charge of the court fairly defines the law of self-defense. The shortcoming of the instruction upon which the case is reversed, was, I think, fully supplied by the learned judge in other portions of the charge upon the same subject, and it does not seem to me probable that the jury was misled by the court.

The oft-repeated rule of this court, that the whole charge must be looked to for the purpose of testing the accuracy of

any part of it, together with the allegiance we owe to a jury's verdict, where it is obviously justified by the evidence, seems to me to demand that the judgment be affirmed.

Judge BATTLE concurs with me in this view.

STATE v. DUPUY.

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ASSIGNMENT: *For benefit of creditors: Instrument constituting.*

A deed without defeasance and which conveys absolutely to a person named therein as trustee, a stock of merchandise, directing him to take immediate possession of the goods and to sell them at private sale for cash, and out of the proceeds to pay the debts of certain creditors of the grantor mentioned in the deed, reserving the surplus for the grantor, is by its terms an assignment for the benefit of creditors, and as it directs the execution of the trust in a manner prohibited by the statute of assignments (*Mansf. Dig., secs. 305-309*) it is fraudulent and void as to attaching creditors.

APPEAL from *Lee* Circuit Court.

M. T. SANDERS, Judge.

J. C. Tappan and *J. J. Hornor*, for appellant.

1. Deeds are to be construed so as to render them operative, if possible. *6 Ark., 109.* Every instrument intended (as was this) as security for a debt, although absolute on its face, will be construed to be intended as a mortgage, and parol testimony is admissible to establish the fact. *5 Ark., 321; 7 id., 505; 13 id., 112; 18 id., 34; 15 id., 284.*

Wherever there is a debt and a conveyance to secure same, the policy of the law is to constitute it a mortgage. *2 Story Com., 287.*

The instrument was a mortgage or deed of trust in the nature of a mortgage. It had none of the elements of an assignment. *4 N. Y., 211; 21 N. Y., 131; 31 Ark., 429.*

E. D. Robertson, for appellee.

37 Ark, 151, and 39 Ark., 66, are conclusive of this case. See *1 Fed. Rep., 768.*

SANDELS, J. Suit by appellant against Sheriff and his bondsmen, for damages alleged to have been sustained in the seizure of certain goods by the Sheriff.

The only question was as to the character of an instrument of conveyance from one Foster to West.

ASSIGNMENT: For benefit of creditors: Instrument constituting.

The deed executed by Foster to West recited the parties, being Thomas Foster of the one part, N. Straub and Henry Lohman, and D. C. Smith of the second part, and P. C. West, as trustee for said Straub & Lohman, and D. C. Smith of the third part; described the debt due to Straub individually, the debt due to the firm of Straub & Lohman, and the debt due to Smith; the desire of Foster to secure the payment of the same and then conveyed in consideration of ten dollars then received, to said West, "all the stock of merchandise, consisting of dry goods, groceries, boots, shoes, hardware, hats, caps and other such articles usually kept in a country store, now in the store-house of said Thomas Foster, in the Town of LaGrange, in the County of Lee and State of Arkansas, an inventory and schedule of which is hereto attached, marked *No. 1*, and made part of this deed as if copied 'herein' to be held by said West in trust, that he should take immediate possession and sell said goods at private sale for thirty days for cash, at not less than the cost price of same in said store; then, if said goods were not all sold, to sell at public auction, and with the proceeds of sale to pay first all expenses, then said debts, and the balance to pay over to said Foster, said West to have the power to appoint suitable assistants, to possess said goods and to make sale of same. And in the event of his death, refusal to act, neglect or inability, the said second party had power to appoint another trustee, who should have all the powers therein conferred upon said West."

The court found the facts from the evidence and declared the law as follows: "Thomas Foster, a merchant, was indebted to the firm of Straub & Lohman and D. C. Smith, and on the 2d day of February, 1885, executed and delivered to D. C.

Smith, one of said creditors, to be by him delivered to P. C. West, the trustee therein named, the instrument of writing introduced in evidence. By the terms of the instrument, Foster sold and conveyed to said West, a stock of merchandise in his store-house in LaGrange, Lee County, Arkansas, which was to be disposed of by West as therein directed, and the proceeds applied, after paying expenses, to the payment of the debts due Straub & Lohman and D. C. Smith, reserving the balance of the proceeds to himself. West took possession of and held said stock and merchandise under and by virtue of said instrument. Afterwards, within a few days, the defendant and Sheriff levied several valid writs of attachment upon the stock and took it from the possession of West. The suits in which said writs of attachment were issued and so levied, were against said Foster, and were duly prosecuted and judgment recovered against him for amounts which exceeded the value of the goods taken, and the latter were duly condemned and sold to satisfy said judgments, no surplus remaining. The instrument of writing by virtue of which West took and held possession of the stock of goods was not given by way of security as a mortgage or deed of trust; there is no defeasance. It does not create a lien upon the goods, but conveys them absolutely for the purpose of raising a fund to pay debts, and until this was done, Foster had no legal or equitable interest in the property that could be sold by him or reached by his creditors. The instrument was not a deed of trust in the nature of a mortgage. By its terms it was an assignment for the benefit of creditors, and considering it as a deed of assignment it is clearly fraudulent and void as to the attaching creditors." The Circuit Court was right upon both the law and facts, and its judgment is affirmed.

ST. L., A. & T. RY. v. STATE.

1. OBSTRUCTION OF HIGHWAYS: *By railroads: Statutes punishing, etc.*

The act of March 18, 1887, providing for the recovery by civil proceeding of a penalty against railroad companies for failing to construct or keep in repair railway crossings, does not repeal section 1865 of Mansfield's Digest which makes it a misdemeanor, punishable by indictment, for any person to obstruct a highway by felling a tree across the same, or placing any other obstruction thereon. And under the latter statute a railway corporation may be indicted for building an embankment across a public highway and failing to keep the same in good condition and repair.

2. SAME: *Same: Indictment.*

An indictment against a railway corporation which alleges that the defendant on, etc., in, etc., "did unlawfully," etc., "obstruct a public road in the City of Camden, Arkansas, where said railroad crosses the road leading from the City of Camden to Bradley's Ferry, known as the Bradley Ferry road, by building an embankment across said road and failing to keep the same in good condition," etc., charges a misdemeanor under section 1865 Mansfield's Digest, and sufficiently describes the road obstructed.

APPEAL from *Ouachita* Circuit Court.

CHAS. W. SMITH, Judge.

The appellant was indicted for obstructing a public road at a point where its railway intersected the same by building across such road an embankment, and failing to keep the same in repair, etc. A demurrer to the indictment and a motion to dismiss it were both overruled, and on a trial the defendant company was convicted, and its fine assessed at $10. A new trial was refused, and the company appealed.

Section 1865 of Mansfield's Digest is as follows: "If any person shall obstruct any public road by felling any tree or trees across the same, or placing any other obstruction therein, he shall be guilty of a misdemeanor, and liable to indictment in the Circuit Court of the proper county, and, on conviction thereof, be fined in any sum not exceeding fifty dollars, and shall forfeit two dollars for every day he shall suffer such obstruction to remain after he shall have been notified to remove the same by the overseer. *Provided*, This

shall not extend to any person who may cut down any timber for rails, wood or other lawful purpose, who shall immediately remove the same out of the road, or to any person who shall dig a ditch or drain across such road on his own lands, and who keeps the same in repair."

The act of March 18, 1887, entitled "An act to prevent the obstruction of roads and highways by railroads," provides "that wherever any railroad corporation has constructed, or shall hereafter construct, a railroad across any public road now established, or which may hereafter be established, such corporation shall so construct or alter the same that the approaches to such railroad shall be at no greater elevation or depression than one perpendicular foot for every five feet of horizontal distance, if such elevation or depression be caused by the construction of such railroad, but if at any such crossing there is a cut of sufficient depth the same may be crossed by a bridge to be maintained in good repair by the company. If such crossings are not so constructed and maintained, it is the duty of the overseer of such public road to serve the section foreman of that part of the railroad, or the nearest station agent, with a copy of a notice warning him that such crossing is not constructed or maintained as required by law, and to comply therewith within sixty days from the service thereof, and to file the original of such notice, with his return showing the service thereof, in the office of the Clerk of the County Court, who shall notify the Prosecuting Attorney of the filing of the same, and the Prosecuting Attorney shall thereupon institute suit against said company. And further provides that for refusing or neglecting to comply with its provisions, such company shall forfeit and pay to the county in which such crossing is located a sum of not less than one hundred nor more than two thousand dollars, and five dollars per day for every day such refusal or neglect shall continue after the expiration of the sixty days' notice."

The indictment accuses the "defendant, St. Louis, Arkansas and Texas Railway Company," of the crime of obstructing a public road, committed as follows: That "the said defendant on the first day of May, 1888, in Ouachita County, Arkansas, did unlawfully on said day, and on divers other days and times continually for four weeks, obstruct a public road in the City of Camden, Arkansas, where the railroad crosses the road leading from the City of Camden to Bradley's Ferry, known as the Bradley Ferry road, by building an embankment across said road and failing to keep same in good condition, and suffering same to remain after he had been notified by B. F. Sale, Marshal of said town, against the peace and dignity of the State of Arkansas.

"H. P. S.,
"Prosecuting Attorney, etc."

On the trial evidence was introduced "tending to prove that the defendant, about the year 1882, obstructed a public road in the City of Camden, Arkansas, where the track of said railway crosses the road leading from the City of Camden to Bradley's Ferry—known as Bradley's Ferry road—the entire length of said road being within the corporate limits of the City of Camden, by building an embankment across said road, and that said defendant, within twelve months next before the filing of the indictment herein, for a period of four weeks failed to keep the crossing in good condition and repair, and that said defendant is a railroad corporation, duly organized under the laws of the State of Arkansas."

Montgomery & Moore, for appellant.

1. The building an embankment for a railroad is not an obstruction as contemplated in sec. 1865 Mansf. Dig., and the words "placing any other obstruction therein," do not embrace an embankment by a railroad. *7 B. & C., 96; 8 Q. B., 452; 1 Cromp., M. & R., 422; Pars. Cont. (5th ed.), Vol. 2, p. 502, and 758, note P; 49 Mo. 559; Sedg. St. and Const. Law, 428; 44 Mo., 444.*

2. The act of 1887 repeals sec. 1865 Mansf. Dig.

3. The indictment not good under act of 1887, because by that act the defendant is not criminally liable, but must be proceeded against, by civil action. *Acts 1887, p. 98; Kent's Com. (7th ed.), Vol. 1, p. 518, note A; 6 Humph. (Tenn.), 17.*

W. E. Atkinson, Attorney General, for appellee.

The offense charged in the indictment in this case of obstructing a public highway, by failing to keep it in repair at its crossing by a railroad company, is indictable under the statute or at common law, at the election of the State. *Bish. St. Cr., section 164; Bish. Cr. Pro., sections 599 and 601*, and authorities below.

When a railroad company lays its track across a public highway and fails to keep crossings in good repair, it is indictable and punishable by law therefor. *Paducah & Elizabethtown R. R. Co. v. People, 10 Am. & Eng. R. R. Cas., 318 (Ky. case); Pittsburg, Va. & Ch. R. R. Co. v. Com., ib. 321; People v. R. R. Co., 74 N. Y., 302; Com. v. Pa. R. R. Co., 12 Atlantic Rep., 38.*

The description of the obstructed road is sufficient. *Patton v. State, 50 Ark., 53.*

The new statutory remedy is cumulative, and does not supercede the common law remedies. *Turnpike v. People, 9 Barb., 161; State v. Virt, 3 Ind., 447; People v. R. R. Co., 74 N. Y., 302; (supra) Bist. St. Cr., section 164; Howard v. State, 47 Ark., 435.*

OBSTRUCTION OF HIGHWAYS: By railroads.

PER CURIAM. The act of March 18, 1887, provides a cumulative remedy, and does not repeal sec. 1865, Mansfield's Digest.

The indictment is good under the latter act.

The remedy by indictment is appropriate. *Texas & St. L, Ry. v. State, 41 Ark., 488; People v. N. Y. C. & H. R. R. Co. 74 New York, 302.*

Affirmed.

HOGAN v. FINLEY.

DESCENT: *Title by: New acquisition.*

Where under the statute found in English's Digest, chap. 97, art. 1, and the act of Dec. 12, 1850, amendatory thereof, land was donated by the State to a minor, it was a new acquisition by him within the meaning of the statute of descents (*Mansf. Dig., sec. 2522*), although his father paid the fees necessary to obtain the deed; and on his dying intestate and without issue, it descended first to his father and then to his mother for life. In such case no interest in the land can be devised by the father, and on his death the sister of the deceased cannot maintain ejectment for it without proving the death of the mother.

APPEAL from *Fulton* Circuit Court.

S. H. Davidson, Special Judge.

This was an action of ejectment brought by the appellee against the appellant, to recover a tract of land. The complaint alleged that the land in controversy was conveyed by the State of Arkansas to Thomas V. Taylor, by a donation deed, executed on the 12th day of February, 1857. That at that date the land was the property of the State, subject to donation, and that Stephen Taylor, the father of Thomas, desiring to procure the title to the land and give it to his son, paid the fees and expenses necessary to obtaining the donation. That Thomas died during his minority without issue, leaving Stephen, his father, his sole heir at law, and Stephen who died subsequently, devised the land to the plaintiff, Eliza Finley. The donation deed to Thomas V. and the will of his father, Stephen, devising the land to the plaintiff, were made exhibits to the complaint. The defendants claimed title to the lands under donation deeds executed in 1880 and 1881. The evidence showed that Thomas V. Taylor was a minor and without funds when the donation of the land was made to him, and that his father, Stephen, procured the deed and paid the necessary legal fees therefor; that Thomas V. was a minor and unmarried at the time of his death, and died intestate and without issue, leaving his father, brothers and one sister, the plaintiff, surviving him. The devise to the plaintiff was also

shown by a certified copy of Stephen Taylor's will. The death of Thomas V. Taylor's mother was not shown.

The verdict and judgment were for the plaintiff and the defendant appealed.

The deed of the State to Thomas V. Taylor was made under the statute (*English's Digest, chap. 97, art. 1*), which provided for the donation to actual settlers of lands forfeited to the State for the non-payment of taxes, and the act of December 12, 1850, amending the original act.

Robert Neill, for appellant.

Z. M. & L. D. Horton, for appellee.

DESCENT: Title by.

PER CURIAM. The land in controversy was a new acquisition by Thomas V. Taylor, and upon his death it descended, first to his father and then to his mother, for life. *Magness v. Arnold, 31 Ark., 103; Kelley's heirs v. McGuire, 15 Ark, 555.*

The plaintiff, therefore, took nothing by the will of the father of Thomas V.

The record shows that the plaintiff is a sister of Thomas V.; but the death of the mother is not shown. The proof, therefore, discloses no right of possession in the plaintiff and having shown no title, she is not in position to raise any of the questions argued by counsel. Reverse and remand.

SICELUFF V. STATE.

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LIQUORS: *Sale to minor: Agency:*

Although a minor acts as the agent of his parent in purchasing liquor, if that fact be not disclosed to the seller at the time of the purchase, and the sale is made without the parent's written consent or order, it is unlawful, and a subsequent disclosure of the agency will not avoid a conviction.

APPEAL from *Lee* Circuit Court.

Hon. M. T. SANDERS, Judge.

The defendant was indicted for selling whisky to George Lockey, a minor, without the written consent of his parent or guardian. On the trial below, the evidence showed that the minor had purchased whisky from the defendant for laborers on his mother's plantation, and with money furnished by her for that purpose. He was the agent of his mother and attended to her business on the plantation, and in purchasing supplies for her tenants and laborers. The purchase of whisky from the defendant was made by the minor under his mother's instruction, but without her written consent or order. And there was nothing in the evidence to show that the agency of the minor was disclosed at the time of the sale, or was then known to the defendant. The court, against the defendant's objection, instructed the jury as follows: "1. George Lockey, if a minor, could not legally act as agent to buy whisky for the hands, except by the consent or authority in writing of his mother." "2. But if it was lawful for a parent to verbally authorize a minor child to buy whisky as an agent, a sale to such minor would be illegal, in the absence of proof that such agency was known or disclosed to the seller at the time of the sale."

The following instructions were requested by the defendant and refused by the court: 1. "If the jury find from the evidence that the defendant sold and delivered whisky to the minor named in the indictment, and received money therefor, but that said minor had been, and was, acting as agent for his mother, and that the liquor was not bought for the minor, but for his mother or her tenants on the place, this would not be a sale to the minor."

2. "That before the jury can convict the defendant, they must find from the evidence that the sale was made to the minor for his own use and purpose, and if acting as the mere agent of his mother, the defendant would not be guilty."

The defendant was convicted and a new trial was refused.

H. N. Hutton, for appellant.

The minor was acting simply as the agent of his mother and a sale to him was a sale to his principal, and no offense.

W. E. Atkinson, Attorney General, for appellee.

The court correctly declared the law. *106 Ill., 95; 45 Ark., 365; 47 id., 555; 63 Miss., 304; 17 Hun., 591; 36 N. W. Rep., 234.* Appellant was guilty, though minor purchased as agent, and especially where he failed to disclose his agency. Cases *supra*.

LIQUORS: Sale to minor.

PER CURIAM. As between a seller and an agent who deals with him without disclosing the fact that he acts as agent, the latter, as well as the principal, is the purchaser.

A liquor seller who contracts with a minor may, therefore, be convicted of selling liquor to a minor, notwithstanding the fact may subsequently be disclosed that the minor acted as agent for his parent. *Gillen v. State, 47 Ark., 555; Foster v. State, 45 Ark., 365; Ritcher v. State, 63 Miss., 304; Ross v. People, 24 Hun., 591; People v. Garrett, 36 N. W. Rep., 234; Com. v. McGuire, 11 Gray, 460.*

Affirmed.

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DICKINSON V. HARRIS.

1. LANDLORD'S LIEN: *Assignment of rent note.*

Where a landlord after assigning a rent note as collateral security for a debt redeems it, his lien on the tenant's crop which was suspended by the assignment is revived; and his right to enforce the lien will not be defeated by a sale of the crop made before the redemption of the note, if the purchaser buys with notice that the rent remains unpaid.

2. SAME: *Liability of tenant's vendee: Practice on bill to enforce lien.*

In such case the vendee of the tenant having disposed of the crop and made a payment on the note before it was redeemed, he will be liable to the landlord on account of the proceeds of the crop, and the landlord will be entitled to recover of him the amount of such proceeds, less the sum paid on the note, if that amount be due on the rent. And where the note was given in part for the use of horses and farming implements, it will be proper on a bill to enforce the landlord's lien, to refer the cause to a master for the purpose of ascertaining what proportion of the note was given for rent and the balance due thereon.

APPEAL from *Drew* Circuit Court, in chancery.

Carroll D. Wood, Judge.

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

1. The lien of a landlord is superior to a mortgage. *25 Ark., 509; 33 id., 737; 35 id., 225; 36 id., 525; 45 id., 447.*

2. Where a rent note, after being assigned as collateral security, is reassigned to the landlord, the lien revives. *39 Ark., 344; 29 id., 218; id., 443; 30 id., 155; 31 id., 142; ib., 250; 33 id., 80.*

Wells & Williamson, for appellees.

1. Appellees had no notice of the landlord's lien at the time of purchase. *31 Ark., 131.*

2. On the day of the purchase the rent note was the property of T. H. Allen, by assignment, *who certainly had no lien. 39 Ark., 344.*

3. The note was never reassigned so as to revive the lien, so as to relate back to the time of appellee's purchase. *2 Ark., 4; 15 id., 372.*

4. The Chancellor being unable to determine how much of the note was for rent of land, properly refused to declare any part of it a lien as against third persons without notice of the amount due.

W. S. McCain, for appellees.

Appellants did not own the note at the time of the purchase by appellees of the cotton, and neither they nor Allen & Co., the assignees, had any lien on the cotton. *31 Ark., 597; 36 id., 561; 39 id., 344.*

BATTLE, J. On the 14th day of March, 1884, T. W. Hemingway rented a farm from J. W. Dickinson, and executed to him a promissory note, and thereby promised to pay him, on the 15th of November, 1884, the sum of $500 for the rent of the farm, and for the use of four horses and mules and plows and gear on the place. Hemingway raised a crop of cotton on the farm during the time for which he rented it. Dickinson

assigned the note to Thos. H. Allen & Co., as collateral security for a debt he owed them. Afterwards and before he redeemed it Hemingway sold eight bales of his cotton crop to Harris & Cotham, who, at the time of their purchase, had notice that the note Hemingway had given for rent was unpaid. Afterwards Dickinson redeemed the note. Did Harris & Cotham acquire the eight bales of cotton free from and unencumbered by Dickinson's lien for rent?

1. LANDLORD'S LIEN: Assignment of rent note.

It has been held by this court that the law gives to the landowner a lien on the crop of the tenant for rent for his personal benefit, and that it does not pass to the assignee of the note for rent; and that when the note of a tenant is assigned to a creditor of the landlord, to be held as collateral security for a debt, and the landlord thereafter redeems the note, and the same is redelivered by the creditor to him, the debt for rent and the right to enforce satisfaction thereof out of the crop of the tenant, reunited in the landlord. *Roberts v. Jacks, 31 Ark., 597; Bernays v. Field, 29 Ark., 218; Varner v. Rice, 39 Ark., 344.*

The effect of the assignment of the note as a collateral security for a debt is not to divest the landlord of all interest and property in the note. He still has an interest in the note, and, as an incident to this interest, a lien on the crop of the tenant, subject to be enforced when the note is redeemed. The lien and the right to enforce it remain dormant or suspended until the debt is redeemed, when both reunite in the landlord. The lien being still alive while the note for rent is held as a collateral security, the purchase of the crop of the tenant, or any part of it, by third parties, with notice that the note remains unpaid, will not defeat the right to enforce it against the crop purchased, or the proceeds of the sale thereof, when the landlord regains the possession of it and the right to hold, control and use it, as his own unencumbered property.

2. SAME: Liability of tenant's vendee.

Harris & Cotham are liable to Dickinson on account of the eight bales of cotton, the same having been disposed of by them. One hundred dollars were paid by them on the note·

The proceeds of the eight bales of cotton amount to $301.79. Dickinson is entitled to recover of them the $301.79, less the $100 paid on the note, if there be so much due him for rent, and if not, so much of the rent as remains unpaid. But it does not appear from the evidence how much of the note was given for rent. It is evident, however, that a part of the rent still remains unpaid; how much the evidence does not disclose.

The decree of the court below is, therefore, reversed, and this cause is remanded, with instructions to the court to ascertain, through a master appointed for that purpose, what proportion of the note was given for rent of land, and the amount due on such proportion, and to render judgment against Harris & Cotham according to this opinion, and for other proceedings. Practice..

HANGER v. LITTLE ROCK JUNCTION RAILWAY.

FERRIES: *License to keep: Damages to right.*

In a suit to recover damages to a ferry right, resulting as alleged, from the conduct of defendant in permitting persons and property to pass for hire over his bridge, and thus diverting traffic from the plaintiff's ferry, the complaint states no cause of action where it fails to show that the plaintiff was at the time of the alleged injury licensed to keep a ferry within limits embracing the site of the bridge. Without such license the plaintiff could not, under the statute [*Mansfield's Digest, sec. 3311*], lawfully collect toll and would not therefore be damaged by the diversion of business from his ferry. To be sufficient the complaint should also aver that the defendant collected toll without lawful authority, since the plaintiff could not recover for losses sustained from a competition that was legal.

APPEAL from *Pulaski* Circuit Court.

JOS. W. MARTIN, Judge.

John Fletcher, for appellants.

1. It was unnecessary to allege the annual payment of the tax and issuance of a license. The fact of a continuous exercise of the franchise for twenty years is sufficient. But if

true that the license had not been regularly paid for and issued, this would be no defense. *10 Ind., 315; Mansf. Dig., secs. 3223, 3226.* Twenty years use of a ferry franchise establishes presumption of its legality. *36 Ala., 230.* In Arkansas seven years is sufficient.

2. The ferry franchise is *exclusive. 20 Ark., 561; 23 id., 514; 26 id., 476; 36 id., 466.*

3. In *41 Ark., 209,* the court recognizes the preference right to establish a ferry before any license has been applied for or attempted to be established, as valuable and descendable by inheritance.

4. A ferry privilege is property, and "No property shall be taken, etc., etc., without just compensation." *Const. Ark., Art. 2, sec. 22; 45 Ark., 429; 4 Jones Law (N. C.), 277.*

J. M. Moore for appellee.

1. It was necessary, to keep the franchise alive, that plaintiffs, or their ancestor, should take out an annual license. *20 Ark., 564; 23 id., 515.*

2. There is no complaint of any interference with or obstruction of their franchise; they complain merely of a diversion of tolls, without showing a right in themselves to take tolls.

HEMINGWAY, J. The appellants brought this action against the appellee for damages to ferry rights. The appellee demurred to the complaint, the demurrer was sustained, the cause dismissed and this appeal taken.

Did the complaint allege facts that constitute a cause of action? It alleges, in substance, that the appellants are the owners of an ancient ferry franchise, entitling it to transport passengers and property for hire from either bank of the Arkansas river to the other, at points along the river between the Quapaw line on the east, and the west boundary line of the City of Little Rock. That they, and Matilda J. Hanger, from whom they inherited the franchise, had of right used, owned

and enjoyed the ferry, in transporting persons and property for hire, for more than twenty years next before the injury complained of. That the defendant is a railroad corporation, authorized to construct and operate a railway from a point in the City of Little Rock to a point on the opposite side of the river. That in January, 1885, it erected a bridge across the river, within the limits of their ferry right, upon which it constructed and opened a roadway for the crossing of persons and property. That against their will it had permitted persons and property to cross over the roadway of the bridge for hire when not transported in its cars, and thereby collected bills amounting to a large sum, which it had wholly converted. That it had thus diverted valuable traffic from their ferry. That this diversion of traffic had rendered the enjoyment and possession of their right, and the privilege itself valueless, whereas, they had previously received from it $5000 per annum.

They file with the complaint, as an exhibit, a transcript of the records of the Pulaski County Court, wherein it appears that on the 1st day of May, 1865, the said court granted to Peter Hanger, in right of his wife, Matilda J. Hanger, a license to keep a ferry within the limits described, for a term of twelve months.

It nowhere appears that a license was afterwards granted either to the appellants or their ancestors, authorizing either of them to keep the ferry. Ferry licenses are for a term of one year. *Mans. Dig., sec. 3319.*

No person can keep a ferry and collect tolls without a license. *Mans. Dig., sec. 3311.* This court in the case of *Organ v. Railway Co., 51 Ark., 235,* declared the law which is decisive of this cause. Judge BATTLE, delivering the opinion of the court, said: "Appellants further insist that they have been damaged by appellees running a transfer boat across the river, and attempt to show that it sometimes transported persons across the river for pay. But there is no evidence that

appellants or any of them ever had a license to keep a ferry. If they did not, they have 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."

FERRIES: License to keep: Damages to right.

It does not appear that the plaintiffs, or those from whom they claim, ever had a license after the bridge was constructed. The license to Peter Hanger, if it appears upon demurrer that he obtained one, expired in 1866; it may be that none was subsequently granted. *Bell v. Clegg, 25 Ark., 26.*

It follows that the complaint does not state facts authorizing a recovery for damages resulting from a diversion of business, because it does not show that the appellants were authorized to receive tolls. No damage to the franchise is alleged to have been occasioned by building the bridge, but all is claimed on account of the use of it as a toll-bridge.

It is not alleged that the defendant collected tolls without lawful authority; the appellants could not complain of losses sustained from lawful competition, and the complaint should have stated that its action was without authority.

It does not appear that they had any other riparian right in the land upon which the bridge rests, and therefore no cause of action is set out within the rule announced in the case of the *L. R. & F. S. Ry. Co. v. McGehee, 41 Ark., 202.*

The judgment is affirmed.

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WATKINS v. GREER.

1. CONTRACTS: *Construction: Parol evidence to explain writing.*

Where the provisions of a written contract are apparently conflicting, parol evidence is admissible to show the subject matter of the agreement, the circumstances surrounding the parties at the time it was made, and their subsequent conduct under it, as a means of correctly interpreting the language employed. In such case it is also admissible to prove changes or modifications in the phraseology of the contract made at the time it was being reduced to writing, to better express the intention of the parties. But attorneys who prepared the instrument cannot be permitted to give in evidence their construction of its language.

2. SAME: *Same.*

The defendant having purchased the plaintiffs' lands at a judicial sale, entered into a written contract with them by which he agreed to sell the lands and after paying out of the proceeds certain debts due to himself and others, to pay over any balance remaining to one of the plaintiffs. After stipulations to the effect that the plaintiffs should actively aid the defendant in effecting a sale and that he should not sell for less than a sum named without their consent, the contract contained the following clause which was inserted by the defendant for the avowed purpose of limiting the trust to one year: "And it is further agreed and understood * * * that the sale of said lands by the said Greer shall not be impeded by the said Watkins and wife, or either of them, but that the sale of said land shall be had within a reasonable time, not exceeding one year from the date hereof, except by mutual agreement of the parties." The parties failed to make a sale and at the end of twelve months the defendant procured a deed from the commissioner who sold the lands, and proceeded to treat them as his own, making thereon lasting and valuable improvements. The plaintiffs, with notice of his outlays, made no claim to the land, or effort to redeem it for nearly seven years. HELD: That although the agreement was not a gratuity on the part of the defendant, it created a trust limited to one year, and became inoperative at the expiration of that time.

APPEAL from *Jefferson* Circuit Court in Chancery.
JOHN A. WILLIAMS, Judge.

Watkins and wife filed their complaint against Greer, alleging that the instrument copied in the opinion created a mortgage, and praying for an account of rents and for redemption, The court below dismissed the complaint for want of equity, and the plaintiff appealed.

J. W. House, for appellant.

The instrument was a mortgage. The law regards the substance of things and not their forms or shadows. *104 Pa. St., 136; 94 Ind., 76; 15 Wisc., 666; 22 id., 465; 58 id., 434; 1 Murphy (N. C.), 116; 70 Ill., 416; 55 Pa. St., 311; 3 W. & S., 384; 41 Ill., 522; 1 Paige (N. Y.), Ch. 56.* It shows upon its face that it is a mortgage, intended to secure the payment of indebtedness mentioned therein. It has all the ingredients of a mortgage. Greer held the land in trust as a security for the payment of the debts mentioned. *24 Hun., 451; 60 Pa. St., 187; Walk. Chy., 110; 5 John. Chy. (Mich.), 435; 17 Beav., 1; 42 Pa. St., 518.* Once a mortgage, always a mortgage. *2 Root (N. C.), 279; 1 Jones on Mortg., sec. 242; 2 Cow. (N. Y.), 324; 2 Col., 89; 18 Peck., 540; 23 Ill., 648; 32 id., 475; 62 Mo., 202; 1 Wend, 433; 3 id., 208; 46 Pa. St., 331; 55 id., 311; 12 Wis., 499; 9 Wheat, 489; 68 N. Y., 499; 82 N. Y., 385; 32 Me., 141; 3 Jones Eq. (N. C.), 427; 27 Vt., 589; 41 Ill., 522; 23 Ark., 479.*

The first clause provides that Greer may sell the lands, and after paying the debts, the surplus is to be paid to Mrs. Watkins. This is a mortgage. *19 Vt., 9; 3 Barb. (N. Y.), 152; 1 Jones on Mortg., sec. 271 and note 5, and 248; 2 Washburn, 55, 56; 5 McLean, C. C., 281; 6 Dana (Ky.), 473; 30 Ind., 495; 3 Watts (Pa.), 188; 6 Pa. St., 390; 31 id., 295; ib., 138; 5 Mass., 109; 70 Ill., 416.*

On payment of the debts the land would have reverted to Mrs. Watkins without a conveyance. *2 Dev. Eq. (N. C.), 470; 18 Pick., 299; 4 Allen (Mass.), 417; 2 J. J. Marsh. (Ky.), 113; 4 Cal., 97; 18 Ill., 578; 3 Watts (Pa.), 118; 11 Mich., 538; 21 Minn., 520; 22 Mo., 79; 38 Mo., 349; 47 Mo., 543; 17 Sarg. & R. (Pa.), 70; 24 Tex., 17; 8 Gray (Mass.), 505; 5 Mass., 109; 22 Ind., 427; 34 Vt., 166; 18 Iowa, 576; 49 Iowa, 487; 49 Wisc., 697; 90 Ill., 245.*

Being a mortgage, an attempt to limit the period of redemption to one year was void. The equity of redemption cannot be thus limited. This clause meant simply that if a sale was

not had, or the debts paid within a year, Greer had the right to foreclose his lien in the courts, as under any other mortgage. *7 Johns. Ch., 39; 1 Saxton Ch. (N. J.), 534; 11 Minn., 22; 13 Wisc., 264; 6 Watts. (Pa.), 405; 2 Dev. Eq. (N. C.) 470; 3 Watts. (Pa.), 118; 1 Randolph (Va.), 258; 6 Tex., 294; 3 Sand. Ch., 492; 47 Am. Rep., 551; 7 Vesey, 273; 23 Ill., 648; Busb. Eq. (N. C.), 88; 37 Ill., 216; 6 Pa. St., 390; 7 Watts. (Pa.), 261; 21 Mo., 325; 65 N. C., 520; 16 Sarg. & R. (Pa.), 361; 4 W. Va., 4; 14 Wisc., 453; 44 Wisc., 408; 109 Mass., 130; 64 Pa. St., 319; 3 Watts & S. (Pa.), 384; 9 S. & R. (Pa.), 434; 5 Mich., 231; 18 Pick., 299; 4 Allen (Mass.), 417; 2 J. J. Marsh. (Ky.), 113; 4 Col., 97; 18 Ill., 578; 5 Miss., 317; 2 Cow., 324; 16 Ala., 472; 7 Watts (Pa.), 372; 4 Sneed (Tenn.), 415; 18 N. J. Eq., 358; 39 Me., 110; 5 Gray (Mass.), 505; 1 Allen (Mass.), 107; 26 Conn., 213; 42 Ill., 453; 22 Pick., 526; 13 Vt., 341; 22 Kans., 661; 59 Tex., 423; 3 Pick., 484; 55 Cal., 352; 42 Cal., 169; 1 Sand. Chy., 56; 7 Ark., 505; Pom. Eq. Jur., vol. 3, sec. 1195; 1 Jones' Mortg., 265; Tiedeman on Real Estate, secs. 304–5.*

The whole transaction was merged in this agreement, and its sole object was to secure Greer in the payment of the several demands mentioned. *29 Gratt., 35; 24 Cal., 385; 92 Ind., 49; 7 N. J. Eq., 27; 33 id., 143; 24 id., 397.*

If a mortgage or redeemable estate, parol testimony is inadmissible to contradict it. But if it is not a mortgage on its face, then parol testimony may be introduced to show the real intention of the parties. *37 Ill., 216; 6 Pa. St., 390; 6 Watts, 130; 31 Pa. St., 131; 22 Pa. St., 171; 5 Binney (Pa.), 499; 3 Pom. Eq. Jur., sec. 1195.*

The testimony clearly shows the instrument a security for a debt, and Watkins had a right to redeem until barred by the statute of limitation. *67 Penn. St., 96; 3 Watts & S. (Pa.), 384; 77 Am. Dec., 658; 64 Penn. St., 315.*

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

1. The testimony of the lawyers to show what the contract meant, there being no charge of any mistake or ambiguity, was clearly inadmissible for any purpose. *1 Pet., 1; 41 Ark., 499; 46 id., 174; 1 Jones Mortg., sec. 96.*

2. When there is reasonable doubt on the face of a writing, whether it be a mortgage or not, it is held a mortgage (*38 Ark., 213; 13 id., 115*), but one cannot take a plain instrument, throw doubt on it by parol evidence, and then say it must be held a mortgage. *1 Jones on Mortg., sec. 335; 40 Ark., 149; 19 Ark., 278; 31 id., 163; 23 id., 212.*

3. The following cases in our own Reports are decisive of this case: *3 Ark., 366; 5 id., 340; 38 id., 264; 34 id., 666.* See, also, *1 Russ. & M., 506; 2 Edw. Chy., 139; 8 Paige, 243.*

M. L. Bell and *Hemingway & Austin*, for appellee.

The whole matter was a mere gratuity on Greer's part, and simply meant as it reads, that if the place could be sold *in a year* for more than the amount of Watkins' indebtedness, the surplus should be paid to Watkins. It was not a mortgage and was not so intended by either party; nor did it create a trust. *34 Ark., 665*, and authorities cited by co-counsel, W. R. Coody.

W. R. Coody, also for appellee.

1. What this instrument is must be gathered from its language and stipulations as a whole, according to the intent of the parties as gathered from the entire instrument. *3 Ark., 225; 13 id., 125.* Parol evidence not admissible to alter, vary, change or explain a written instrument. *4 Ark., 179; Baker v. Turner, 30 Ark.; 13 id., 592; 16 id., 519; 20 id., 293; 21 id., 69; 15 id., 543.*

2. It cannot be contradicted by a pretended reformation. Courts only reform contracts when there is mutual mistake. They do not make new contracts. *26 Ark., 28; 1 Story Eq., secs. 155, 156; 2 Lead. Cas. Eq., part 1, pp. 981, 982, 983; 8 Rep., 175, 176, 177; Rector v. Collins, 45 Ark., 5; 1 Story Eq., 164, 165, 166.*

3. Parol evidence not admissible to establish a trust. *Mansf. Dig., sec. 3382; Perry on Trusts, sec. 75.*

4. It is not a mortgage, because it contains none of the elements of a mortgage—no mortgagor or mortgagee. *1 Jones Mortg., secs. 11 to 16; 18 Ark., 85, 170*—something conveyed, *37 Ark., 312; 1 Jones Mortg, sec. 136;* no debt to be secured. *Jones on Mortg, secs. 69, 70, 343 to 346.*

It is not a trust. *Perry, secs. 1, 2, 9, 799, 828, etc.; 41 Ark., 400; 15 id., 312; 19 id., 51; 21 id., 539.*

6. Mrs. Watkins was only entitled to the surplus in case of a sale within the year. This created no lien. *37 Ark., 516; 39 id., 385.* See, also, *113 U. S., 676; 34 Ark., 365.*

7. While in many of its provisions it resembles a conditional sale, with power to repurchase within a year, it is wanting in several of the necessary elements of such a sale; because, (first) Watkins had no interest in the land to convey; (second) there was no agreement to reconvey, nor could it revert to them under any circumstances. *Jones Mortg., secs. 267 to 276 and 331; Rose Dig., p. 540; 8 Paige, 243.*

8. The contract speaks for itself, that, if a sale could be made *within a year*, all over $18,000 was to be paid to Mrs. Watkins.

9. There was no consideration for the agreement—it was a mere gratuity. *1 Pars. Cont., pp. 429, 436, 450; 34 Ark., 303.* No mutuality. *4 Ark., 252; 24 id., 52; 42 id., 243; 38 id., 58 to 71.*

WILLIAMS, SP. J. The decision of this case involves the correct construction of the following agreement, executed February 27, 1878: "Whereas, at a commissioner's sale had and held at the City of Little Rock, by L. E. Barber, Commissioner, on the 27th day of February, A. D. 1878, under and by virtue of a decree of the Supreme Court of the State of Arkansas, in the case of *James K. Brodie et al. v. Thomas Watkins and wife,* Green B. Greer, of the Town of Searcy, in the County of White and said State of Arkansas, became the purchaser of

the real estate herein after described for the sum of $10,000, $500 of which sum was paid by him in cash, and the balance in a promissory note for nine thousand and five hundred dollars ($9500), payable one half thereof in nine months and the other half thereof in twelve months from the date thereof, to-wit, the 27th day of February, A. D. 1878, and which said promissory note was given by the said Greer with surety, approved by the said Commissioner. And whereas, Thomas Watkins and Margaret Watkins, his wife, of the said Town of Searcy, are indebted to George F. Baucum, of the City of Little Rock, in the sum of eight thousand six hundred and seventy-seven dollas and seventy-five cents ($8,677.75), with interest thereon at the rate of 10 per cent. per annum from the date thereof, and to the said Green B. Greer in the sum of six thousand five hundred dollars ($6500), with interest at the rate of 10 per cent. per annum from the date hereof, and also the sum of $1815, with 10 per cent. interest per annum thereon from the date hereof, being the amount of two notes and interest given by W. R. Coody to Greer & Baucum, and assigned by said Green B. Greer to the said George F. Baucum, but said sum is to be subject to the deduction of whatever sum may be found due and owing to the said Coody, as attorney in the suit of *James K. Brodie et al. v. Thomas Watkins and wife.*

"And, whereas, it is intended by the said Green B. Greer to sell the said real estate for the best advantage for the said Thomas Watkins and Margaret Watkins, his wife.

"Now, therefore, this agreement, made and entered into this 27th day of February, A. D., 1878, by and between the said Green B. Greer, party of the first part, and the said Thomas Watkins and Margaret E. Watkins, his wife, party of the second part, witnesseth, that for and in consideration of the sum of one dollar, to him in hand paid, and other good and valuable considerations to the said Green B. Greer, moving from the said Watkins and wife, the said Green B. Greer hereby agrees to and with the said Watkins and wife that he will not sell the

said real estate which is bounded and described as follows, situate, lying and being in the county of Jefferson, and State of Arkansas, and known as the Stone or Watkins plantation, to wit: Part, about twenty-eight acres of the southeast quarter of the northwest quarter of section twenty-two; part, about fifty-six acres of the south half of the northeast quarter of section twenty-two, and the southeast quarter of section twenty-two; part, about twenty-eight acres, of the southwest quarter of the northwest quarter of section twenty-three; the west half of the southwest quarter of section twenty-four; all of sections twenty-five and twenty-six; the north half of the northwest quarter of section twenty-seven; the east half of the northeast quarter, the southeast quarter, and the southeast quarter of the southwest quarter of section thirty-four; and all of section thirty-five; and the south half of section twenty three; all lying and being in township three south, range ten west, and containing in all three thousand acres of land, for less than the sum of eighteen thousand dollars, without the consent of the said Watkins and wife; and that, after paying out of the purchase money thereof, the said indebtedness to the said Baucum and the said Greer, and the said Coody, and any and all taxes now due, payable and unpaid thereon, or that may hereafter become due and payable thereon, and chargeable against said land, while he, the said Greer, shall own the same, and after the payment of any and all attorneys' fees that are properly chargeable against the said land in the said case of *James K. Brodie et al. v. Thomas Watkins* and wife, as a lien thereon, or upon any part thereof, and when the amount of such fees or any part thereof is disputed by the said Watkins and wife, that he, the said Greer, will only pay such a part thereof as shall be held by the judgment of the Supreme Court of the said State to be so chargeable upon the said land, in case the said Watkins and wife, or either of them, shall resort to the said court for a final determination of the amount of such fees that shall be chargeable against the said land; that then the balance of the pur-

chase money of the said land shall be paid by the said Greer, or his executors, administrators, or assigns, to the said Margaret E. Watkins, her executors, administrators or assigns, for her and their sole and separate use, free from control, debts or liabilities of her said husband, Thomas Watkins.

"And the said Green B. Greer hereby further agrees to and with the said Thomas Watkins and wife, that upon the payment of the said sum of money so due as aforesaid to the said Baucum, and the said Greer, and the said Coody, and all necessary expenses in renting or selling the said land, or that may otherwise become due and payable as hereinbefore set forth and *paid by the said Greer*, he will deliver to the said Watkins and wife, their executors, administrators or assigns, any and all of the evidence of such indebtedness that he may have or hold upon such payment. And the said Green B. Greer hereby further agrees to and with the said Thomas Watkins and wife that pending the sale of the said real estate for the payment of any and all of the indebtedness hereinbefore mentioned, the rents shall be payable to the said Greer, and not personally to either the said Thomas Watkins or the said Margaret E. Watkins, his wife; and the said Thomas Watkins and Margaret E., his wife, hereby agree to and with the said Greer that they will actively aid the said Greer in the sale of said land, and make every exertion to bring for it the best possible price. And it is further agreed and understood by and between the parties hereto, that the sale of the said lands by the said Greer shall not be impeded by the said Thomas Watkins and wife, or either of them, but that the sale of said land shall be had within a reasonable time, not exceeding one year from the date thereof, except by mutual agreement of the parties hereto. And it is further agreed by and between the parties hereto, that the decree in the Supreme Court of the said State, in the said case of *James K. Brodie et al. v. Thomas Watkins and wife*, shall be satisfied upon the record by the said Watkins and wife to the extent of the amount of the purchase money paid for

the said land as aforesaid by the said Greer, to wit, ten thousand dollars, and as of the 27th day of February, A. D. 1878."

For Watkins and wife, it is contended that this instrument is a mortgage, and that parol evidence may be admitted to explain and establish its character.

On the other side, the contention is: First—That Greer having executed the agreement after his purchase of the land, it was a mere gratuity, and did not bind him. Second—That on its face the writing is a mere declaration of trust, limited to one year, after which, if no sale was made, Greer was freed from its obligation, by its terms, without the aid of extrinsic proof.

1. CONTRACTS: Construction: Parol evidence to explain writing.

While it is true, as a general rule, that in equity parol testimony is admissible to prove that one holding a title apparently absolute, holds as a mortgagee, or as a trustee, yet when parties undertake to reduce the defeasance, or declaration of trust, to writing, we understand that the rule excluding parol evidence obtains, and in the absence of fraud, mistake, or a latent ambiguity, the writing must speak for itself. But this rule does not exclude parol testimony to show the subject matter of the contract, the circumstances which surrounded the parties at its making, and what changes or modifications of the writing were made, at the time it was being reduced to writing, to better express the intention of the parties. In this case parties have introduced parol testimony of their several attorneys, who assisted in their behalf in making the contract, to show not only these admissible facts, but have undertaken to construe the language of the writing. This cannot be permitted. When we take up the contract, we find this language in the last paragraph: "And it is further agreed, and understood, by and between the parties hereto, that *the sale* of the said land by the said Greer shall not be *impeded* by the said Watkins and wife, or either of them, but that *the sale* of said land shall be had within a reasonable time, not exceeding one year from the date hereof, except by mutual agreement of the

parties." Now, does this limitation reach back, and qualify the whole instrument, and limit its operation, or does "*the sale*" mean the private sale that Greer was to make under its stipulations? And does the limitation of one year only affect *that sale*, and bind Watkins for one year only not to impede it, and after that the parties are left to their legal rights? But, on the face of the writing, it is apparent that both parties wanted the place sold to pay and re-imburse Greer, provided it sold at not less than $18,000, supposed to be the aggregate amount due Greer. Why should Watkins impede, and why should this clause be inserted at the instance of Greer, merely for the purpose of restraining Watkins from doing that which nowhere in the writing appears to be his interest to do?

SAME: Same.

There is here an ambiguity which might well lead, and in this controversy *has* led, different minds to different conclusions in its construction. When we look at the parol testimony, it is proven by Watkins and his counsel, as well as by Greer and his attorneys, that Greer objected to the instrument, as originally drawn without the limitation, and took it, and submitted it to his attorney, who, after examining it, took it to Watkins and his attorneys, and insisted upon this clause (for the declared and avowed purpose of limiting the trust to one year), and after its execution Greer waited a year before making any substantial improvements. Watkins made one effort to make a sale, and failed; Greer failed to make a sale, and at the end of twelve months procured from the Commissioner of the Supreme Court a deed for the land, which was executed to Mrs. Greer, upon an assignment of the certificate of purchase by Greer. Mrs. Greer afterward reconveyed it to Greer. After getting the deed Greer, who had made some temporary repairs, and rented part of the land in 1878, proceeded to the place as his own, made expensive and lasting improvements, and made outlays on the place as a trustee would not have made, and perhaps would not have been warranted in making, upon the principle that a trustee cannot improve his

cestui que trust out of his estate; and for nearly seven years Watkins and his wife stood by, knowing, or having opportunity to know, that Greer was making these outlays; never claiming the land, never demanding an account of rents, and credit for the same, nor offering to pay Greer his debts and redeem. "Tell me what you have done under a deed, and I will tell you what that deed means," said Lord Sudgen in *Attorney-General v. Drummond*, cited by Chief Justice COCKRILL, with approval, in delivering the opinion of this court in *Gauss & Son v. Orr and Lindsay, 46 Ark., 130.*

Turning on the light of the parol testimony establishing the surrounding circumstances, and motives and actions of parties, it is manifest that Greer had this limiting clause inserted with a view to prevent a perpetual trust hanging over him, so that after the lapse of twelve months he could put lasting and valuable improvements upon the property, enhance its value for his own benefit, without being held liable to account for rents from year to year, and receive dribbling annual returns for his outlays on the place.

While we hold that the contract is not a gratuity on Greer's part, for, beside the considerations expressed in the writing, Greer was one of the assignees of the decree mentioned in this agreement; and though Baucum was the holder of the note, the assignment of the decree secured, yet Greer being liable on it as indorser to Baucum, placed him in the relation of a quasi creditor holding a pledge of Watkins, and, therefore, this relation and its duties would be sufficient consideration for the contract. Furthermore, Greer admits in his answer, and it is proven, that the agreement sued on herein was made pursuant to a parol promise of Greer, made before the sale, to buy in the land, and make the contract, which of itself was a sufficient moral consideration, yet, in construing the writing, about which minds may honestly differ, we must put ourselves in the place of the parties, and view their motives for, and intention in making it, and their subsequent conduct under it.

In this light it seems reasonably clear that the limitation of the trust covers the whole of the provisions of the contract, and thereby harmonizes apparently conflicting provisions, accounts for omissions in its stipulations which would otherwise be obscure, if not unreasonable.

Finding no error, the decree is affirmed.

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

WREN v. FOLLOWELL.

1. STATUTE OF LIMITATIONS: *Operation as to trusts: Attorney and client.*

Where land is sold under a decree foreclosing a vendor's lien, and the plaintiff's attorney becomes the purchaser and takes the deed to himself, he holds the land as the trustee of his client, and the statute of limitations will not run in his favor until there is a disclaimer of the trust.

2. SAME: *Same.*

Such disclaimer is not established by proof that several years after his purchase, the attorney having received a letter from the client, asking whether the latter could have possession of the land, replied that he (the attorney) had bought it and had a deed to it; that he had made valuable improvements, bought adjoining land, and had put a tenant on the property for the ensuing year, but that he was willing to either buy out his client or to sell to him.

APPEAL from *Fulton* Circuit Court in Chancery.

R. H. POWELL, Judge.

The father of the appellee was entitled to a vendor's lien on the land in controversy in this suit, for the amount of a promissory note executed by one Stinnett. The appellee delivered the note, which was for the sum of $450, to the appellant for collection. Acting as the attorney of appellee, the appellant brought suit on the note to foreclose the lien, and obtained a decree for the sale of the land. The sale was made in 1869, by a commissioner appointed for that purpose, and the appellant purchased the land for less than half the amount of the note, and took the conveyance to himself. This action was brought against him by the appellee, to recover the

land. It appears from the abstract filed by his counsel, that the appellant on the trial testified, in substance, as follows: He wrote to the appellee, informing him that the land would be sold, and suggesting that if appellee wished to buy it he should attend the sale or send his bid to the appellant. The appellee answered that he could not attend the sale, and if he were able to do so, that he could not buy the land, saying he "could not pay the rest of the children their part." After the sale the appellant wrote to the appellee, telling him "to come down and settle the matters and take title to the land," if he wanted it. The appellee replied that he could not go; that he could not take the land, and that appellant would have to keep it. The appellant wrote again, saying he was ready to pay the appellee all the money due on the land after taking out costs, attorney's fees and his commissions. But to this letter he received no answer. The agreement as to the compensation of the appellant for his services, was that he should receive ten per cent. commission if the note was collected without suit, and twenty-five per cent. if the collection was made by a suit. It also appears from the abstract that in November, 1873, the appellee wrote to the appellant, asking whether he (appellee) could have possession of the land. The appellant, on the 5th day of December, 1873, replied as follows * * *:

"You wanted to know if you could have possession of the place sold for debt placed in my hands for collection. I have bought the balance of the tract of land, amounting to 320 acres, which takes part of the farm. The farm on both tracts has gone down. I have spent some $300 repairing, and have a man on the place for next year. If you will come down next fall I will buy you out or sell. I bought the eighty acres that was sold for your debt and have a deed to it, also all the tract that belongs to Stinnett. Come down next fall, or I will come up. I may come in the summer."

This letter was relied upon as sufficient to put in motion the statute of limitations.

Sanders & Watkins and *J. L. Abernethy*, for appellants.

Demand for possession having been made and refused, the appellee is barred by limitation. *24 Ark., 371; id., 392, 395; 46 id., 32; 36 Ark., 383; 97 Mass., 198; Mansf. Dig., sec. 4474.*

STATUTE OF LIMITATIONS: Trusts.

PER CURIAM. The appellant held the land in controversy in trust for the appellee, and relies upon the statute of limitations as a defense to the appellee's action to recover possession; but as there is no fact set forth in the abstract from which we can infer a disclaimer of the trust, there is nothing to show that the statute was ever set in motion.

The judgment of recovery will be affirmed

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RAILWAY V. BARGER.

EVIDENCE: *Declarations of agent.*

In an action against a railway company, to recover damages for an injury to the plaintiff sustained by falling into a hole in the defendant's platform, a statement of the depot agent made at the time the injury was received, that the hole "ought to have been fixed," is not admissible to prove unreasonable delay, on the part of the company, in repairing the platform after the defect became known.

APPEAL from *Washington* Circuit Court.

J. M. PITTMAN, Judge.

This action was brought against the defendant company to recover damages for an injury sustained by the plaintiff in falling through a hole in the defendant's depot platform. The complaint alleged that the injury was received while the plaintiff was lawfully engaged in removing some freight from the depot, and that the defendant had negligently suffered the platform to become unsafe and had failed to repair it. The answer denied the negligence imputed to the defendant, denied that the plaintiff was injured in the manner stated

in the complaint, or otherwise, and alleged that any injury received by the plaintiff was the direct result of his own negligence.

The evidence showed that the plaintiff was assisting the owner of a box of freight, to carry it out of the defendant's freight room and across the platform for the purpose of placing it in a wagon which had been backed up to the platform to receive it. The box was heavy and had to be carried out of the door lengthwise. In carrying one end of it the plaintiff walked backwards, and in doing so, fell through a hole in the platform, the box falling on him. The depot agent, Frost, was also assisting to carry the box, and after the plaintiff had fallen and got up, Frost said "that hole ought to have been fixed." The hole through which the plaintiff fell was one foot wide and about one and a half or two feet long. It was near the outside of the platform, and was made by the breaking off of a board. One of the witnesses testified that it did not "look fresh like it had been done that day," and that the board "looked as if some heavy piece of machinery had broken it." The declaration of the agent, Frost, was given in evidence on the part of the plaintiff, and was objected to by the defendant. The objection was overruled and the court instructed the jury that if the station agent in charge of the depot and platform, knew of a defect in the platform, that was equivalent to knowledge by the defendant. The verdict and judgment were for the plaintiff, and the defendant appealed.

John O'Day, *E. D. Kenna* and *B. R. Davidson*, for appellant.

It was error to admit the declarations of the agent, Frost. They were incompetent. *Story on Ag., sec 136; 74 Mo., 553; 19 A. & E. Ry. cases, 408; 57 Ill., 265; 60 id., 534; 1 Gr. Ev., 14th Ed., sec. 113; 72 N. Y., 542; 68 N. C., 107; Thompson Car. Pass. pp. 557–8; 9 Kan., 631; 20 Wall., 528*, and many other cases. It was not sufficient to prove that there was a hole in the platform. The proof should have shown that the defendant knew, or should have known in the exercise of due

care, of its existence. *Ry. v. Fairbain, 48 Ark.; 30 A. & E. Ry. Cases, 166; ib., 163; 86 Pa. St., 74.*

L. Gregg, for appellee.

The negligence of the agent was the negligence of the company. It was the duty of the company to keep its platform in safe condition. *46 Ark., 195; 13 A. & E. R. R. Cases, 28; 49 Ark., 277.* The agent's admission was of the *res gestæ*, the very pith of the derilection. A corporation can act only by agents, and can be negligent in no other way than through its agents.

EVIDENCE: Declarations of agent.

PER CURIAM. The admission of the statement made by Frost was error. The only object of the testimony was to prove unreasonable delay upon the part of the company in repairing the platform, after the defect in it became known. The statement of the agent was incompetent for that purpose. *Story on Agency, sec. 136; R. R. v. Fillmore, 57 Ill., 265; R. R. v. Riddle, 60 Ill., 534; Flynn v. State, 43 Ark., 289.*

Reverse the judgment and remand the cause for a new trial.

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ROTAN V. SPRINGER.

JUDGMENT: *Without notice: Complaint to enjoin.*

A bill to enjoin a judgment on the ground that it was rendered without notice, states no cause of action where it fails to allege the existence of a defense to the claim on which such judgment was based. (*State v. Hill, 50 Ark, 458.*)

APPEAL from *Chicot* Circuit Court in Chancery.

C. D. WOOD, Judge.

This is a suit in equity, brought by the heirs-at-law of W. A. Rotan, deceased, against his administratrix and others, to enjoin a judgment at law obtained against the administratrix by the defendant, Springer, in the Chicot Circuit Court. A copy of the judgment is exhibited with the complaint, and it appears therefrom that it was rendered by default on the 15th

day of January, 1879, for a debt amounting to $293.57-100. The complaint alleges that it was recovered in an action commenced against Rotan and that he died while it was pending; that the record recites that the cause was revived in the name of the defendant Hamlett, as administratrix of Rotan's estate; but that in fact she had not at the date of such recital qualified as the personal representative of the deceased, and that no order was then, or afterwards, made and served upon her to show cause against the revivor of said action; that she did not consent to such revivor and was not served with notice of any application therefor; that she did not appear in said action; that judgment therein was rendered against her without notice and that she had no knowledge thereof until the year 1887; that Springer assigned said judgment to the defendant Ford, and the latter is proceeding to enforce its execution in the Probate Court. There is no allegation that any defense existed to the claim on which the judgment is based. The complaint was dismissed on demurrer and the plaintiffs appealed.

William B. Street, for appellants.

The judgment having been rendered against an administrator, without revivor, as required by the code, without notice actual or constructive, without consent and without appearance by defendant, was void. *Mansf. Dig., sec. 520; 43 Ark., 506; 97 U. S., 171; 4 Pet., 466; 11 How., 437; Mansf. Dig., secs. 5239, 5240, 5245; Maxwell Pl. and Pr., p. 692; Bates, Pl. p. 219, sec. 5151; 39 Ark., 104; 4 S. W. Rep., 914; 25 Ark., 60; Freeman, Judg., sec 125; 11 Ark., 131; 3 Otto, 274.*

D. H. Reynolds, for appellee.

PER CURIAM: The plaintiff offered no suggestion of a defense to the claim upon which the judgment which he sought to enjoin was based. His complaint, therefore, stated no cause of action (*State v. Hill, 50 Ark., 458*), and the court did not err in sustaining the demurrer. Affirm.

JUDGMENTS: Injunction.

WORTHEN V. QUINN.

TAXES: *When equity will enforce lien for.*

Where goods are sold by the person in whose name they are assessed for taxation, after the lien of the State for taxes attaches thereto, and his vendee sells them, the collector, if he cannot realize the taxes otherwise, may maintain a suit in equity against the vendee to charge the proceeds of such sale with the payment of the taxes.

APPEAL from *Pulaski* Chancery Court.

D. W. CARROLL, Chancellor.

This is an action brought by R. W. Worthen, as Collector, in the Pulaski Chancery Court, against Quinn & Gray, for the collection of nine hundred and eighty-four dollars and thirty-eight cents, taxes on a twenty-five thousand dollar stock of goods, listed by Quinn Bros., who, at the time of the assessment were doing business in the City of Little Rock. Subsequent to the assessment and after the State's lien for the taxes of the year 1884, had attached, but prior to the time for the payment of taxes, said stock of goods of Quinn Bros. was exposed to sale, by virtue of a writ of execution issued out of the United States Court for the Eastern District of Arkansas, and was purchased by Quinn & Gray, who disposed of the same in the ordinary course of trade. The complaint alleges that Quinn Bros. are insolvent and have no property in Pulaski County out of which said taxes or any part thereof can be made by distress or other legal process.

The court below dismissed the complaint on demurrer.

Section 5712 Mansfield's Digest provides that "taxes assessed upon real or personal property shall bind the same and be entitled to preference over all judgments, executions, incumbrances or liens, wheresoever created," and that all taxes assessed on property shall be a lien thereon * * * until the taxes are paid. *Sec. 5757, id.,* provides that the Collector may collect at any time all delinquent personal property tax

in his county * * * "by the sale of the property or otherwise."

W. L. Terry and *T. E. Gibbon* for appellant.

Taxes, though they be not "debts" in the strict sense, are *demands* owing by the citizen to the State; they are not only enforceable against other property than that upon which they are due, but are a lien upon the articles into whosesoever hands they may come. *Mans. Dig., sec. 5712.* If then, they are a lien, and there is no other mode to enforce it, the remedy is in equity, as in case of landlord's liens. *33 Ark., 395; 41 Ark., 152; Mansf. Dig., sec. 5757; 10 Lea, 209; 2 Yerg., 167; 3 Lea, 679; 2 Desty on Taxes, 707.*

Caruth & Erb for appellees.

The lien on personal property is purely statutory, and the method of collection is prescribed. *Mansf. Dig., secs. 5712, 5757, 5746, 2712.*

A tax is not a debt, and no personal *action* against the vendee of the property upon which the taxes are due can be maintained. *20 Cal., 350; 23 N. W. Rep., 527; Cooley on Taxation, p. 16; 26 Vt., 486; 2 Dutch., 398; Black on Tax Titles, sec. 45.*

Under the decision in *46 Ark., 73*, the Collector could have seized the property wherever found and sold it to satisfy the taxes, but in this case none of it could be found. See, also, *ib 76* and *60 Ill., 179.*

PER CURIAM: When a Collector has exhausted his remedy by warrant for the distraint of taxes due on personal property, he may resort to his remedy by suit to collect them. *Mansf. Dig., sec. 5757; Rapley v. Murray, 30 Ark.; State v Hirsch, 16 Lea, 40.* TAXES: Enforcing lien for.

If goods are sold by the person charged with the taxes after the lien attached, they are liable to seizure in the hands of the vendee for the satisfaction of the lien (*Bridwell v. Worthen, 46 Ark., 73*), and if he sells them and the Collector

cannot realize the taxes otherwise, he may maintain a suit in equity against the vendee to charge the proceeds of such sale with the payment of the taxes. *Dickinson v. Harris, 48 Ark., 355; Anderson v. Bowles, 44 ib., 110; Mitchell v. Badgett, 33 ib., 387.*

The judgment of the Chancery Court will be reversed and the cause remanded, with instructions to overrule the demurrer to the complaint.

FORT SMITH v. YORK.

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MUNICIPAL CORPORATIONS: *Failure to repair streets: Liability, etc.*

Under the statute [*Mansf. Dig., sec. 737*] the duty of a municipal corporation to repair a street is no greater than its duty to put the street in good condition originally. Both are duties which the corporation owes to the public, but it is not liable to an individual for an injury resulting from a failure to perform either. [*Arkadelphia v. Windham, 49 Ark., 139, approved.*]

APPEAL from *Sebastian* Circuit Court, Greenwood District

JOHN S. LITTLE, Judge.

C. M. Cooke, for appellant.

In the absence of a statute, municipal corporations are not liable for failure to repair defects in streets and sidewalks. *21 Mich., 118; 122 Mass., 344; 26 Am. Rep., 279; 6 Am. & Eng. Corp. Cases, 54, 568; 45 Cal., 36; 32 N. J., 394; 6 Nev., 90; 102 Mass., 489; 49 Ark., 139, and cases cited.*

Reviews the decisions, English and American, and contends that *Arkadelphia v. Windham, 49 Ark., 139*, is sustained by reason and the weight of authority, citing numerous authorities.

E. E. Bryant and *Sanders & Watkins*, for appellees.

1. This case is distinguishable from *49 Ark., 139.*

2. If not, the doctrine announced therein is erroneous, and it should be overruled. *47 Ark., 359.*

Twenty-four State courts, the United States courts, the English authorities, and *all* text writers, affirm the liability of municipal corporations for non-feasance, without a statute expressly giving the remedy. On the contrary, only five States deny the liability, citing the authorities: *91 U. S., 540; 99 U. S., 660; 4 Wall, 194; 14 Fed. Rep., 567; 7 A. & E. Corp. Cases, 52; 72 Ala., 411; 4 A & E. Corp. Cases, 568; 3 Am. St. Rep., 594; 19 N. W. Rep., 414; 5 Houst. (Del.), 531; 37 Conn., 475; 19 Flor., 106; 76 Ga., 585; 105 Ill., 554; 77 Ind., 29; 32 Iowa, 324; 2 Pac. Rep., 685; 11 Bush., 550; 20 Md., 468; 30 La. An., 220; 14 Gray, 543; 21 Minn., 65; 54 Miss., 391; 89 Mo., 208; 15 A. & E. Corp. Cas., 222; 108 N. Y., 301; 4 Am. St. Rep., 453; 55 N. H., 130; 77 N. C., 229; 41 Oh. St., 149; 9 N. E. Rep., 226; 77 Penn. St., 313; 9 Humph. (Tenn.), 757; 62 Tex., 162; 9 S. W. Rep., 884; 3 Utah, 63; 31 Gratt., 271; 2 S. E. Rep., 727; 19 W. Va., 324; 41 Wisc., 647; 5 Bing., 91; Cowp., 86; 4 Best & S., 361; 5 id., 743; 13 Iowa, 183; 2 Thomps. Neg., pp. 753, 735, note 11; Cooley on Torts, 625; Cooley Const. Lim., 248; 1 Sh. & Redf. Neg., 288–9, 268, n. 2; 2 Dillon Mun. Corp. (3d ed.), secs. 961, 965, 966, 967, 980, 983, 996, 997, 998, 999, 1014, 1017, 1018, 1022, 1023; Morrill City Neg., 72, 61, 34; 63 Am. Dec., 357, and note; Wharton Neg., 956, 959; Bishop Non. Cont. Law, secs 748, 750, 755, 756, 757 and note 4,* and many others.

HEMINGWAY, J. This is an action by the appellees, as next of kin of N. H. York, to recover of the appellant, damages for an injury to him, resulting in his death.

The appellant had constructed a culvert in one of its streets; after its construction a hole was made in its covering, into which the deceased stepped, thereby receiving the injury. It is conceded that the culvert was constructed with care and skill, but claimed that the appellant was negligent in not repairing it.

The appellant contends that the facts alleged constitute no cause of action against it, and relies upon the decision of this

court in the case of *Arkadelphia v. Windham, 49 Ark., 139,* as conclusive of its contention.

The contention of the appellee is: First: That the facts of this case do not bring it within the rule announced in that decision. Second: That if this case comes within the rule controlling the case referred to, its holdings were erroneous, and it should be reconsidered and overruled. In the consideration of the questions presented, the court has been greatly aided by the labors of counsel upon either side, which we cheerfully commend for thoroughness of research, and clearness and accuracy in the analysis of adjudged cases.

In attempting to distinguish the facts of this case from those considered in the case referred to, it is contended that, as the injury complained of in this case resulted from a failure to repair a street fallen out of repair, while the injury complained of in that case was occasioned by a failure to put a street in good condition, the cases should be governed by different rules. This distinction is not sustained by the authorities upon which the court relied in that case, but is opposed to their reasoning.

MUNICIPAL CORPORATIONS: Failure to repair streets: Liability for.

That it is a duty owing by municipal corporations to the public, to make good streets and to repair defects in them as they occur, is plain. *Mans. Dig., sec. 737.* But an inspection of the statute discloses that the measure of the duty to repair a street fallen out of repair, is not greater than, but the same as the duty to put it in good condition originally. We have carefully examined the cases relied upon to maintain the disdinction. Most of them, we think, fail to do it; one was subsequently overruled by the learned Judge who delivered it, and another, in its reasoning antagonizes principles sustained by undoubted authority and approved by this court.

We cannot distinguish the cases.

The question then involved, is one upon which the earlier authorities agree in sustaining the views heretofore taken by this court. If later authorities sustain the contrary view, they

have done no more than effect a division, and it cannot be claimed safely that the weight, as respects numbers or learning, is against the views first taken. The former decision of this court was made after a careful and exhaustive examination of adjudged cases. It would be unwise to reconsider the conclusion there reached, unless we were clearly satisfied that it was wrong in principle and mischievous in its operation. We do not reach that conclusion.

The judgment is reversed and the cause remanded for further proceeding according to law.

CRESWELL v. MATTHEWS.

PROBATE COURT: *Judgment against guardian: Jurisdiction: Certiorari.*

A judgment of the Probate Court, rendered against a guardian in a proceeding to recover the value of goods furnished to his ward, is void for the want of jurisdiction over the subject of the action, and may be quashed on *certiorari.*

APPEAL from *Izard* Circuit Court.

R. H. POWELL, Judge.

J. L. Abernethy and *Sanders & Watkins*, for appellants.

The Probate Court had no jurisdiction of the subject matter, or of the minors; there was no service upon either the guardian or the infants, and no defense made. The judgment was void, and should have been quashed upon *certiorari. Mansf. Dig., secs. 4957, 5042, 4983; 42 Ark., 222; id., 227; 40 id., 57.*

Robert Neill, for appellees.

No summons was necessary, the guardian waiving notice; and no service on minors is required by law. The guardian is their representative. *Mansf. Dig., secs. 3485, 3489.* See, also, *sec. 3501.*

The Probate Court had jurisdiction. *19 Ark., 499; 44 Ark., 516.* The remedy was by appeal.

HUGHES, J. William Wood died in Izard County in 1878, leaving him surviving, Sarah Wood his widow, and seven minor children, some of whom intermarried with some of the plaintiffs below—appellants here. The appellee, T. J. Mathews, having intermarried with Mollie Wood, one of said minors, became the probate guardian of the others. Sarah Wood, the mother of these children, died intestate in January, 1880, and there was administration upon her estate.

While a widow, in 1879, Mrs. Sarah Wood bought merchandise, goods and wares of the firm of R. C. Mathews & Son, amounting to $169.69. On the 11th day of November, 1880, Mathews & Son made affidavit to the correctness and justice of the account, and on the 18th day of November, 1880, the same was indorsed, "examined and approved this the 18th day of November, 1880, notice waived," and signed,

"T. J. MATHEWS, Guardian Wm. Wood's heirs."

This account was thereafter presented to the Probate Court of Izard County, and a judgment for the amount thereof was rendered by said court against T. J. Mathews, as guardian of the minor heirs of William Wood, deceased, in which judgment it is recited that the court found that Mrs. Sarah Wood was the mother and natural guardian of the heirs, and that the goods were purchased by her for the benefit of said heirs. It does not appear that this judgment was ever paid by, or that credit for the same was ever allowed the guardian in any settlement of his in the Probate Court. In February, 1886, appellants obtained a writ of *certiorari* from the Judge of the Third Judicial District, to have the proceedings referred to in the Probate Court certified up to the March term of the Izard Circuit Court, and filed their petition, charging that said judgment was void for the want of jurisdiction of the subject matter, and of the minor heirs who were not served with process, and praying that the judgment be quashed.

Appellees answered and demurred to the petition, on the ground that it did not state facts sufficient to constitute a

cause of action. The demurrer to the petition was sustained by the Circuit Court. Appellants excepted and appealed.

The mode of revising a judgment of the Probate Court is usually by appeal, but when the Probate Court exceeds its jurisdiction, the judgment may be examined into and quashed upon *certiorari.*

PROBATE COURT: Judgment against guardian.

It appears to this court too clear for argument, that the Probate Court had no jurisdiction to entertain an action, suit or proceeding of this kind. We are of opinion that the proceedings in the Probate Court, in allowing said claims were *coram non judice* and void, and that the said judgment of said court ought to be quashed and held for naught. A guardian cannot be sued in the Probate Court. It is the duty of the Probate Court, from time to time, to make the necessary appropriations of money, or personal estate, for the maintenance and education of minors, and when these are insufficient, it may, upon application, order a sale of the minor's real estate. *Secs. 3501, 3502, Mansf. Digest.*

A guardian is not responsible, either personally or in his fiduciary capacity, for necessaries furnished his ward without his consent, express or implied. *Overton v. Beavers, 19 Ark., 623.* In such case the infant may be, and if so, an action lies against the infant in the proper tribunal, and he may defend by his guardian, and if a judgment is obtained, it should be against the infant, and not the guardian. *Id.*

The judgment is reversed, with direction to the court below to overrule the demurrer to appellant's petition.

SHINN V. COTTON.

FERRIES: *Penalty for running without license.*

The penalty imposed by Mansfield's Digest, Sec. 3335, for keeping a ferry and charging therefor any money or other valuable thing, without obtaining a license, is not recoverable against one who runs a free skiff as an inducement to persons to trade at his store, when it appears that the persons carried did not agree to buy anything from the defendant, and that he made no charge, in money or otherwise, for ferriage.

APPEAL from *Johnson* Circuit Court.

G. S. CUNNINGHAM, Judge.

Mansfield's Digest, Sec. 3328 provides that the County Court shall not permit any ferry to be established within one mile above or below any ferry previously established, except at or near cities and towns where the public convenience may require it. * * *

Section 3335 of the same digest is as follows:

"If any person shall keep any ferry over any navigable stream, for which he shall charge any person any money or any other valuable thing, without complying with the provisions of law in relation to obtaining license, he shall forfeit and pay to every other person having a licensed ferry on the same stream or lake, in the same county, five dollars for every person so ferried, and the same sum for every wagon or other article so transported, which may be the subject of a separate charge, to be sued for and recovered by civil action, founded on this statute, with costs of prosecution."

G. W. Shinn, for appellant.

One who runs a free ferry within one mile of a licensed ferry, without obtaining license or permission of the licensed ferryman, and said free ferry is run for the purpose of getting increased trade and custom at the store of the owner of the free ferry, thereby damaging the licensed ferry by taking away custom and tolls, is liable under Sec. 3335 of Mansfield's Digest. *1 Johns. Chy., 611; 9 Johns.* (*N. Y.*), *507; 1 Haywood*

(N. C.), 457; 20 Ark., 561; 2 Kans., 198; 3 Murph. (N. C.), 57; 1 Nott & McC. (S. C. Const. Ct.), 387; 2 Steev. (Ala.), 211; 12 N. E. Rep., 631.

Suit for the penalty is the proper remedy. *5 Johns., 175; 10 id., 388; 44 Ark., 184.*

FERRIES: Running without license.

PER CURIAM. This is a suit for a statutory penalty under Sec. 3335 Mansfield's Digest. The proof showed the running of a free skiff within a mile of plaintiff's licensed ferry, by the defendants, as an inducement to persons to trade at their store. The agreed statement of facts is to the effect that the persons so carried did not agree to buy anything of defendants, and that the defendants made no charge, in money or other valuable thing, for ferriage.

Plaintiff's right to damages for an injury done him, had he sought such a remedy, would have been clear under the authorities cited by him; but the statutory penalty is not recoverable against one who runs a free ferry. The agreed statement of facts excludes a recovery.

Affirmed.

BIRDSONG V. TUTTLE.

1. EXEMPTION: *Of personal property: Domicile: Residence.*

One who has a domicile in Arkansas may claim his exemption of personal property, from sale under process, as provided for in Art. 9, Sec. 1 of the Constitution, although at the time of asserting such claim, he is temporarily residing in another State.

2. SAME: *Garnishment, etc., of wages.*

The act of November 27, 1875 [Mansf. Dig., Sec. 3422] providing, with certain limitations as to time and amount, for the exemption of the wages of laborers and mechanics, from seizure by garnishment or other legal process, is constitutional.

APPEAL from *Miller* Circuit Court.

C. E. MITCHEL, Judge.

In this action, which was begun in a justice's court upon an account for house rent, the plaintiff obtained an order of attachment on the ground that the defendant was a non-resident of this State. The St. L., I. M. & S. Ry. was summoned as garnishee, and answered that at the time the writ of garnishment was served, it was indebted to the defendant in the sum of $78.05. On appeal to the Circuit Court, the plaintiff recovered a judgment for his debt. But the court found that the defendant was a resident of this State, and that the indebtedness of the garnishee was for the amount of his current wages as conductor on the garnishee's road in this State, for the months of April and May, 1887, and that he was entitled to claim the same as exempt from the garnishment. Judgment was therefore given sustaining his claim to such exemption, and the plaintiff appealed.

The evidence was to the effect that the house, for the rent of which the plaintiff sued, was situated in Bowie County, Texas, and that the defendant was occupying it with his family when the action was commenced, and had been renting it for over a year. That defendant claimed to be a citizen of Arkansas, and that he had been for seventeen years; that he had always voted in Arkansas; that he had never exercised any right of citizenship in Texas, but had been living there for several years in the Town of Texarkana, because he could not rent a house on the "Arkansas side" of that town. Sec. 1, Art. 9 of the Constitution, provides that "the personal property of any resident of this State," etc., * * * not exceeding in value a specified sum, "shall be exempt from seizure on attachment, or sale on execution." * * *

Sec. 3422 Mansfield's Digest, is as follows:

"The time wages of all laborers and mechanics, not exceeding their wages for sixty days, shall hereafter be exempt from seizure by garnishment, or other legal process. *Provided*, That the defendant in any case shall file with the court from which such process shall issue, a sworn statement that said

sixty days wages, claimed to be exempt, is less than the amount exempt to him under the Constitution of the State, and that he does not own sufficient other personal property, which, together with the said sixty days' wages, would exceed in amount the limits of said constitutional exemption." Act Nov. 27, 1875.

The appellant *pro se.*

If appellee with his family resided in Texas, he was a non-resident of Arkansas, although he claimed his domicile in this State. *43 Ark., 547; 63 Iowa, 104; Drake on Att., sec. 65.*

The Legislature could not extend the exemption laws to non-residents. *11 S. C., 333; 32 A. M. Rep., 476; Cooley Con. Lim., pp. 78–94; 24 Ark., 161; 1 Wade Att., sec. 215.*

Scott & Jones, for appellee.

PER CURIAM. A person temporarily residing in another State, who has a domicile in this State, may claim his exemption of personal property from sale under process, under Sec. 1, Art. 9, of the Constitution of 1874.

EXEMPTION: Domicile: Garnishment.

The provision is remedial and should be liberally construed. *St. L., I. M. & S. Ry. Co. v. Hart, 38 Ark., 112.* The word resident should be accepted in its broader sense.

The act of November 27, 1875, gives no right not granted by this clause, and is constitutional. *Winter & Co. v. Simpson et al., 42 Ark., 410.*

The judgment is affirmed.

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RAILWAY V. SHINN.

1. CONTRACTS: *Construction of written instrument.*

Where the language of a written contract is capable of more than one interpretation the court will look to the subject matter of the agreement, the circumstances surrounding the parties at the time it was made, and their sabsequent acts under it, for the purpose of giving to their written language the meaning they intended it should have.

2. SAME: *Same.*

The defendant company, owning and operating a railway between the town of R. and a point on the Arkansas River opposite the town of D., ran a line of wagons from the terminus of its track for the transportation of freights across the river to its warehouse at D., and sold passenger tickets and signed bills of lading for freight to and from that place. While thus engaged the company entered into a written contract with the plaintiff, by which the latter agreed "to ferry all passengers, freight, baggage, mail * * * and express matter * * " presented for ferriage by the defendant, together with such conveyances as might be necessary to transfer the same across the river; and in consideration of such ferriage the company agreed to pay the plaintiff "one-fifth of the actual gross earnings of the railway * * * on all passengers, freight, mail and express matter * * * carried across the river." Under this agreement the defendant transported all freights, mail and express matter across the ferry at its own cost, and accounted to the plaintiff for one-fifth of the gross amount thus earned. But it let the contract for hauling passengers between the terminus of the track and D. to a transfer company, the vehicles of which were ferried by the plaintiff without charge, under the impression that they were part of the defendant's line. The fare on the railway proper between D. and R. was fifty cents, to which was added twenty-five cents for a hack ticket, making the entire fare between the two towns seventy-five cents. The defendant sold the hack tickets, and out of the proceeds paid the transfer company twenty cents for their services, and retained five cents as commission and ferriage. It accounted to the plaintiff for ten cents on each passenger, but refused to account for more of the amount received for hack fare than one-fifth of the five cents retained on the sale of each ticket. HELD: That the term "gross earnings of the railway," as used in the contract, included the whole amount earned by the transfer company.

APPEAL from *Johnson* Circuit Court.

J. E. CRAVENS, Special Judge.

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

As to the meaning of "earnings," see *Webster and Worcester Dicts.* The omnibus fare was not an earning within this definition; nothing of profit, or reward, or wages was added to the the railroad receipts, except the five cents commissions. See *99 U. S., 402.* Gross earnings cannot include the profits made by a separate and distinct company, in which the railway did not share.

G. W. Shinn, for appellee.

Under the contract appellee is entitled to one-fifth of the gross earnings. The railway charges seventy-five cents for a ticket from Russellville to Dardanelle. Instead of running the transfer themselves, they farm it out and pay twenty cents for every passenger transferred; they receive twenty-five cents, of which appellee is certainly entitled to one fifth. The twenty-five cents is part of the "gross earnings" of the railway.

COCKRILL, C. J. The only question involved in this case is the true construction of the terms of a written contract. The record shows substantially the following state of facts:

The appellant owns a short line of railway running between Russellville to a point on the Arkansas river opposite the Town of Dardanelle. Shinn, the appellee, is proprietor of a steam ferry between Dardanelle and a point near the terminus of the railroad track. The company is known as the Dardanelle and Russellville Railway Company, and sells tickets to passengers and issues bills of lading for freight from the Town of Dardanelle to Russellville and from Russellville to Dardanelle. It maintains a passenger ticket office, and a warehouse for the receipt of freights in the latter town. To facilitate the transaction of its freight and passenger business, it entered into a written agreement with Shinn, by the terms of which the latter agreed (to quote from the contract) "to ferry all passengers, freight, baggage, mail, express matter, live-stock and other kinds of freight, presented for ferriage by the party of the second part (the company) in the course of transportation by it, together with such conveyances as may be necessary to convey and transfer the same with dispatch and safety across the Arkansas river. * * * * For and in consideration of which ferriage, and the services in regard thereto, the party of the second part hereby agrees to pay the party of the first part (Shinn) one-fifth of the actual gross earnings of the railway, the party of the second part, on all passengers, freight, mail, express or other matter of every kind and nature whatsoever, carried across the said river either way."

Under the agreement the company transported its freights from the terminus of its track, across the ferry to its destination in Dardanelle and from Dardanelle to the railway at its own cost, and accounted to Shinn for one-fifth of the gross amounts earned thereby, and for the same proportion of the gross receipts for mail and express matter. It let the contract to haul its passengers to a transfer company; which ostensibly charged twenty-five cents for transporting each passenger to or from the terminus of the track and points in the Town of Dardanelle. The passenger vehicles were carried over the ferry without charge by Shinn under the impression that they were acting for the railway company, as a continuation of its line. The railway company sold the hack tickets and out of the proceeds paid the transfer company twenty cents for their services and retained five cents as a commission for selling such tickets and as pay for the transfer company's ferriage for their hacks. The fare on the railway proper, between Dardanelle and Russellville, was fifty cents, which sum added to the hack fare made seventy-five cents for a complete ride between the two towns. Passengers were not required to purchase the hack tickets, and the ralway fare entitled them to free ferriage without transportation, from the terminus of the track to the ferry. The railway company accounted to Shinn for one-fifth of the amount collected by them as railway fare, that is, ten cents on each passenger and one-fifth of the five cents retained by them on the sale of each hack ticket.

Shinn contended that he was entitled to five cents for each hack ticket sold, as being a part of the gross earnings contemplated by the contract. The railway company insisted that the transfer company was not a part of its system, and what it earned was a matter of no concern to Shinn. The latter instituted this suit to recover the difference between the amount he received and what he claimed. The cause was tried without a jury before the Circuit Judge, who heard testimony establishing the facts above detailed, and found therefrom that Shinn

was entitled to recover. The only ground assigned for a new trial is, that the finding is not sustained by the facts.

1. CONTRACTS: Construction of written instrument.

The duty of the Judge was to ascertain what was meant by the parties by the use of the terms "gross earning of the railway." To do that it was necessary that he should put himself as nearly as possible in the position of the parties at the time of making the contract, and to inform himself of everything which could legally elucidate the question of their intention; for the foremost rule of interpretation is to give to language employed by the parties to a contract the meaning they intended, if it is capable of more than one interpretation. Could the Circuit Judge legally reach the conclusion that the terms "gross earning of the railway," included the earnings of the transfer company?

2. SAME: Same.

The railway company was actually engaged in a transportation business other than that carried on by the railway proper; that is to say, it ran a line of wagons from the termination of its track to the Town of Dardanelle, in connection with and as an appendage to its railway business, in order to reach the destination its name indicated, and to fulfill the contracts for transportations, which it was in the habit of entering into after as well as before its stipulation with Shinn. It may not be strictly within the corporate powers of the railway to carry on a transportation business between its terminus and Dardanelle, but if such a business is operated by it, and a charge is made over the line as for one indivisible trip, what is received by the company as compensation therefor would be earnings of the railway company, for that is the style under which the concern is operated. An individual who contracted with the company about its earnings would be justified in that construction.

The earnings of a railway, say the Supreme Court of the United States, in the case of the *Union Pacific Railway v. United States, 99 U. S., 419*, "must be regarded as embracing all the earnings and income derived by the company from the railway

proper, and all the appendages and appurtenances thereof, including its ferry and bridge * * *, its cars and all its property and apparatus legitimately connected with its railroad."

That was the view entertained by the parties to the contract in dispute, as is shown by their division of the gross earnings for freight, etc., carried by the company. But by the terms of the contract freight and passengers are put on exactly the same footing. It will not do, therefore, for the company to say that Shinn is entitled to one-fifth of the gross earnings received for freight, but shall not participate in like manner in the gross earnings from passengers, unless they can show some reason other than the terms of the contract for the distinction. We do not understand that that is the position of the officers of the company who negotiated the contract with Shinn. They seem to assume that, because they have farmed out the privilege of running vehicles to transport passengers from the terminus of the road to the river, and thence into Dardanelle, and thus shifted the burden of that part of the trip to other shoulders—they may share with Shinn the net profit that is received by them on such transportation; and instead of paying him one-fifth of the gross sum received for such transportation, pay him one-fifth of the net earnings. But the non-ownership of the transportation company does not tend to alter the case so long as the transportation privilege is practically controlled or managed by the railway as part of its system. What is received from the passengers under the circumstances, is as much a part of the gross earnings of the company as what is received for freight transported over its railway and wagon line. The latter the company concedes, as we have seen, is covered by the contract. There is no proof in the record to indicate that the state of facts existing at the time the contract was made, would justify any distinction between the gross earnings from the freight and passengers. Shinn's testimony is to the effect that in carrying the passenger vehicles over his ferry without charge, he supposed they formed a continuation of

the railway line of business; the contract contemplates that such vehicles may be used by the company for that purpose, and there is nothing except the company's subsequent refusal to pay that tends to show that either party contemplated that such a distinction should exist.

We think the Circuit Judge was warranted in concluding that the gross amount earned in the carriage of passengers between Russellville and Dardanelle, was contemplated in the use of the terms adopted by the parties.

We do not hold that the railway company is under obligation to Shinn to run a transfer business in connection with its railway, or that it may not run such a business south of the ferry into the Town of Dardanelle without allowing him to participate in the receipts. Those questions are not before us.

Affirmed.

HOLMES v. MORGAN.

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1. LIQUORS: *Appeal from order prohibiting sale of.*

An order of the County Court prohibiting the sale of liquors under the three-mile law, is not an allowance against the county within the meaning of Sec. 51, Art. 7 of the Constitution, which provides that in all cases of allowance against a county, an appeal shall lie to the Circuit Court "at the instance * * * * of any citizen or resident and tax-payer" of the county.

2. SAME: *Same.*

An appeal from an order of the County Court, prohibiting the sale of liquors under the three-mile law, cannot be taken by one who did not become, or make any effort to become, a party to the proceeding in which the order was made.

APPEAL from *Desha* Circuit Court.

JOHN A. WILLIAMS, Judge.

The appellants filed their petition in the Desha County Court, making the statutory allegation as to age and place of residence, and praying for an order prohibiting the sale of

liquor within three miles of Bethlehem Church, in said county.

The petition was filed January 3, 1887, and on the same day an order was made, in accordance with the prayer of the petition. Four months afterwards, to-wit.: on April 30th, 1887, the appellee's intestate, B. F. Morgan, as a "citizen and taxpayer" filed with the Clerk, in vacation, an affidavit for an appeal from this order, and the appeal was granted.

At the next July term of the Circuit Court, the petition came on for hearing "in that court, and the Circuit Court found from the evidence that the petition did not contain a majority of the adult inhabitants, and therefore dismissed the petition, adjudged the cost against the petitioner and awarded execution."

Sec. 51, Art. 7 of the Constitution, is as follows:

That in all cases of allowances made for or against counties, cities or towns, an appeal shall lie to the Circuit Court of the county, at the instance of the party aggrieved, or on the intervention of any citizen or resident and tax-payer of such county, city or town, on the same terms and conditions on which appeals may be granted to the Circuit Court in other cases; and the matter pertaining to any such allowance shall be tried in the Circuit Court *de novo*. In case an appeal be taken by any citizen, he shall give a bond, payable to the proper county, conditioned to prosecute the appeal and save the county from costs on account of the same being taken.

W. S. McCain, for appellants.

Morgan never made himself party to the proceedings. He was a stranger and could not appeal. *30 Ark., 578; 47 id., 411.* The judgment was not an *allowance* against the county. *Const., Art. 7, sec. 51.* The Circuit Court had therefore no jurisdiction on appeal, and its judgment for costs was void. *6 Atl. Rep., 910; Mansf. Dig., sec. 1042.*

No judgment for costs can be rendered in an *ex parte* proceeding. *Bouvier, "Costs"; 12 Ark., 60.*

PER CURIAM. The judgment of the County Court was not an allowance against Desha County within the meaning of Section 51, Article 7, of the Constitution.

LIQUORS: Order prohibiting sale of: Appeal.

We are not called to decide whether B. F. Morgan might or might not have become a party to the proceeding in the County Court. It is sufficient to say that he made no effort to avail himself of the right, if it existed.

Not being a party to the proceeding, he could not appeal. *Austin v. Crawford Co., 30 Ark., 578.*

Reverse and remand with instructions to dismiss the appeal.

BOGAN V. CLEVELAND.

HOMESTEAD: *Conveyance of not fraudulent.*

The homestead of a debtor not being subject to the lien of a judgment, or to sale under execution, his conveyance of it, although executed with a bad motive, deprives his creditors of no right, and is therefore not fraudulent.

APPEAL from *Washington* Circuit Court in Chancery.

J. M. PITTMAN, Judge.

The conveyance which this suit seeks to avoid was executed in 1884. The Constitution of 1874, Article 9, Section 3, provides that a homestead "shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution * * * * except such as may be rendered for the purchase money, or for specific liens, laborers' or mechanics' liens for improving the same, * * * * or against executors, administrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity."

A. M. Wilson, for appellant.

The sale was made in good faith, and from a good motive,

and was not in fraud of creditors. The land was his homestead, and not subject to execution or sale for his debts. *Act March, 1887, p. 90.*

C. R. Buckner, Sam H. West and *B. R. Davidson,* for appellees.

The judgment of appellees had become a lien on the land before Mrs. Bogan made a payment on it, if she ever did make one. *Const., Art. 9, sec. 9; 30 Ark., 111.*

She was not an innocent purchaser; she had notice; and the proof shows the conveyance made for the express purpose of defrauding creditors. *23 Ark., 258; 45 id., 520; 32 id., 251.*

The act of March, 1887, has no application; it applies only to execution sales. If the homestead right is not asserted in the manner prescribed by law, the right is waived. *33 Ark., 454; 28 id., 485.*

HOMESTEAD: Conveyance of.

PER CURIAM. The appellees, judgment creditors of one Bryant, brought this suit, seeking to cancel for fraud a conveyance of land from him to the appellant. The land constituted the homestead of the debtor when the conveyance was made. It was not subject to the lien of a judgment, or to sale under execution. Creditors could not be injured by the conveyance. The debtor may have executed the conveyance with a bad motive, but it deprived his creditors of no right, and was therefore not fraudulent. *Bump's Fraud Con., p. 245; Wait Fraud Con., sec. 71; Cammack v. Lovett, 44 Ark., 180.*

The judgment is reversed and cause remanded with instructions to dismiss the bill.

CARY V. DUCKER.

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1. COSTS: *Meaning of term: Power to tax.*

The term "costs," means expenses pending the suit, as allowed or taxed by the court; and a court without jurisdiction of the subject matter of an action cannot "allow or tax" costs therein.

2. SAME: *Action on bond: Defenses.*

A bond was given under Section 1036 Mansfield's Digest, for the payment of the costs of a suit brought in the Circuit Court by a non-resident. A judgment obtained by the plaintiff in such suit having been reversed on appeal, the defendant therein brought an action on the bond to recover a sum alleged to have been paid by him as costs. The defendant in the latter action filed an answer, by the second paragraph of which he alleged that he had no knowledge or information sufficient to form a belief as to whether any costs had been adjudged to plaintiff. By the third paragraph he alleged that he had no knowledge or information sufficient to form a belief as to whether the costs alleged to have been paid by the plaintiff were authorized by law, or as to whether the same, or any part thereof, had been paid. The fourth paragraph alleged that the court which tried the cause in which said bond was given had no jurisdiction thereof, and that all its proceedings with reference to said bond were void. HELD, That the second and third paragraphs of the answer presented valid defenses, but a demurrer was properly sustained to the fourth, since the Supreme Court had jurisdiction to determine the cause on appeal, and to give judgment for costs incurred there.

3. SAME: *Same: Instructions:*

In such suit to recover costs, it was error to refuse to instruct the jury that it devolves on the plaintiff to prove that the costs which he sought to recover, were adjudged to him in the action in which they were incurred by a court having jurisdiction of the subject matter of that action. But a request to instruct that the plaintiff must show "that the bond was executed by the defendant in manner and form as charged" in the complaint; "that the court had jurisdiction of the subject matter of the action, and that the costs paid by plaintiff, were costs allowed by law for such services as were rendered," was properly refused.

4. EVIDENCE: *To prove matters of record.*

The rendition of a judgment by the Circuit Court, an appeal therefrom, the reversal of the judgment by the Supreme Court, and the taxation of costs in the cause by the Clerk, are all matters which must be proved by the record of such proceedings, unless it has been dertroyed.

APPEAL from *Carroll* Circuit Court, Western District.

J. M. PITTMAN, Judge.

This was an action on a bond given for the payment of costs under section 1036, Mansfield's Digest, which provides that "a plaintiff who is a non-resident * * * before commencing an action shall file in the Clerk's office a bond, with sufficient surety, to be approved by the Clerk, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court." The bond is in the following form:

"We undertake that the plaintiffs, A. Mercia and J. W. Petty, shall pay to the defendants, J. O. and Daisy I. Ducker, and to the officers of the court, all costs that may accrue to them in this action, either in the Carroll Circuit Court, Western District, or in any other court to which it may be carried.

(Signed) "CRUMP & WATKINS,
"J. W. CARY,
"M. H. JONES."

A judgment obtained by the plaintiff in the suit in which the bond was executed, was reversed, and the defendants therein brought this action on the bond to recover a sum alleged to have been paid by them as costs. The defendant in the latter action filed an answer by the second paragraph of which he alleged that he had no knowledge or information sufficient to form a belief as to whether any costs had been adjudged to plaintiffs. By the third paragraph he alleged that he had no knowledge or information sufficient to form a belief as to whether the costs alleged to have been paid by the plaintiffs were authorized by law, or as to whether the same, or any part thereof, had been paid. The fourth paragraph of the answer alleged that the court, which tried the cause in which the bond for costs was given, had no jurisdiction thereof, and that all its proceedings with reference to said bond were void. The court below sustained a demurrer to each of said paragraphs. On the trial the defendant requested the following instructions, which were refused:

"1. The court instructs the jury that before the plaintiffs can recover on the bond in this action in any amount, it devolves on them to show by a preponderance of the evidence that the costs claimed by them were incurred and adjudged to them by a court having jurisdiction of the subject matter in the action in which such costs were adjudged and incurred.

"2. The court instructs the jury that it devolves on the plaintiffs to show, by a preponderance of the testimony, that the bond was executed by the defendant in manner and form as charged by the plaintiffs in their complaint; and that the court had jurisdiction of the subject matter of the action; and that the costs paid by the plaintiffs were costs allowed by law for such services as were rendered."

The verdict was for the plaintiffs, and the defendant appealed.

Crump & Watkins and *W. S. McCain*, for appellant.

1. The court erred in sustaining the demurrer to second plea. If it was indefinite, the objection could not be taken by demurrer. *31 Ark., 379, 659.*

2. The third plea was good. Plaintiffs could not recover without showing that they had actually paid costs, that is, legal fees. *Bouvier Law Dict., Costs, 47 Ark., 443; 25 id., 235; Mans. Dig., sec. 1062.*

3. The bond is for costs. There can be no costs where there is no jurisdiction. *13 How. (U. S.), 369; 47 Ark., 443; Mansf. Dig., sec. 1043; 33 id., 688; Wells on Jur. Courts, sec. 15; 6 Wall., 247; 8 Cranch, 9; 1 Ark., 55; 24 id., 177; 10 id., 569; ib., 265; 27 id., 20; 21 id., 93; 7 Cow., 424.*

The bond is not good at common law. It recites no consideration and none is alleged in the complaint. Not being a good common law bond, it falls with the jurisdiction of the court. *31 Ark., 33; Drake on Att., sec. 319; 34 id., 529; 15 Johns., 256; 27 Ala., 44; 12 Ind., 556; 1 Duval (Ky.), 199; 2 id., 376; 7 Barb. (N. Y.), 253; 62 id., 175; 3 Keyes (N. Y.), 97; 1 Denio, 184.*

COSTS: Power to tax, etc.

SANDELS, J. The fourth ground of appellant's motion for new trial challenged the correctness of the decision of the court in sustaining plaintiff's demurrer to the second, third, and fourth paragraphs of his answer. Both the second and third paragraphs presented good defenses. The demurrer was properly sustained to the fourth paragraph.

The fifth assignment of error is the admission of the testimony of J. O. Ducker as to the rendition of judgment in the Washington Circuit Court, the appeal by appellees to the Supreme Court, the reversal of said case in the Supreme Court, the taxation of costs by the Clerk, etc. All of this was provable only by the record, unless it had been destroyed. There was no claim of that kind here.

The sixth assignment of error is the refusal to give instructions numbered one and two, asked by appellant. There was no error in refusing instruction No. 2. But instruction numbered one, correctly stated the law and should have been given The term "costs" has a known technical meaning, as well understood by lawyers as the word "suit" or "prosecution." The expression does not mean all the expenses incurred; but it means expenses *pending the suit*, as *allowed or taxed* by the court. *Norwich v. Hyde, 7 Conn., 533.* A court without jurisdiction of the subject matter of an action, cannot "allow or tax" costs incidental to such proceedings.

The Supreme Court had jurisdiction to hear and determine the cause on appeal, and costs incurred there are legally taxable. *Hightower v. Handlin & Venny, 27 Ark., 20.*

Reverse and remand.

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LITTLE ROCK v. KATZENSTEIN.

1. TAXATION: *For local improvements in cities: Constitutional provision.*

Sec. 27, Art. 19, of the Constitution, which in effect provides that the Legislature may authorize "assessments on real property for local improvements in towns and cities, under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property-holders owning property adjoining the locality to be affected * * * ;" applies to any property adjoining or near the improvement, which is physically affected, or the value of which is commercially affected, directly by the improvement to a degree in excess of the effect upon the property in the city generally.

2. SAME: *Same.*

Under Mansfield's Digest, section 826, empowering the councils of cities of the first class to form and define the boundaries of districts for local improvements, the action of a city council in including property in an improvement district is, except when attacked for fraud or demonstrable mistake—conclusive of the fact that such property is "adjoining the locality to be affected" by the improvement, within the meaning of the Constitution. [Art. 19, sec. 27.]

APPEAL from *Pulaski* Chancery Court.

D. W. CARROLL, Chancellor.

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

The constitutional provision is not intended to apply to owners of abutting lots only. *Const. Ark., Art. 19., sec. 27; Little Rock v. Board of Improvements, 42 Ark., 153.*

The obvious intention is to fix the liability on the property to be affected or benefited. *McDermott v. Matthis, 21 Ark., 60.*

A corner lot is an abutting lot on both streets and pays double taxes even under the abutting system; that is, a tax on each street. *Springfield v. Greene, 11 N. E. R., 262.*

It is certainly more just that the whole quarter of the block should be put on the same footing.

The rule contended for by us was applied in a converse case in *Shepherd v. Baltimore R. R. Co., 130 U. S., 432.*

The property is not to be considered according to artificial lines merely. *Wassell v. Tunnah, 25 Ark., 101.*

The organization of a district will only be interfered with where the discretion vested in the council has been grossly

abused. *Davis v. Gaines, 48 Ark., 382; County Judge v. Shelby R. R. Co., 5 Bush., 228; Peay v. Little Rock, 32 Ark., 38; Nevins v. Roach, 5 S. W. R., 547: Goodrich v. Minout, 62 Ill., 123; State v. Dist. Com'n., 29 Minn., 65; Mitchener v. Philadelphia, 12 Atl. R., 174; Henderson v. Jersey City, 41 N. J. L., 490; Massing v. Ames, 37 Wis., 651; Stowbridge v. Portland, 8 Oreg., 67; State v. Newark, 12 Atl. R., 171; Kelly v. Pittsburgh, 104 U. S., 82.*

There was no repeal implied. Repeals are not favored and have no existence where both statutes can be made to stand. *State v. Watts, 23 Ark., 304.*

And where private rights have accrued the prior ordinance could not be repealed. *1 Dill. Mun. Corp., sec. 314; Endlich Stat., sec. 481.*

Probably the word "affected" was used instead of "benefited" as being of less ambiguous meaning. One whose property was injured might sign the petition, and he would be entitled to compensation from the district to the extent of his injury. *Hot Springs R. R. Co. v. Williamson, 45 Ark., 429; Packet Co. v. Sorrells, 50 id., 474; Rigney v. Chicago, 102 Ill., 79; 1 Hare Am. Const. Law, 418.*

The word has therefore a larger meaning.

The lots taxed need not all abut on the street. *41 N. J. L., 490; 37 Wisc., 651; 8 Oregon, 67.*

W. S. McCain for, appellee.

1. This tax is illegal, unless it can be upheld under *art. 19, sec. 27.* The clear meaning of the words "adjoining the locality to be affected," is "abutting the place" or street along which the walk is laid. Reviews the statutes of the different States and cites: *32 N. J. L., 490; 38 id., 169; 10 Ohio, 130; 10 Oh. St., 159; 32 Ark., 31; 49 id., 381; 52 N. Y., 395; Cooley Tax, 452, note (I); 69 Pa. St., 352; ib., 365; 55 Am. Dec., 266; 78 id., 359; 67 id., 289; 73 Pa. St., 404; 81 Ill., 49; 99 id., 137; 91 id., 596; 2 Oregon, 146; 30 N. W. R., 780; 40 Wis., 315; 44 Vt., 174; 27 Cal., 613; 31 Oh. St., 371; 37 N. J. Law,*

415; 2 Mich., 560; 14 Wall., 676; Desty Tax, sec. 191; Cooley Tax, 425–6.

2. A fatal objection is that the commissioners allow lot owners, who already had sidewalks, credit for the reasonable value of their sidewalks. *49 Ark., 370.*

3. The ordinance was repealed by ordinance No. 81, covering the same territory.

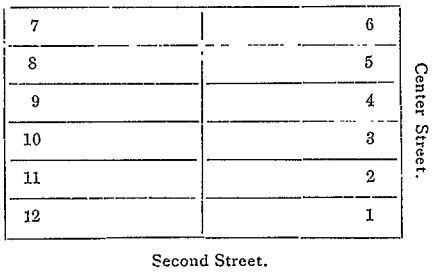
SANDELS, J. Section 27 of article 19, of the Constitution of Arkansas, is as follows:

"Nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements, in towns and cities, under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected; but such assessments shall be *ad volorem* and uniform."

Section 826 Mansfield's Digest, laws of Arkansas, is as follows: "Section 826. When any ten resident owners of real property in any such city, or of any portion thereof, shall petition the city council to take steps toward the making of any such local improvement, it shall be the duty of the council to at once lay off the whole city, if the whole of the desired improvement be general and local in its nature to said city, or the portion thereof mentioned in the petition, if it be limited to a part of said city only, into one or more improvement districts, designating the boundaries of such district, so that it may be easily distinguished, and each district, if more than one, shall be designated by number and by the object of the proposed improvement."

Pursuant to the foregoing provisions, the City Council of the City of Little Rock, on the 10th day of May, 1887, by ordinance, created "Sidewalk Improvement District No. 2, of the City of Little Rock," for the purpose of building a sidewalk on Second street. Its boundaries were defined, and it may be said, generally, embraced half of each block on either side of

Second street in said city, from Main street to the western boundary of the district. Block 82 of said city lies on the south side of Second street, and a diagram of the same with the numbers of its lots is here given:



The district for the improvement of Second street embraced lots 1, 2, 3, 10, 11, and 12. The council proceeded regularly, and in due course, the levy was made upon all the property included in the district, to pay the costs of said improvement; and within the period of limitation prescribed by law, *i. e.*, within twenty days from the publication of the ordinance levying said tax, the appellee, Katzenstein, filed the bill herein, alleging that he was the owner of lot 3 in block 82, and praying that the defendants be enjoined from exacting or claiming any tax from him, under said ordinance. He insists that said lot 3 does not abut upon, and is not contiguous or adjoining Second street, that he owns no property between lot 3 and Second street, and that said lots are fifty feet wide. He does not claim that his property is not affected nor benefited by the improvements. The defendants demurred generally, their demurrer was overruled, and declining to plead further, the preliminary injunction granted by the Chancellor was made perpetual, and they appealed.

Two questions are presented for determination: First. What is, "property adjoining the locality to be affected?" Second. To what extent is the action of the city council in placing lands in an improvement district, conclusive of the fact

that it is "property adjoining the locality to be affected?" These two queries may be considered together. Appellee insists that all reference to "benefits" must be excluded from consideration, and that only property abutting upon the sidewalk or other improvement, or owned by one who also owns abutting property lots, can be subjected to the tax. The appellants insist that the word "affected" has a larger meaning than "benefited;" that property may be "affected" injuriously as well as beneficially, and that all property in the locality "affected" by the work should be included in the district and be required to bear its share of the burthen.

It has been so often said as to become axiomatic, that absolute equality in the distribution of benefits and burthens is unattainable, yet it is also everywhere held that the very existence, in justice and equity, of the power of taxation, rests upon the theory of corresponding benefits to the tax-payer. We cannot exclude from view the idea of *benefits*, when the propriety of a tax is under consideration. Nor is it practicable to determine whether property is, or is not, "adjoining the locality to be affected" by the accident of proprietorship. The property of A today becomes the property of B tomorrow; and it is inconceivable to us, that the invisible and intangible passage of title from one to another can work any physical or legal removal of real estate from the locality to be affected. The "improvement" contemplated need not always have a physical effect upon the land taxable for its construction. Indeed, in most cases its effect is only upon its commercial value; and the land affected in either way, so that the effect be traceable directly to the neighboring improvement, is the "property adjoining the locality to be affected," mentioned in the Constitution. Under some circumstances, the effects may be more extended and far-reaching than under others. There is a given amount of improvement which will affect all localities alike, and the Constitution wisely avoided the erection of an absolute limit up to or beyond which the benefits might go,

or below which they might fall. There is no procrustean measurement for the exersise of equitable discretion.

To the General Assembly, then, was delegated the task of providing agencies for the accomplishment of these improvements. The General Assembly, in the exercise of a well-recognized constitutional power, imposed the duty of forming improvement districts, and defining their boundaries, upon the various city councils. The city council is invested with discretion, in this behalf, necessary to a just performance of the duty, and when it has acted, the property included by it in any district is, *prima facie*, adjoining the locality to be affected. We conclude, therefore, in answer to the two queries originally propounded:

1. TAXATION: For local improvements.

First—That property adjoining the locality to be affected is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect upon the property in the city generally.

2. SAME.

Second—That the action of the city council, in including property in an improvement district, is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake.

Upon the various propositions above stated, we cite: *Little Rock v. Board of Improvement, 42 Ark, 153; McDermot v. Mathis, 21 Ark., 60; Wassell v. Tunnah, 25 Ark., 101; Davis v. Gaines, 48 Ark., 382; Peay v. Little Rock, 32 Ark., 38; Shepherd v. Balto. Ry., 130 U. S., 432; County v. Ry., 5 Bush., 228; Nevins v. Roach, 5 S. W. Rep., 547; Goodrich v. Minonk, 52 Ill., 123; Mitchiner v. Philad., 12 Atlantic R., 174; Mossing v. Ames, 37 Wis., 651; Stowbridge v. Portland, 8 Oregon, 67; State v. Commrs., 29 Minn., 65; Rogers v. Paul, 22 Minn., 494; Carpenter v. same, 23 Minn., 232; State v. same, 27 Minn., 442.*

Reverse, with direction to sustain the demurrer to the complaint.

COCKRILL, C. J., did not participate.

WALL v. LOONEY.

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SPECIAL JUDGE: *Record of election: Dismissal of appeal.*

An appeal will be dismissed by the Supreme Court where the record fails to show that the special judge who presided at the trial of the cause, was elected for that purpose.

APPEAL from *Greene* Circuit Court in Chancery.

E. F. BROWN, Special Judge.

Ben H. Crowley, for appellants.

Argues upon the merits.

L. L. Mack, for appellees.

It does not appear from the record that the regular Judge was disqualified, nor that the special Judge was elected to try the cause. The appeal should be dismissed. *39 Ark., 254; 42 id., 126.*

PER CURIAM. The record fails to disclose that the special judge who presided at the trial of this cause, was ever elected for that purpose. The motion to dismiss the appeal will be granted.

DOUGLASS v. SHARP.

WILLS: *Estate conveyed: Power of sale.*

A will disposed of the testator's property as follows: "I give * * to my beloved wife all my real and personal estate, notes and accounts, during her natural life, and to dispose of according to her own will and judgment, providing that she never marries a second time; and in the event that she marries then all my property, real and personal estate, notes and accounts, shall go to my children now living, or who may be living at the time of my wife's death or marriage * * * * ." HELD: That the wife took only a life estate and her power to dispose of the lands was limited to her life estate therein. (*Patty v. Goolsby 51 Ark., 61.*)

APPEAL from *Drew* Circuit Court.

C. D. WOOD, Judge.

The children of William A. Douglass, deceased, brought this action to recover certain lands of which he held possession at the time of his death. They claimed title under his will, the body of which is as follows:

"*First*—After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: To my beloved wife all my real and personal estate, notes and accounts during her natural life and to dispose of according to her own will and judgment, providing that she never marries a second time; and in the event that she marries, then all my property, real and personal estate, notes and accounts shall go to my children now living or who may be living at the time of my wife's death or marriage, to be divided equally between them, share and share alike."

The testator's widow, Mary E., while *sole*, conveyed the lands in controversy, in fee simple, to the defendant, T. M. Sharp, and the other defendants claim under conveyances from him. The widow died before the commencement of this suit. The cause having been submitted for trial to the court sitting as a jury, the plaintiff requested the following declaration of law, which was refused:

"Under the will of W. A. Douglass, deceased, Mary E. Douglass took a life estate in the lands in controversy, and at her death the children and heirs-at-law of said W. A. Douglass became the owners * * * and entitled to the possession thereof."

The court thereupon found as conclusions of law that the will of Douglass gave to his wife, Mary E., the title to the lands in controversy, in fee simple; that she had the absolute right to dispose of the same, and that her deed to Sharp conveyed to the latter the lands in fee simple.

The judgment was for the defendants, and plaintiffs appealed.

Wells & Williamson, for appellants.

Under the will Mary E. Douglas, the widow, took only a life estate. *11 Atl. Rep., 116; 8 id., 920; 15 Johns., 169; 16 id., 537; Redf. on Wills, 448 to 450, sec. 13; 42 Barb., 615; 1 Phillips, 532; 2 Barb., 534; Patty v. Goolsby, 51 Ark.*

Harrison & Harrison, for appellees.

The widow took a qualified fee, and the estate over to the children depended solely upon her marriage again, without having sold or disposed of the property. *2 Redf. on Wills, 278, 279; 68 Me., 34; 28 Am. Rep., 1; 41 Conn., 607; 19 Am. Rep., 525; 29 id., 493; 18 Ala., 132; Fitz., 315; 5 Mass., 500; 2 Johns., 391; 125 Mass., 453; 2 Wils., 6; 11 Ves., 135; 3 Ad. & El., 123; 9 Rich. Eq., 420; 32 Miss., 107; 26 Ala., 360; 2 Vt., 181; Tied. on R. P., sec. 564; 2 Wash. R P., 639; 1 Sugd. on Powers, 179, 180; 11 S. & R., 23, 24; 22 Mo., 336; 14 Ill., 244.*

PER CURIAM. The will gave to the widow, a life estate only, and the power of disposal vested in her was limited to her life estate in the land, as decided by this court in *Patty v. Goolsby, 51 Ark., 61.* See, also, *Giles v. Little, 104 U. S.* WILLS.

Reverse and remand.

KING V. CONNEVY.

1. REPLEVIN: *Description of property: Variance.*

In replevin for a mare claimed by the plaintiff under a mortgage, where the complaint describes the animal as "a cream-colored, blazed-face mare, eight or nine years old, described in the mortgage * * * * as being a cream-colored mare seven years old," the variance between the mortgage and complaint is immaterial and constitutes no ground of demurrer.

2. SAME: *Same: Practice.*

If such variance were material and existing between the mortgage and a proper description of the animal taken under the order of delivery, it could be availed of only at the trial and not by motion to quash the order.

APPEAL from *Lafayette* Circuit Court.

C. E. MITCHEL, Judge.

This is an action of replevin commenced before a justice of the peace where the affidavit filed to obtain an order of delivery, was made to serve also the office of a complaint. The affidavit describes the property which the plaintiff seeks to recover as "cream-colored, blazed-face mare, eight or nine years old, described in a mortgage given by James M. King to J. M. Witt, as being a cream-colored mare seven years old." The value of the mare was stated to be $75, and the sum of $50 was claimed as damages for her detention. The affidavit also states that the plaintiff has a special ownership in the animal and is entitled to its immediate possession as trustee under the mortgage to Witt, and that the defendant has wrongfully taken and unlawfully detains it under an execution against the mortgagor. An order of delivery was issued in which the mare is described as "a cream-colored, blazed-face mare, eight or nine years old," of the value of $75. On appeal to the Circuit Court a demurrer was sustained to the affidavit, and the plaintiff filed an amended affidavit. The order of delivery was thereupon quashed on the defendant's motion for a variance between the description it contained of the mare and that given in the amended affidavit. The plaintiff afterwards amended his amended affidavit, and the defendant demurred thereto on the ground that there was a variance between the affidavit and the mortgage in the description of the mare. The court sustained the demurrer, and the plaintiff declining to amend further, final judgment was rendered against him. The only substantial difference between the original and amended affidavit, is that the latter stated, while the former omitted to state, that the mare "has not been taken for a tax, or fine," etc. (as provided for in *Mansf. Dig., sec. 5572*).

D. L. King, for appellant.

The description in the mortgage was ample to give third parties notice. *39 Ark., 394; 46 id., 70.* The mortgage was

simply evidence for plaintiff to use on the trial. *35 Ark., 543; 33 id., 543.* A variance in description may be corrected by oral evidence. *33 Ark., 475.* Contends that there was no real variance, but if there was demurrer, was not the remedy. *42 Ark., 186.*

PER CURIAM. It was error to quash the order of delivery on demurrer to the complaint.

REPLEVIN: Variance: Practice.

The complaint stated a good cause of action, and the demurrer should have been overruled. If there was a fatal variance between the description of the horse in the mortgage, and the one taken under the order of delivery, it was a matter to be availed of at the trial. The variance between the two as set forth was immaterial in any event.

Reverse and remand for further proceedings.

GIBNEY V. TURNER.

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1. EVIDENCE: *As to value of labor.*

In an action to recover damages for the breach of a contract, to pay a specific sum for work, testimony as to the value of the work is inadmissible.

2. DAMAGES: *Breach of contract to pay a specific sum for work.*

When a mechanic employed to perform specific work for a stipulated price, is wrongfully prevented by his employer from completing the contract, he may recover for such breach thereof, damages equal to the difference between the cost of the work and the price agreed to be paid for it, the cost being the market value of material on hand for the work, the amount that would have been paid for labor and material in completing it, and what the mechanic gained, or might have gained, by the saving of his time not employed in completing the contract.

APPEAL from *Clark* Circuit Court.

R. D. HEARN, Judge.

Turner sued Gibney & Patterson in a justice's court upon an open account for $40, and on appeal to the Circuit Court, recovered judgment against them for $20.60, from which they

have appealed. On the trial the plaintiff testified that the defendants employed him to put upon their building a tin gutter, for which they agreed to pay him the sum of $40. That having furnished the necessary material, and made the gutter, he found that the defendant had let the job to another person, and he was not permitted to complete the contract. That the material for the entire job cost $9.90, and that in putting the tin together he employed one person whose labor cost $1.50, and that the labor required for completing the work would have cost $8. He also stated that he sold the gutter, which was prepared for the defendant's house, for $26.32. The defendants offered to prove by one Phillips, a practical tinner, that he did the work referred to for $16.50, and that that sum was a fair price for it; but the court excluded this testimony. Instruction numbered one, requested by the plaintiff, and amended by the court, and given to the jury against the defendants' objection, is as follows:

"If the jury believe from the evidence that the defendants employed the plaintiff to do certain work for them at an agreed price, and being willing and ready to perform the work, the plaintiff was, without fault on his part, prevented by the defendants from performing the same, then the plaintiff will be entitled to recover on the contract; and the basis of damages will be the amount agreed upon as a price for the work to be done, less the cost of material to be used in performing the same, and also the labor necessary to perform the contract, unless the defendants show to the jury that the plaintiff, during the time required of plaintiff to perform the contract, was or could have been engaged in other work of like kind, which would have yielded to him the same profits."

Murry & Kinsworthy, for appellants.

1. The court erred in amending plaintiff's instruction No. 1, and giving it as amended. A party who charges a breach of contract and seeks to recover on the contract which he has kept, can do so, provided he has used all the means in his power

to avoid or mitigate the loss resulting from the breach; but only his actual damage. *20 Am. Dec., 341; 27 id., 626; 24 id., 137; 34 id., 262; 11 N. E. Rep., 784, and note.* It was error also to instruct the jury that defendants were required to prove that the plaintiff could have been engaged at the same kind of work contracted for. Plaintiff was bound to take such employment as was offered. *Sedg. on Dam. (6th ed.), 417–18, note 2.* For the measure of damages, see *34 Am. Dec., 262; 9 Ark., 394; 20 Am. Dec., 341; 27 id., 626.*

Crawford & Crawford, for appellee.

In a job contract like this, where before performance, the principal wrongfully terminates the contract, the damages are based on the difference between the price stipulated and the cost of the performance. *13 How. (U. S.), 344; 14 Mich., 39; 35 Cal., 229; 3 Ark., 324; 110 U. S., 338: 2 Suth. on Dam., pp. 521–3.* See, also, *4 Cal., 392. 9 Ark., 394,* was a time contract to labor. The cases cited by appellant are chiefly cases of time contracts. The court's error was prejudicial only to appellee, if any one.

EVIDENCE: DAMAGES: Breach of contract.

PER CURIAM. The court did not err in excluding the testimony of Phillips; but error was committed in giving instruction No. 1, asked by plaintiff and amended by the court.

The rule in cases of this kind is that plaintiff, if he prove the existence of a contract for a specific sum, for the performance of specific work, is entitled for the breach thereof by his employer to damages equal to the difference between the cost of the work and the price to be paid for it; the cost being the market value of the material on hand and the amount that would have been paid for labor and material in completing the contract, and the value to him of his own time that would have been consumed in completing the contract. *Gardenhire v. Smith, 39 Ark., 280; Brodie v. Watkins, 33 ib., 545.* The value of the time is what he gained or might have gained by the saving of his time not employed in completing the contract. Reverse and remand for further proceedings.

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BROWN v. ST. L., I. M. & S. RY.

1. INSTRUCTIONS: *As to exemplary damages.*

In an action to recover damages for an assault, where the verdict is for the defendant, the plaintiff was not prejudiced by the court's refusal to instruct the jury that if they found that the assault was malicious, they might return a verdict for punitive damages.

2. SAME: *Not responsive to cause of action.*

It is not error to refuse a plaintiff's request for an instruction not responsive to the cause of action stated in his complaint.

3. RAILROAD COMPANIES: *Liability for injury to trespasser.*

Where a person is injured by a train while he is trespassing on a railroad track, the company is not liable for the negligence of its employes in failing to discover him on the track, but only for their failure to use proper care to avoid the injury after his presence is known. (*St. L., I. M. & S. Ry. v. Monday, 49 Ark., 257.*)

4. PLEADING AND PRACTICE: *Cause of action: Instructions.*

In an action against a railroad company to recover damages for the killing of the plaintiff's son, the complaint alleged that the deceased being a passenger on the defendant's freight train, was by its employes "assaulted and wilfully thrown from said train," and thereby sustained injuries from which he died. There was evidence tending to show that he received the wounds which caused his death by being struck or run over by a passenger train, and the court instructed the jury to find for the defendant if they believed from the evidence that the deceased was killed by being thus struck or run over. *Held:* That this was not error, as the plaintiff could not recover without proving that the deceased was thrown from defendant's train, nor could he, without an amendment alleging negligence on the part of the defendant in running another train over the deceased, recover for that cause.

5. NEW TRIAL: *Prejudice of juror.*

Where a party does not avail himself of the opportunity to examine a juror on the *voir dire*, and is not misled or deceived with reference to the juror's prejudice, it is too late after verdict to raise an objection thereto.

6. SAME: *Newly discovered evidence.*

It is not error to refuse a new trial on the ground of newly discovered evidence, where such evidence is cumulative only.

APPEAL from *Clark* Circuit Court.

R. D. HEARN, Judge.

Maria Brown brought this action against the St. L., I. M. & S. Ry. to recover damages for the killing of her minor son, W. C. Brown. Her complaint alleges that on the 27th day of June, 1887, the deceased was a passenger on one of the defendant's freight trains, and that while the train was running he was assaulted and thrown from it by the defendant's employes, and that he thus received wounds from which he died a few hours later. The answer of the defendant specifically denies each allegation of the complaint, and alleges contributory negligence on the part of the deceased. On the part of the plaintiff there was testimony to show that on the day mentioned in the complaint, the deceased and Stephen Elder left the defendant's depot at Arkadelphia on a freight train going south, and that they were seen sitting on top of a car, on the east side. Elder testified that he and Brown, the deceased, got on a freight train leaving Arkadelphia at the time referred to, between 12 and 1 o'clock at night, and, having paid the conductor the fare required, obtained his permission to ride on top of the car. That they sat down on the east side of the car, and just after the train left Smithton, the brakeman went to where they were sitting and demanded money. That they told the brakeman they had paid the conductor, and Brown said he did not have any more money. That the brakeman then attacked them both with sticks or clubs, and knocked them off the train. That they fell on the track and were taken up by a passenger train and carried to Smithton. The witness stated that he did not see Brown after they were knocked off the train until he was put on the passenger train, and that he (witness) was so wounded that he was unable to get off the track when he heard the passenger train approaching. William Freeland, a witness for defendant, testified that he was a conductor and ran the second section of freight train No. 619, which left Arkadelphia going south, on the 27th day of June, 1887, at 12:30 a. m. That the train was a "through freight train," and the rules of the company for-

bade the carrying of passengers upon such trains. He denied that he saw Brown or Elder or received pay from them, or that he gave them permission to ride on the top of the train, and stated that he took no passenger on the train and saw no one there except the defendant's employes. Ben Parker testified that he was engineer of passenger train No. 604 on the night of June 27, 1887, and that when near Smithton, he saw two negroes (one of whom was deceased) lying on the track about twenty-five feet ahead of the engine. That one of them was struck by the pilot and knocked against the other. They were put on the train and taken to Smithton. One of them was bleeding very much, and was assisted to get on the train. The other got on without assistance. Two physicians testified as to the nature of the wounds received by the deceased. One of them expressed the opinion that some of his wounds could not have resulted from a fall from the top of a car, and might have been produced by the engine. The court refused to instruct the jury that if they found that the alleged assault was wilful and made maliciously, they could find exemplary damages in addition to those actually sustained. The court also refused the plaintiff's third prayer for instruction, which is as follows:

"It is the duty of the defendant's agents employed in running trains over its road, to keep a sharp lookout, and give alarm signals at public crossings, stations, and all other places where they may reasonably expect persons to be on or near the track, and if the jury believe, from the evidence, that the deceased, Wm. C. Brown, was lying on the track near the Smithton depot when one of the defendant's passenger trains passed that place, and that the engine drawing said train struck the deceased and injured him, they will find for the plaintiff, although they may believe deceased was a trespasser and on defendant's track without defendant's fault; provided, they believe defendant's agents in charge of said train could have avoided the accident by giving the proper alarm and

stopping the train after they discovered, or by reasonable care and watchfulness, they might have discovered, deceased's perilous condition, unless they believe, from the evidence, that after deceased became aware of the impending danger, he failed to do all in his power to avoid the accident."

The court gave the following instruction, which was objected to by the plaintiff:

"If you believe from the evidence that William C. Brown received the wounds, from which he died, by being struck or run over by the passenger train No. 604 running north from Gurdon, you will find for the defendant."

The verdict was for the defendant and the plaintiff moved for a new trial, which being refused, she appealed. The fifth ground of the motion for a new trial is newly-discovered evidence, shown by the following affidavit:

"I, H. W. Meador, Jr., do solemnly swear that I examined the body of Wm. C. Brown soon after his death, and found on his body and left arm marks and bruises which, from appearances, were evidently made by a stroke with a stick or club, in the hands of some party; and in speaking of marks and bruises, I do not refer to the broken arm and the cut wounds on the head of the deceased."

The sixth ground of the motion is the alleged incompetency of one of the jurors because of prejudice. This ground is supported by the following affidavits:

"I, Jerry Battle, do solemnly swear that some time after the death of Wm. C. Brown I had a conversation with Mr. G. A. Trigg, one of the jurors who tried above entitled cause, about the killing of the said Brown by the railway company, and about this suit for damages against the railway company; and in said conversation Mr. Trigg said to me that the deceased, Wm. C. Brown, might have been knocked off of the freight train by the brakemen, and if he was they served him right, or he ought to have been knocked off, and that plaintiff would

never recover anything for his death against the defendant railway company."

"I, H. W. Walters, do solemnly swear that some time after the killing of Wm. C. Brown by the railway company, I heard Jerry Battle, in conversation with Mr. G. A. Trigg about the killing of said Brown, and I heard Mr. Trigg say to Jerry Battle that the said Wm. C. Brown might have been knocked off of the freight train by the brakemen, but if he was he was stealing a ride and the brakemen did him right, or they had no business on the train, and the plaintiff would never recover anything for it against the railway company."

Sam W. Williams and *Murry & Kinsworthy*, for appellant.

1. This is a case like *48 Ark., 177*. The dying declarations of Brown were admissible. *23 N. Y., 94; 48 Ill., 475*.

2. The third instruction of defendant was based upon an assumed state of facts not shown by the evidence. *Sacket on Inst. to Juries, p. 20, sec. 20*, and cases cited. This was error. *42 Ark., 57; 16 id., 651; 36 id., 641; Thomps. Charg. the Jury, 62; 41 Ark., 382; 37 id., 593*. The verdict in this case is shocking to a sense of justice. *37 Ark., 580*.

3. The court erred in giving defendants first and second instructions, and refusing to give plaintiffs third. Plaintiffs claim was for damages for the negligent killing of her son; the manner of the killing, if wilful or negligent, was not material. The variance was amendable, even after verdict. *33 Ark., 811; 30 Ark., 771; 29 id., 323; 40 id., 352; 35 id., 342; 1 Nash. Pl., 328; Newman Pl. and Pr., p. 721; 10 How., Pr. Rep., 321; 1 Bush, 2; 1 Estee Pl., etc., sec. 162; Myers' Ky. Code, p. 422; 3 Boswell, 456; 3 S. E. Rep., 355*. See, also, *46 Ark., 524; 49 id., 182*.

4. The newly discovered evidence was not cumulative, merely; it was pertinent to the issue and would have changed the verdict. *Bayless New Tr. and App., pp. 524–8; 43 Barb., 203; Hayne New Tr., and App., sec. 90*. But if cumulative, if

it would change the result, a new trial ought to be granted. *27 Cal., 147; 16 id., 180; 35 Cal., 43.*

5. The juror, Trigg, was prejudiced, and a new trial should have been granted. *19 Ark., 156; Bayless New Tr. and App., p. 540; 35 Ark., 646.*

Dodge & Johnson, for appellee.

1. Having failed to examine the jury on their *voir dire*, plaintiff waived his right to object after verdict. *8 Atl. Rep., 246; 36 N. W. Rep., 651 and note; 7 S. W. Rep., 307; ib., 373 and note; 20 Ark., 36; 19 id., 161; 44 id., 133; 40 id., 515; 23 id., 54; 35 id., 113; 3 S. E. Rep., 864; 4 Rect., 594; 2 id., 122; 12 id., 136.*

2. The newly discovered evidence was cumulative merely.

3. The third instruction of plaintiff is not the law. *49 Ark., 257.* An instruction that is not confined to the issues in the case is erroneous. *24 N. W. Rep., 38; 25 id., 104.*

INSTRUCTIONS: Practice: New trial.

PER CURIAM. 1. Maria Brown, the plaintiff, was not prejudiced by the court's refusal to instruct the jury that they might return a verdict for punitive damages, because by their finding she was entitled to nothing.

2. The plaintiff's third prayer for instruction was inconsistent with the ruling in *Monday v. St. L., I. M. and S. Ry. Co., 49 Ark., 257.* Moreover, it was not responsive to the cause of action stated in the complaint.

3. Upon the cause of action made by the complaint, it was necessary for the plaintiff to prove that the deceased was knocked or thrown from the defendant's train before she could recover; and without an amendment to the complaint showing a cause of action for negligence by being run over by another train (if such amendment was permissible), there could be no recovery for that cause. There was no error in instructing the jury to that effect.

4. The objection to the prejudice of the juror came too late after the verdict, inasmuch as the plaintiff had not availed

herself of the opportunity to examine him on the *voir dire* and was not misled or deceived in reference thereto.

5. The newly-discovered evidence was cumulative only.

Affirmed.

MUNDAY V. COLLIER, ADM'R.

HUSBAND AND WIFE: *Action on contract between: Practice.*

Whether a note given by a husband to his wife for borrowed money constitutes a legal liability or not, it is clearly a claim which equity will enforce against him; and where the wife's administrator sues the husband at law upon such note, the error, if any, in the form of the proceeding, will be waived by the defendant's failure to move a transfer to the proper docket.

APPEAL from *Randolph* Circuit Court.

J. W. BUTLER, Judge.

This was an action at law brought by the administrator of Mary Munday, on a note for $500, given to her by her husband, Daniel Munday. The latter answered, setting up that at the time the note was executed he and the payee were husband and wife, and also that it had been satisfied by various payments, which are stated in detail. The evidence showed that the note was given for money, which the defendant borrowed from his wife, and that they separated on the day it was executed, and did not live together at any subsequent time, although they were never divorced. There was no motion to transfer the cause to the equity docket. Some of the credits claimed by the defendant were for supplies furnished Mrs. Munday while she was living apart from him, and these the jury were instructed to disallow. The court refused to instruct the jury that if they found that the defendant and Mary Munday were husband and wife at the time the note was given, it was void in law. The verdict and judgment were for the plaintiff, and the defendant appealed.

Sam W. Williams, for appellant.

1. The note was void at law, and if enforceable at all, only in equity. *15 Ark., 519; 20 id., 265; Stewart on Husb. and Wife, secs. 164, 41, 163; 49 Ark., 438; 25 id., 153.*

2. The note could only be enforced *by the wife*, and in equity alone. *91 N. Y., 381; 49 Ark., 438; 29 id., 612; 32 id., 714; 43 id., 28; 36 id., 456.*

3. On the death of the wife without disposal, the marital rights of the husband attached. *4 S. E. Rep., 745; 47 Ark., 115; 22 N. Y., 110; 24 id., 372; 44 id., 280; Kelly on Mar. Wom., pp. 212, 213; 2 Ves. Sr., 663; 2 Ves. Jr., 698, 716; 2 Bright Husb. and Wife, pp. 260, 259; 3 Bro., C. C., 441; Reeve's Dom., Rel., p. 86; Wells on Sep. Prop. of Mar. Wom., p. 107; 18 N. J. Eq., 208; Schouler Dom. Rel., sec. 107; 41 E. Ch. Rep., 432; Tyler Inf. and Cov., sec 237.*

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

Under our Constitution and laws a wife, as to her separate estate, has the same remedies against her husband that she has against a stranger. *Mansf. Dig., secs. 4624, 4625, 4951.* She can sue at law or proceed in equity. *19 Iowa, 491; 58 Me., 139; 39 Am. Rep., 307; 39 Vt., 319; 32 Md., 214; 47 Ark., 558; 9 Neb., 16; 43 Am. Rep., 675; 4 Laws, 164; 19 Hun., 358; 20 id., 472; 24 id., 401; 52 Texas, 294; 90 Pa. St., 238, 507; 9 Ill. App., 27; 50 Mich., 77; 58 id., 546; 62 Wis., 493; 36 Cal., 447; 24 Kans., 101.* A failure to transfer a cause to the proper docket is no ground of reversal. If no motion is made to transfer, and no objection made, the right to a transfer is waived. *Mansf. Dig., secs. 4925, 4928; 48 Ark., 539; 49 id., 22; 37 id., 286; 31 id., 411; 32 id., 562.*

2. Whatever a wife receives from her husband is presumed to be a gift, and will not raise an implied promise of repayment. *36 Ark., 586; 47 id., 111.* A husband is bound to support his wife, and she may contract for necessaries on his account. *Bish. on Cont., sec. 87.*

3. On the death of the wife the note passed to her administrator and not to the husband. *48 Ark., 395; 14 id., 603; 16 id., 154.*

4. The fact of the money being in the hands of the husband at the time of the wife's death constituted no reduction to possession. *Schouler on H. and W., sec. 154; 131 U. S., 227.*

HUSBAND AND WIFE: Contracts: Practice.

PER CURIAM. The question of the application of the sums claimed to have been paid by the defendant, Munday, to his wife, was fairly submitted to the jury; and they found that the amounts, if paid, were not made as payments on the note, and their verdict is conclusive.

Whether the note constituted a legal liability or not, it was unquestionably an equitable claim against the husband. The error, if any, in bringing the action at law, was waived by the defendant's failure to move a transfer to the proper docket. *Organ v. Ry., 51 Ark., 235.*

Affirmed.

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WILLIS V. REINHARDT.

REPLEVIN: *For property seized under attachment.*

The owner of personal property seized under an attachment against the property of another, may maintain replevin against the officer having it in possession.

APPEAL from *Prairie* Circuit Court.

M. T. SANDERS, Judge.

Willis brought an action of replevin against Reinhardt, the Sheriff of Prairie County, to recover certain personal property which the latter had seized under an order of attachment against one Meyer. Upon Reinhardt's motion the court dismissed the action upon the ground that the property was in the custody of the law and could not, therefore, be made the subject of replevin. Willis appealed.

J. E. Gatewood and *J. S. Thomas*, for appellant.

1. If the property taken by the officer under the writ is the property of the defendant in execution or attachment, it is then *in custodia legis;* but if it belongs to a stranger it is not, and may be replevied by the owner. *Mansf. Dig., sec. 5578; Allen on Sheriffs, secs. 270, 272; 20 Johns., 467; Freeman on Ex., 268.*

2. A stranger to the process may replevy from a Sheriff or other officer. *7 Mon. (Ky.), 427; 3 J. J. Marsh., 124; 4 B. Mon., 9; 3 and 4 J. J. Marsh., 123; 36 Ark., 406; 37 id., 64; 43 id., 207; 4 S. W. Rep., 286; Settles v. Bond, 49 Ark., —; Harris v. Phillips, 49 id., —; Mansf. Dig., sec. 5572; subd. 5.*

C. E. Warner, for appellees.

1. The property was in *custodia legis*, and not the subject of replevin. *10 Pet. (U. S.), 172; 24 How. (U. S.), 457; 4 Ark., 525; Mansf. Dig., secs. 356, 390; 6 Eng., 525; 24 Ark.. 216.*

REPLEVIN.

PER CURIAM. The owner of personal property, seized under an attachment against the property of another, may maintain replevin against the Sheriff or other officer having it in posession. The right has been recognized by this court in many cases. *Thatcher v. Franklin, 37 Ark., 64; Cox v. Vise, 50 Ark. 283; Raleigh v. Griffith, 37 Ark., 151; Clayton v. Johnson, 36 Ark., 406; Overbee v. McGee, 15 Ark., 459; Hickman v. Ford, 43 Ark., 207; Mansf. Dig., 5572, subd. 5.*

Reverse the judgment and remand the cause for further proceedings.

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PENYAN v. BERRY.

GARNISHMENT: *Order to pay garnished debt; effect of: Action against garnishee.*

An order to pay over money made upon a garnishee in an attachment proceeding after his failure to appear therein, is not a judgment against him, and does not determine his liability to pay. The only effect of such order is to confer upon the attaching creditor the same right to collect whatever the garnishee owes the attached debtor that the latter himself had against the garnishee, and in an action brought by the plaintiff in the attachment to recover the garnished debt, the garnishee is not precluded from any defense he might have made before the garnishment.

APPEAL from *Madison* Circuit Court.

HENRY GLITSCH, Special Judge.

This is a suit in equity against a garnishee to recover the amount of a debt which he was ordered to pay to the plaintiff in an attachment proceeding, and to obtain a decree for the sale of certain lands mortgaged to secure the garnished debt. The complaint alleges that the plaintiff's intestate brought an action in the Benton Circuit Court against S. D. McReynolds, and sued out therein a writ of attachment, under which a debt which the defendant Berry owed to McReynolds, was attached. That the plaintiff afterwards recovered judgment against McReynolds in said action, for a debt amounting to $1105, and that the court rendering such judgment, having found that defendant, Berry, was indebted to McReynolds in the sum of $2029, ordered said Berry to pay over to the plaintiff therefrom the sum due to the latter on said judgment. The complaint further alleges that said indebtedness of the defendant, Berry, was secured by a mortgage on certain real estate. Prayer for judgment against Berry for the amount of the plaintiff's debt, and that the mortgaged land be sold to satisfy the same. Berry's answer states that he paid in land and goods the whole amount due on the mortgage, and that McReynolds agreed to satisfy it. This alleged satisfaction of the garnished debt, it appears from defendant's tes-

timony, was made before plaintiff's suit against McReynolds was commenced. The finding of the Chancellor was in favor of the defendant, and the plaintiff appealed.

E. S. McDaniel and *Crump & Watkins*, for appellant.

1. The finding of the Chancellor is against the evidence, and should be reversed.

2. The court proceeded in the manner provided in garnishment cases. *Mansf. Dig., sec. 343; 29 Ark., 470; 45 Aak. 271; 48 Ark., 349; 3 S. W. Rep., 439; Wade on Att., secs. 377-389, Vol. 2;* and Berry is estopped to deny his indebtedness until the judgment against him is set aside. *2 Wade Att., sec. 522; 1 Flor., 233; 46 Am. Dec., 339 and note; 29 Ark., 470.*

C. R. Buckner and *J. D. Walker*, for appellee.

1. The evidence supports the finding of the court.

2. The order of the Benton Circuit Court in the garnishment suit does not preclude Berry from setting up any defense he might or may have had to the foreclosure suit. It was not a judgment against the garnishee, and does not determine his liability. *48 Ark., 349; 94 U. S., the A. & P. R. R. v. Hopkins; 13 Kan., 32; 6 id., 165; Wade Att., 348-352; secs. 220, 247-8, Code; 29 Ark., 470.*

GARNISHMENT: Effect of order to pay, etc.

PER CURIAM. An order to pay money made by the court upon a garnishee after his failure to appear in the attachment proceedings wherein he was garnished, is not a judgment against the garnishee, and does not determine his liability to pay. *Giles v. Hicks, 45 Ark., 271; Ry. v. Richter, 48 ib., 349.* The garnishment proceeding is not instituted to settle the question of indebtedness between the attached debtor and third persons (*Moore v. Kelly, 47 Ark., 219*), and the only effect of the court's order upon the garnishee is to confer upon the attaching creditor of his creditor, the same right to collect whatever he may owe his attached creditor, that the latter had against him, *i. e.*, the garnishee. *Giles v. Hicks, sup.* When suit is instituted by the attaching creditor to recover the gar-

nished debt, the order made in the attachment proceedings does not preclude the garnishee from setting up any defense he might have made before the garnishment.

The chancellor heard the witness orally, and had opportunities of judging of their credibility that we have not; and his finding of fact, if opposed to the preponderance of evidence at all, is not so grossly opposed to it, as to warrant our interference.

Affirmed.

BENDER V. BEAN.

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1. ADMINISTRATION: *Relinquishment of land to vendor of decedent: Void order, etc.*

Section 4 of chapter 3, of the so-called "Chapters of the Digest," adopted by the General Assembly in 1869, which provided that when lands of a decedent had not been paid for, the Probate Court might order the same to be relinquished to his vendor on the most advantageous terms that could be agreed upon, not having received legislative sanction did not become a law. An order made pursuant to said section in 1871, authorizing an administrator to relinquish his intestate's interest in certain lands was void; and not being in itself a sale, nothing was added to its validity by the act of 1873, providing that all sales previously made in pursuance of such "chapters," should be binding. Nor could that act impart any validity to a deed executed by the administrator after its passage.

2. SAME: *Same.*

An order of the Probate Court, made on the *ex parte* petition of an administrator, authorizing him to relinquish certain lands conveyed to his intestate, to the vendor thereof on the surrender of the notes given for the purchase money, does not bind the vendor, and if valid in other respects, could not be executed by the administrator after his removal. Nor could a conveyance for the purpose of such relinquishment, executed by the administrator after his discharge, be made effectual by an order confirming it, made by the court after its jurisdiction over the land had ceased by the close of the administration.

3. STATUTE OF LIMITATIONS: *When infants barred.*

In an action to recover lands the infancy of the plaintiff is no protection against the statute of limitations where it began to run in the lifetime of the ancestor under whom he claims.

4. TAX SALES: *Minor's right of redemption: Compensation for improvements.*

The right granted to minors by the act of 1873 (*Gantt's Dig., sec. 5197*) to redeem their lands from tax sales at any time within two years from the expiration of their disability, was upon the condition, expressed in the same act (*Gantt's Dig., sec. 5216*), that the Legislature might regulate the compensation to be paid by them for improvements thereafter placed on their lands by tax purchasers.

5. SAME: *Same.*

The provisions of the revenue act of 1883 (*Mansf. Dig., sec. 5792*), to the effect that occupying tax-claimants of land shall be allowed the full cash value for improvements made after two years from the date of sale, applies to the redemption by minors of lands forfeited in 1876–7, and gives to the tax-purchaser the right to compensation for such improvements without exacting the showing of belief in the integrity of his title which is required by the "betterment act."

6. SAME: *Same: Minor's right not an estate: Rents.*

On the execution of a tax deed the purchaser becomes the owner of the land conveyed, and a minor's right to redeem it is not an estate in the land, but only a statutory privilege to defeat the tax title within a limited time. The purchaser is not, therefore, liable for rents until his fee is terminated by a redemption effected in the manner provided by law.

7. SAME: *Same: Tender of payments: Offer to redeem.*

A minor may terminate the fee of a tax-purchaser of his land by paying or tendering the sum prescribed by the statute as necessary to effect its redemption And an offer, made in good faith, to redeem, which is refused not because no tender or an insufficient tender is made, but because the right to redeem is denied, is as effective as a tender. But a joint tender by several persons is not good where one of them is not entitled to redeem.

8. SAME: *Same.*

Where on a bill brought by minors against several purchasers, to redeem lands from tax sale, the plaintiffs set out their respective interests and ask to be allowed to redeem as provided by law, there is an implied offer to pay to each of the purchasers the sum which the law allows him. And if such offer is met by no objection to its terms, or to the fact that no money is actually tendered, but by a denial of the plaintiff's right to redeem, and by the assertion of an adverse title, the purchasers should be charged with rents from the commencement of the suit where the judgment of the court sustains the right to redeem.

APPEAL from *Saline* Circuit Court in Chancery.

J. B. WOOD, Judge.

P. C. Dooley and *C. Altenberg*, for the Bender heirs.

The administration having closed, the Probate Court had no authority to order a sale of the lands. It was without jurisdiction. *Const. 1868, art. 12, sec. 5; 15 Ark., 412; 48 id., 360;* but if it had authority to sell, title could not be passed by the proceedings had, which were wholly without authority and void. *40 Ark., 220; 7 Tex., 617; ib., 240.*

The pretended "relinquishment" was never confirmed by the Probate Court. *47 Ark., 413.* Nor are there any appropriate words to *convey* title.

The Probate Court has no power to foreclose or adjust vendor's liens. *27 Ark., 306; 28 id., 266; 43 id., 464.* The order for the sale of the homestead was void. *29 Ark., 633; 37 id., 316.*

The Douglass heirs not barred; the statute does not run until the youngest heir is of age. *47 Ark., 504; ib., 445.* It is less than seven years from the death of Douglass to the institution of suit. *41 Ark., 149.*

2. A minor could not be required to make compensation for improvements beyond the value of the rents and profits. *33 Ark., 490; 42 id., 118.* Nor can they be improved out of their estate. The benefit of the betterment act inures only to those who act *bona fide* and believe in the justice of their title. *47 Ark., 528; 8 Wheat., 79; 45 Ark., 419; 46 id., 333; 47 id., 445.* The element of honest belief in ownership is wanting in this case.

If Haynes & Helms are allowed for improvements over the rents, they should be charged with the improvements when they donated it. No tender was made therefor. *42 Ark., 330.*

Minors may redeem at any time within two years from their minority. *Secs. 5771, 5775 Mansf. Dig.* The latter section fixes the amount to be paid. The act of March 14, 1879, p. 69, is silent as to the amount to be paid; but section 10, p. 70, Acts of 1879, gave minors the right to redeem "as provided by existing law. The Acts of 1877, section 1, p. 29, saves the minor's right to redeem in the manner now provided by law," or here-

after may be prescribed. None of these laws, after the first make any provision for the amount to be paid. The Acts of 1875, section 17, p. 227, provides the amounts to be paid on redemption, and this was the law in force when the land was sold in 1877 for the taxes of 1876. See *sec. 5197 Gantt's Digest;* also, *5700 ib.* The Acts of 1871 changed the amount to be paid. *Acts 1871, sec. 114, p. 166, and sec. 116.* The Acts of 1869, p. 59, section 131, also change the amount by adding 100 per cent. penalty. See also *Acts 1868, p. 277, sec. 57.*

From this review, it is evident that minors had the right to redeem for two years after attaining full age, but nothing is said of improvements. The act of January 10, 1857, if applicable, provides for the tender of the full amount of improvements made by the tax-purchaser. In *41 Ark., 149,* it was held that the law was "revised and modified" by the Acts 1868-9, so far as "the amount to be paid the purchaser at the tax sale before he can be evicted." *43 Ark., 398.*

The act of 1873 covers the same matter as sec. 2, act 1857, and sec. 17, act March 5th, 1875, p. 227, is on the same subject precisely as sec. 117, act 1873. Both are revenue laws and are inconsistent; the act 1873 is repealed, as well as sec. 2, act 1857, and the act 1875 does not apply to the redemption of lands sold for taxes 1876. The redemption from tax sales is governed by the law in force at the time of sale, and is not affected by subsequent legislation. The law of 1857 provides only for a tender of the value of such improvements as were made after the time for redemption expired. And to a minor two years after his majority. See, *Black, Tax Titles, sec. 169; ib., sec. 199, 193–4, 268.*

The improvements in this case were put on by defendants, knowing that there were minors. See, on this subject, *Sedg. & W. on Land Titles, sec. 690–4; 33 Ark., 495; 41 Ark., 120; 47 id., 456.*

The law in force at the time of sale controls the amount to

be paid for redemption. *Black, Tax Tit., sec. 175; Cooley, Tax, 369–370.*

The transaction was not even in accordance with sec. 4, chap. 3 of the so-called "Digest," which never was law. *27 Ark., 266.* Nor was it cured by act February 25th, 1873, because this did not take place until October, 1874, and the act only cured past acts.

The claim in this cause was never allowed or classified against the estate of Samuel Bender, and the Probate Court has no power to dispose of lands, except at public sale, to pay *debts. 27 Ark., 335; Gantt's Dig., sec. 171.* There was no estate in course of administration, no administration, no representation, in the absense of which the court had no power to act. *36 Ark., 529.*

Ratcliffe & Fletcher, for Haynes and Helms.

The claim was presented to the administrator before August 15th, 1871, and under the chapters of Digest, ch. 4, secs. 5-6, David Bender had three years in which to present the claim to the courts.

The matters were in accordance with ch. 3, secs. 2, 3 and 4, chapters of the Digest. By act March 16th, 1871 (*Acts 1871, p. 18*), the Probate Court was clothed with original jurisdiction at law and *equity*. The court then had *plenary powers;* all the parties acted in good faith, thinking their rights were settled, and all presumptions must be indulged in favor of the rightful exercise of the jurisdiction of the court. *19 Ark., 516; 44 id., 269; 33 id., 828.* A presentation to the administrator within two years, and the authentication of a copy, was all required by *Gould's Dig., ch. 4, sec. 102.* But these objections merely affect the regularity of the order, and do not render it void. *35 Ark., 210-11; 31 id., 83; 37 id., 159.* The order was an allowance of the claim.

An affidavit to a claim is not a *jurisdictional* prerequisite. *2 Eng., 78; 30 Ark., 759.* The preliminary matters may be waived by the administrator. *13 Ark., 276; 25 id., 219.* If Ben-

der had proceeded in equity to enforce his lien, no question could have been raised on account of the absence of an affidavit. *25 Ark., 152; 29 id., 440; 32 id., 297; ib., 406; 28 id., 512.* It was as much the duty of the administrator to present the claim to the Probate Court as it was of the claimant. *29 Ark., 248.*

Under section 184, chapter 4, Gould's Digest, the court had power to dispose of the land as the interests of the estate demanded; the requirement of a public sale is not jurisdictional, and by section 181, the sale might be conducted as the court directed. The order was, in effect, a private sale to David Bender. *26 Ark., 431.*

But a failure to comply with the statute in this respect, is but an irregularity, and does not affect the jurisdiction or the validity of the order in a collateral proceeding. *13 Ark., 177; ib., 507; 19 id., 499; 44 id., 411; 31 id., 74.*

The order was an effectual allowance and adjudication of Bender's claim, fixed the status of the parties, and was in effect a sale of the land, or rather a canceling of the deed from David to Samuel Bender, and revesting the title in David, and a court of equity will treat that as done which should have been done. *1 Story Eq. Jur., sec. 640; 3 Wheat, 578; 10 Wall., 68; Willard Eq. Jur., 271.*

The relinquishment was simply the performance of a duty which a court of equity would have enforced. The order authorizing the relinquishment was a confirmation. Besides, the order of the Circuit Court, directing the deed to be spread upon the record, and taking the acknowledgment, was sufficient confirmation. *33 Ark., 294.*

There could be no homestead exemption against a claim for purchase money. *Const. 1868, art. 12, sec. 3.* The heirs of Samuel Bender have no interest, unless there should have been a balance after payment of the claim. *22 Ark., 302.*

David Bender acted in good faith, relying upon the order, and all persons claiming subsequent to him will be subrogated

to his rights. *1 Story Eq. Jur., secs. 567, 635, 638; 16 Ark., 216; 31 Ark., 411; 32 id., 346; 1 Jones Mortg., secs. 812, 874; Freeman Void Jud. Sales, sec. 51.*

The Douglass heirs having failed to redeem within two years from the death of their mother, are barred. *Burrows Tax., p. 362; 31 Ark., 364; 16 id., 612.*

If appellants are entitled to redeem, Haynes and Helms are entitled to the full value of all improvements, without deduction for rents. *Mansf. Dig., sec. 2651; 32 Ark., 131.* A bill in equity is the proper remedy. *41 Ark., 59.*

The statute of two years is applicable and can be successfully pleaded against all defects, if any, in the sale. *22 Ark., 178; 21 id., 145; 20 id., 508; 7 Eng., 822; 46 id., 96.*

Under the act of 1857, minors had no longer time to redeem than others. Subsequent acts extended the time as a *matter of grace*, but there is nothing to affect the act of 1857. The purchaser was entitled to pay for improvements before the time for redemption expired. *Gould's Dig., ch. 148, sec. 143.* The words "after the expiration of the period allowed for redemption," in *secs. 2649* and *2651 Mansf. Dig.*, are interpolations by the digester taken from section 5792, as found in the act of 1883. It does not appear in *Gantt's Dig., secs. 2267–9*, although the act of 1871, page 186, and 1873, page 376, contained similar provisions.

Under all the statutes, a deed issues after two years from sale, and the title passes to the purchaser subject to be defeated by the exercise of the redemption by minors. *31 Kans., 310.* But a recovery by a minor is upon the same terms as an adult, the difference being that an adult must show a fatal defect in the sale, while a minor need only show disability. *21 Ark., 319.*

The betterment act is not in conflict with the act of 1857. The two acts when applied to the objects which the Legislature had in view, work in perfect harmony, and fall clearly

within the rule in *44 Ark., 410; 10 Ark., 588; 23 id., 304; 41 id., 149.*

COCKRILL, C. J. The complaint in this cause was filed for the purpose of effecting a redemption of the lands described therein from tax sales. It alleged that the plaintiffs, Julia and Adelia Bender, Sallie Morris and Maggie Vanlandingham, together with Walter and David Bender and Agnes Douglas, were tenants in common and owners of the lands when they were forfeited for the non-payment of taxes; that the four first named were the minor children and heirs of Samuel Bender, deceased, who died seized of the lands, and that the others were the heirs-at-law of Agnes Douglas, who was daughter to Samuel Bender and who died after the forfeitures; that each of the defendants, Bean, Helms and Haynes held part of the lands by virtue of donation deeds from the State, executed in pursuance of forfeitures for the non-payment of taxes; that they had made a tender to each of the amount required by law to redeem, and that the tenders had been refused.

The prayer was for an account of rents and for the enforcement of their right to redeem. Haynes and Helms filed a joint answer admitting that they held under donation deeds, but denying that the plaintiffs were ever the owners of the lands, and alleged that they had paid taxes and put valuable improvements upon them.

Bean denied that he held under a tax deed; admitted that the lands in question had once belonged to Samuel Bender, the plaintiff's ancestor, and that he had died seized and possessed thereof, but alleged that the administrator of his estate, acting under authority of the Probate Court of his appointment, conveyed the same to one David Bender before the forfeiture mentioned in the complaint, and that he had succeeded to David Bender's title through certain mesne conveyances; he pleaded the seven-year statute of limitations; alleged that the tax titles of Haynes and Helms were irregular and void;

made his answer a cross-complaint against them and the plaintiffs aud prayed that his title be quieted against the claims of title of all the parties.

Proof was taken and the court heard the cause without objection from any source as to multifariousness or misjoinder of parties, and decreed that Bean had no title except as against the Douglass heirs; that the minor children of Samuel Bender were entitled to recover four-sevenths of the lands which he held; that they were entitled to redeem the same proportion of the lands held by Haynes and Helms, on paying the excess of the amount of taxes paid, and the value of improvements made by the tax-purchasers over the value of the rents enjoyed by them, and dismissed the complaint as to the heirs of Agnes Douglass. The plaintiffs appealed, and afterwards cross-appeals were allowed here in favor of each of the other parties.

Bean argues that he succeeded to the title of Samuel Bender, by virtue of the administrator's deed, and that the decree granting the plaintiffs relief against him is wrong for that reason. Haynes and Helms also argue that the administrator's deed divested the title of the plaintiffs before the forfeiture, and left them without interest to redeem; and say if they are mistaken in that, that the court erred in refusing to allow them credit for the full amount of their tax expenses and the value of the improvements, without diminution for rents enjoyed by them.

The successful plaintiffs complain because they are required to pay for any part of the improvements, and the other plaintiffs appeal because no relief was granted them.

The facts in relation to the execution of the deed by Bender's administratior, are as follows. In 1860 Samuel Bender purchased the lands in dispute from David Bender, who, as all the parties admit, was then the owner in fee, making a cash payment and giving his notes for $2000 for the deferred payments of the purchase money. A lien was retained in the deed as se-

curity for the payment of the unpaid purchase money. Samuel Bender died in January, 1869. In March of the same year, Walter Bender was appointed administrator of his estate, and in August, 1871, presented his petition to the Probate Court of his appointment, alleging that the notes for the purchase money were unpaid, and that the lands were worth less than the principal and interest due on them; that the estate was insolvent, and that he was unable to discharge the notes if it was to the interest of the estate to do so; and prayed that authority be granted him to relinquish to David Bender all the interest of the estate in the lands, upon condition that he would surrender the purchase money notes to the petitioner.

The order of the Probate Court in this connection is as follows: "Upon examination it is considered and ordered by the court that the prayer of said petition be granted, and he (the administrator) is hereby authorized to make said relinquishment."

The records of the administration of the estate of Samuel Bender were put in evidence. and it nowhere appears that the claim of David Bender against the estate of Samuel, was ever allowed by the court or presented to the administrator. In June, 1872, the accounts of Bender's administrator were examined and approved, and the administrator was discharged. In October, 1874, a deed of relinquishment was executed by Walter Bender, purporting to act as administrator of the estate of Samuel Bender, deceased, to David Bender, to carry out the order of August, 1871, in reference to the settlement of the purchase-money notes. The deed was acknowledged by Walter Bender before the Probate Court, and was spread at large upon the record; no order in reference to the matter was made by the Court. David Bender appeared at the time the deed was acknowledged, and surrendered the purchase-money notes. No other action was had in the matter of the estate after the discharge of Walter Bender as administrator in

1873. The lands were assessed for taxation in the name of David Bender after 1874. He conveyed them to one Allen, and Allen to the defendant, Bean. Bean and those through whom he claimed title, had been in the adverse possession for more than seven years when the suit was instituted.

1. ADMINISTRATION: Relinquishment of land to vendor of decedent: "CHAPTERS OF DIGEST."

Such is Bean's title. The order of the Probate Court, of August, 1871, was evidently made in pursuance of the supposed authority of the fourth section, of chapter 3, of the so-called "Chapters of the Digest," which was to the effect that where lands of a decedent had not been paid for, the court might, if it believed it advantageous to the estate, "order the same to be relinquished" to the vendor on the most advantageous terms that could be agreed upon. But the "Chapters of the Digest" did not receive legislative sanction in legal form and the provision referred never became a law. *Vincent v. Knox, 27 Ark., 267.*

In 1873 the Legislature enacted that all sales previously made in pursuance of the "Chapters of the Digest" should be binding (*Acts of 1873, p. 13*), but this act could add nothing to the validity of the order of August, 1871, because it was not in itself a sale, but purported only to confer authority upon the administrator to sell, and the power had not been executed when the healing act was passed. If the order rested upon the supposed authority of the "Chapters of the Digest," it was a nullity, and no rights could be acquired under it.

2. SAME: Same.

But it is argued that under the act of March 16, 1871, which was in force when the order was made, the Probate Court was clothed with all necessary jurisdiction at law and in equity, to do what was necessary to close up the administration of estates (*Acts of 1871, p. 18*), and that being a superior court and having jurisdiction of the subject matter, the order is valid. But the order does not profess to divest the title of the estate and vest it in David Bender, as counsel argue. And, if it be admitted that the Probate Court had authority to do that, it could not have been effected upon the *ex parte* petition of the adminis-

trator. The order was not binding on David Bender. His assent to the condition upon which the conveyance was to be made, that is, the surrender of the notes which he held, was necessary to give it effect. But his assent was not obtained, and no effort was made to execute the order until the administrator had been shorn of his authority to act by the court's order of removal. What he did after removal was no more than the act of a stranger. The administration had ceased, the heirs had the right to the possession of the land (*Stewart v. Smiley, 46 Ark., 373*), and the court had lost its jurisdiction over it. An order confirming the execution of the previous power to sell under such circumstances could not have breathed life into the deed. It would have been an *ex parte* judgment with no party in interest before the court, and no cause pending. See *Phelps v. Buck, 40 Ark., 219; Sumner v. Howard, 33 ib., 490; Gwynn v. McCauley, 32 Ark., 97.* There was no error in declaring Bean's claim of title without foundation.

3. STATUTE OF LIMITATIONS: When infants barred.

The plaintiffs who recovered against Bean were minors when their cause of action accrued, and when the suit was brought, and the statute of limitations did not operate as a bar against them. But the minority of the heirs of Agnes Douglass is no protection to them, because the statute was set in motion in the lifetime of their mother. It follows that the plaintiffs in whose favor the decree was rendered were owners of the land when they were forfeited to the State for the non-payment of taxes, and as they were within the age when their suit was begun, their right to redeem was intact and could be enforced in equity. *Carroll v. Johnson, 41 Ark., 59; Keith v. Freeman, 43 ib., 296.* The questien is, what must an infant pay to redeem, or what is the tax-purchaser entitled to receive as the price of redemption? The answer, so far at least as the purchaser is concerned, depends upon the law in force when the rights of the parties accrued. *Railway v. Alexander, 49 Ark. 190.*

4. TAX SALES: Minor's right of redemption: Compensation for improvements.

One of the tax deeds is based upon a sale made in 1876, and the other in 1877. The lands were certified to the State Land Commissioner, and donation certificates were issued by him to the present claimants in 1879, and were followed by deeds in due course of time. The privilege of redemption was extended to minors by the revenue act of 1873 (*Gantt's Dig., sec. 5197*), and has remained unchanged. By the seventeenth section of the amendment to the revenue law enacted March 5, 1875, any person desiring to redeem lands sold for non-payment of taxes could do so within the time limited by law, by paying "an amount of money equal to the taxes for which the land was sold, penalty and cost of advertising; and the taxes subsequently paid thereon by such purchaser, or those claiming under him, together with interest at the rate of ten per cent. per annum, on the whole amount so paid and the amount paid by the purchaser for the certificate of purchase, and the expenses of advertising." *Acts of 1875, p. 227.*

5. SAME: Same.

While this section applies to redemption by minors (*Keith v. Freeman, sup.*), the reference to payment for a certificate of purchase without mentioning the deed shows that the Legislature had in view more particularly a redemption within two years from the sale and before a deed issued. Nothing is said therefore in this section about improvements. But in section 186 of the same act (*Gantt's Dig., sec. 5216*), it was declared that no compensation should be allowed for improvements made within two years of the sale, but that for "improvements made after two years from the date of sale (such) proceedings shall (should) be had in relation thereto as shall be prescribed in any law existing at the time of such proceedings for the relief of occupying claimants of land." This law was in force when the forfeitures were had. It was then, a condition upon which the right to redeem was granted to the minors, that the Legislature might regulate the compensation to be paid by them for improvements thereafter placed on their land by the tax-purchaser. The amount of the taxes, penalties, and the rate of interest

the purchaser was to receive were unalterably fixed by the terms of the implied contract made at the date of his purchase. These are regulated as we have seen by the act of 1875 above quoted. The law for the relief of occupying tax claimants of land in force when the suit was instituted, was the 155th section of the revenue act of 1883 (*Mansf. Dig., sec. 5792*), which provides that they shall be allowed the full cash value for improvements made after two years from the date of sale. The law was passed subsequent to the "betterment act" and gives to the claimant the right to compensation without the showing of belief in the integrity of his title, which is demanded by the latter act. Being the last expression of the Legislative will and applicable especially to tax claimants it prevails in this suit. The court followed the correct rule in allowing the tax-purchasers the value of the improvements made by them.

6. SAME: Minor's right to redeem, not an estate: Rents.

But upon what principle can they be charged with the value of the rents? Upon the execution of the tax deeds they became the owners of the lands. *Craig v. Flanagin, 21 Ark. 319.* The minor's right to redeem is not an estate in the lands, but only a statutory privilege to defeat the purchaser's title within a limited time. That was the effect of the ruling in *Craig v. Flanagin, sup.*, where the right to redeem by a non-resident—a privilege granted by a previous law—was considered. The right is analogous to a condition subsequent attached to an estate, and it was only by virtue of the statutory recognition of the minor's vendee that we were able to rule that the privilege was not strictly personal. *Neil v. Rozier, 49 Ark., 551; Mansf. Dig., sec. 4272.*

The plaintiff's suit to redeem was an affirmance of the validity of the tax titles and an election to defeat them by complying with the law governing such cases. It is true allegations of irregularities in the tax proceedings were made in the complaint, but the proof does not sustain them.

The court erred, therefore, in charging Haynes and Helms with rents. As to them the decree will be reversed and the

cause remanded with instructions to enter a decree in accordance with the opinion.

Otherwise the decree is affirmed.

SUPPLEMENTAL OPINION ON MOTION TO MODIFY DECREE AS TO RENTS.

HEMINGWAY, J. Upon the hearing of this cause, we held that defendants Haynes and Helms were not chargeable with rents of land purchased by them at tax sale.

The plaintiffs, who prevailed, have filed a motion seeking to modify the decree in this respect, and to charge Haynes and Helms with rents after they offered to redeem and made a tender of the sum necessary.

7. SAME: Same: Tender of payment: Offer to redeem.

As we said upon the hearing of this cause, the minor's right to redeem is a statutory privilege to defeat the purchaser's title within a limited time. The purchaser holds an estate in fee, subject to be defeated by the exercise of the privilege. This the minor may do by making the payment prescribed by the statute, within the statutory period, to the purchaser. Upon such payment, the fee of the purchaser is terminated, and the person redeeming becomes seized thereof with all rights pertaining thereto, including the right to rents.

A tender of the amount necessary to redeem is as effective as a payment thereof; and an offer, made in good faith, to redeem, which is refused, not because no tender, or an insufficient tender, is made, but because the right to redeem is denied, is equally effective.

Any other rule would make a profit for the purchaser, from his unlawful denial of a statutory right.

A tender of the exact amount necessary, under a statute which exacts payment for improvements, would in many cases be impracticable If the purchaser could decline it without making a showing as to the correct amount, and still enjoy the rents and profits of the land, redemption by minors would be difficult and tedious. In all cases where the rents and profits for a few years exceeded the cost of litigation, redemption

would be allowed only at the end of vexatious suits. When the former owner, who is entitled, desires, and in good faith attempts, to redeem, the tax-purchaser should offer no obstacles to his doing so. If the sum offered is inadequate, the inadequacy should be objected to, and the correct amount indicated. It will not do to maintain silence as to objections, which if expressed, might be met, and afterwards assert them to the owner's prejudice.

The plaintiffs made a tender before bringing the suit, but it was joined with a tender from another party who was not entitled to redeem. This was not a good tender.

8. SAME: Same.

In the bill filed, they set out their respective interests, and ask to be allowed to redeem as provided by law. This implied an offer to pay the amounts which the law allowed to each of the tax-purchasers. It was met by no objection to its terms, or to the fact that no money was actually tendered, but by a denial of the right to redeem and by the assertion of a title adverse to the plaintiffs. They desired to redeem and sought to terminate the estate of the tax-purchasers, which they had a right to do; the purchasers could not by their improper refusal of the privilege sought, extend the term of their estate, and continue to enjoy its rents and profits.

The decree will be modified, and Haynes and Helms will be charged with rents from the date of the institution of the suit.

DISSENTING OPINION BY SANDELS, J. On motion to modify decree.

I do not assent to the conclusion of the court upon the motion of plaintiffs below to award them the rents of the lands in controversy, since the filing of their bill. I do not think they are entitled to rents until after the decree of the court has adjudged them entitled to redeem, and they have paid the sums adjudged against them.

So much of the record as is necessary to a proper understanding of my position, is as follows:

There were seven heirs of Bender. *Two* were confessedly barred of their right to redeem. *Five* of them claimed the right, and sent their attorney to Haynes and Helms to effect the redemption. He offered to each of them (Haynes and Helms) $100 to cover taxes, penalty, costs, etc, on behalf of the "Bender heirs." Each refused to accept the sum tendered without assigning any reason for the refusal.

Five of the Bender heirs, soon after, filed their bill to redeem, and, after alleging the tender of $100 to each of the defendants, offered to pay such sums as the court might adjudge against them for the redemption of five-sevenths of the land. By the consideration of this court it was determined that *one* of the *five* plaintiffs was not entitled to redeem, and that only four-sevenths of the land was redeemable. It was determined, also, that the sum due to Haynes was $, and to Helms $. The sum tendered before the filing of the bill was for the redemption of more land than they were entitled to redeem, and was insufficient to pay for the redemption of *that* to which they were entitled. It is conceded by the court that this tender was ineffectual for any purpose. It is decided, however, that by the subsequent filing of the bill by *five* heirs claiming five-sevenths of the land, and offering to pay such sums as the court might adjudge; and, also, by the filing of the answer denying the right of these plaintiffs to redeem; but insisting that if they were so entitled, the sum tendered them was inadequate, the right of plaintiffs to the rents accrued.

For a long time *the right to maintain* a bill to redeem without a previous sufficient tender was denied, except when the fraud of the tax-purchaser or officer had prevented redemption within the proper time, or when the bill presented other features that brought the case within some distinct head of equity jurisprudence. But the last, as also the greatest innovation, in favor of liberal dealing with delinquent tax-payers, is that they may preserve their *right of redemption*, by filing a bill without

tender at all, where it is difficult to tell what exact sum should be tendered. This saves *the right to redeem* when the bil offers to pay such sums as are adjudged. But I maintain that the right to redeem does not necessarily carry with it the right to rents. The right to rents depends upon the ownership of the lands.

In cases of redemption, by persons generally, within two years from the sale, the tax-purchaser has only an inchoate right to the land, and is not entitled to possession. He is a trespasser if he takes it. He gets *title* upon the execution of a deed to him at the expiration of two years. This title is unqualified, except in cases where the delinquent tax-payer is a minor. In that event the tax-purchaser takes the title subject to divestiture by the exercise of the minor's right of redemption within the statutory period.

From the time of the execution of the tax deed, then, the tax-purchaser's title is indefeasible except upon the contingencies above stated: the minor paying or tendering the full amount of taxes, penalty, costs, etc. If the sum be tendered before, or at the filing of the bill, the minor upon recovery in the action is entitled to the rents and profits from the time a sufficient tender was made and refused. Why? Because the payment, or the tender, of the full sum due the tax-purchaser operated to divest his title, and from that time he holds wrongfully the *plaintiff's* land.

But in case the plaintiff offers, generally, to do what the court may adjudge proper, there is no divestiture of the title of the tax-purchaser until the court adjudges the plaintiff's right to redeem, fixes the amount of plaintiff's liability, and the plaintiff pays it. The plaintiff may never pay it, in which case there would never be a divestiture. Until such adjudication and payment, the land remains the property of the tax-purchaser, and he is not chargeable with rents for living on his own place.

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STATE v. MORGAN.

1. SCHOOL LANDS: *Statute regulating sale of.*

Section 52, chapter 154, Gould's Digest, required that the school lands should be sold upon a credit, the purchasers to give bonds and pay interest semi-annually, but provided that "any person might pay the amount in cash for which said land was sold." HELD: That the provision as to cash payments applied only to purchasers and that it was not the purpose of the statute to permit one thus to acquire land which had been sold to another.

2. SAME: *Same: Authority to sell.*

Sections 5564, 5565, Gantt's Digest, only enlarged the authority elsewhere conferred by statute on County Collectors to sell the school lands; and section 5578, id., merely provided a method by which persons who had purchased lands according to law and complied with the terms of purchase, might acquire patents. Neither of these statutes nor any other authorized the sale of such lands by the Board of Commissioners of the common school fund.

3. PATENTS: *Collateral attack upon.*

A patent of the State absolutely void on its face, as for instance where it is for land reserved by statute from sale, or is executed by officers not charged with that duty, may be assailed in any controversy. But where a patent for lands of the State subject to sale is executed by officers empowered by law to issue it, their decision that the facts necessary to its issuance existed, is conclusive against collateral attack.

4. SAME: *Same.*

Gantt's Digest, section 5571, having made it the duty of the Governor and Secretary of State to execute patents for the school lands to purchasers thereof on payment of the purchase money, a patent executed by those officers in the manner provided by the statute, although issued pursuant to a sale made without any warrant of law, cannot be assailed in an action of ejectment, and can be avoided only by a direct proceeding in chancery for that purpose.

5. SAME: *Proceeding to annul: Complaint.*

A complaint in equity by which the State seeks to cancel its patent and recover the possession of lands held thereunder, is insufficient unless it offers to restore to the defendant the purchase money and taxes received from him and to pay the value of his improvements, less the rents and profits with which he ought to be charged.

APPEAL from *Independence* Circuit Court.

R. H. POWELL, Judge.

Coleman & Yancey, for appellant.

There is no allegation in the answer that a sale of the land was ever made to Morgan, by any person, or in any manner known to the law, or that he ever did, in fact, *purchase* the land. The answer was not responsive to the complaint, and did not show a *prima facie* title. *Mansf. Dig., sec. 2632.* There never was a *sale* of the land to Morgan. The whole proceedings were wholly without authority of law. *Gantt's Digest, secs. 5560, 5561, 5568, etc.* The Collector is the only person authorized to sell school lands, and he only on the *terms*, at the *place* and in the *manner* prescribed. A sale made otherwise is a nullity, and a patent based upon such a sale is *void. Blackw. Tax Tit., 46; 27 Ark., 226; ib., 414.*

The Secretary of State issues patents "from returns made by the Collector," and *not* from any "consideration" or "order" of the Board of Commissioners. *Gantt's Digest, sec. 5571.*

The State is not bound by the unauthorized acts of its officers, and third parties deal with them at their peril. *Story on Ag., sec. 307a; 39 Ark., 580.*

A naked patent will not divest the State of her title, unless a lawful sale has first been made. *27 Ark., 414; 42 id., 77; 46 id., 333.*

Statutes of limitation do not run against the *State. Wood on Lim., 88,* and as Morgan was in possession under a void patent, ejectment was the proper remedy; a void deed not being a "cloud upon title," chancery will not take jurisdiction. *27 Ark., 233, 414.* But if there was error in the method of procedure, the error was waived. *Mansf. Dig., sec. 4927.*

The proviso in section 52, chapter 154, Gould's Digest, and section 14, act of April 12, 1869, simply authorized a *purchaser in accordance with law,* to pay his bid *in cash.* And this proviso was repealed by section 6, act of April 12, 1869, page 190. *Gantt's Digest, sec. 5562.*

Gantt's Digest, section 5578, has reference exclusively to the issuance of patents to *purchasers* under the old school law, who had complied therewith.

Robert Neill, for appellee.

Reviews the antecedent laws on the subject, and contends that where school lands *have once been offered for sale* as prescribed by law, and by reason of non-payment, the land reverts to the State, the Board of Commissioners were authorized to sell to any one for cash at a price not less than $1.25 per acre. *Gantt's Digest, secs. 5564, 5565; Gould's Digest, sec. 52, ch. 154, and proviso; sec. 5563 Gantt's Dig.; ib., 5665, 5549 to 5565; Acts of 1859, p. 148.*

Section 52, *sup.*, was not repealed by section 6, acts April 12, 1869, as to lands which had already been offered and sold, and reverted to the State, but if it was, *section 5565* was not.

But if the board did err in their construction of the law, the patent is not void. The Governor and Secretary of State, then Superintendent of Public Instruction, composed the Land Department of the State, charged with the duty of passing on the facts necessary to entitle a party to a patent (*secs. 5570-1-2-3, Gantt's Dig.*), and its judgment is unassailable, except by direct proceedings to annul the patent. The patent passes the title. *16 Otto, 447; Gantt's Dig., sec. 5571; id., 857; 10 Johnson, 22; 4 Bibb (Ky.) 329; id., 330;* and cannot be attacked collaterally. *4 Munroe, 51; 4 Dana, 50; 2 B. Mon., 57; 13 Pet., 436;* the patent is conclusive. *14 Otto, 636; 31 Ark., 609; ib., 425;* thereby divesting the State of her title. *Supra.*

The patent must prevail in a suit at law until canceled in equity by bill praying such relief. Even courts of equity do not grant relief unasked. *45 Ark., 270; 43 id., 317.*

Even if his patent were worthless, the State must do equity (*17 Fed. Rep., p. 39; 21 How., 450; 7 Wall., 675; 12 Wheat., 559; 94 U. S., 217; 7 Wall., 159*) by complying with the betterment act, restoring the consideration, paying for improvements, etc.

That the patent is conclusive at law, see *27 Ark., 200; 39 id., 121.* The State is estopped by her deed. *Bigelow Est.,*

2d ed., 247; 4 Pet., 87; 17 Wall., 32; 49 Mo., 224; 38 Ark., 81; 7 Cal., 527.

HEMINGWAY, J. The State of Arkansas brought suit in the Independence Circuit Court to recover of Thomas J. Morgan a section of common school land.

The defendant filed his answer to the complaint, to which a demurrer was interposed. The demurrer was overruled, and the cause tried upon the pleadings and exhibits; there was verdict and judgment for defendant, from which the State prosecutes this appeal.

The court treated the answer as a complete bar to plaintiff's right to recovery, and we are now called to decide whether this was error.

The complaint alleges that the plaintiff is the owner of the land, and that the defendant is in the unlawful possession thereof. That the State acquired title by an act of Congress and an ordinance of the General Assembly, each approved in 1836. That the defendant claims title under patent from the State, signed by the Governor and countersigned by the Secretary of State, bearing date the 27th day of February, 1875. That the patent was procured by the false and fraudulent representations of the defendant in this: That the defendant presented an application to the Board of Common School Commissioners for the purchase of the land, and also an unsigned paper, addressed to the Secretary of State, who was a member of the board, purporting to come from the office of said board, stating that the defendant had paid in full the purchase money for the tract of land, and recommending that a patent be issued to him. It is further alleged that the defendant had not acquired a right to a patent, either by original purchase, or by assignment from the original purchaser; and that the action of the Governor and Secretary of State in issuing the patent was in excess of their authority and without warrant of law There is prayer for the possession of the land, with damages.

The answer of the defendant alleges that in 1854 the land was sold by the county commissioners to one John W. Bright, upon a credit. That Bright failed to pay either the principal or interest, and by the provisions of the law regulating the sale, the land reverted to the State. That on the 18th day of February, 1875 the land was subject to sale by the Board of Commissioners of the common school fund, and he made application to said board to purchase it. Denies that he made any false or fraudulent representations to the board to procure a patent, but alleges that his application disclosed the sale to Bright, and its terms. Alleges that the application was duly considered at a meeting of the board, and that the board, being satisfied that the land had been sold to Bright at public auction, that he had failed to pay for the same; that it had reverted to the State, and that $2 per acre was a fair price for it, ordered that it be sold to him at that price. That he paid into the treasury of the State the price fixed, and thereupon the patent issued to him, and he thereby acquired title to and became the owner of the land. That the board had adjudged that he had become and was the purchaser of the land, and that the finding was conclusive against the State. That the facts so found were true. It is further alleged that the defendant complied with all the conditions of purchase, entered immediately into possession of the land, paid all taxes assessed against it, and had made lasting and valuable improvements upon it. A copy of the patent is exhibited with the answer.

The complaint was entitled "at law," and the court so treated the case. With this view it overruled the demurrer to the answer. Was this error?

1. SCHOOL LANDS: Statute regulating sale of.

It is contended for the appellee that the State Board had ample authority to sell the land, and that he acquired a perfect title to it. To support this contention we are referred to *sec. 52, chap. 154, Gould's Digest; sec. 14, act of April 12, 1869,* and *sec. 5564 of Gantt's Digest.*

Section 52, of chapter 154 of Gould's Digest, prescribes the terms upon which school lands should be sold. It provides for sales upon a credit, purchasers to give bonds and pay interest semi-annually. It contains a provision "that any person may pay the amount in cash for which the said land was sold," and it is upon the terms of this provision that the appellee relies to sustain his right to purchase. We cannot give it the construction contended for, even if the act was in force when he purchased. Its manifest purpose was to permit purchasers to pay cash instead of giving the bonds provided for. It was not intended to allow other persons than the purchasers to acquire land sold, by paying in cash the amount for which some one else had purchased it.

2. SAME: Same: Authority to sell.

The fourteenth section of the act approved April 12, 1869, provided a mode by which persons who had purchased lands according to law, and complied with the terms of purchase, but who had received no patent, might acquire patent and perfect their legal title. It conferred no authority to sell.

Sections 5564 and 5565, of Gantt's Digest, conferred no new authority to sell, but only enlarges the authority elsewhere conferred on the Collector of the county. It is not alleged that the appellee purchased from the County Commissioner under the provisions of Gould's Digest, or from the County Collector, under the provisions of Gantt's Digest: as the Board of Commissioners never had authority to sell, it follows that his purchase was made without any warrant of law.

But it was provided by the law in force when the appellee received his patent, that every purchaser of common school lands should be entitled to receive a patent from the State, conveying and assuring title after the purchase money was paid. *Gantt's Dig., sec. 5570.*

And it is made the duty of the Secretary of State to make out patents, to be signed by the Governor, and countersigned by him, with the seal of the State affixed. *Gantt's Dig., sec. 5571.* The object of the patents so made is to invest the legal

title of the lands described in the patentee. Such a patent was executed and delivered to the appellee, and the purchase price of the land received and appropriated by the appellant. What then is the effect of the patent and the status of the parties with reference to the land? It was State land, subject to sale, and the patent was executed by the officers charged with that duty. Patents should issue only to persons who had purchased in the manner provided by law; but whether the particular facts existed or the antecedent acts had been done necessary to the issuance of a patent, was a question for the officers making it, and their determination is conclusive against collateral attack.

3. PATENTS: Collateral attack upon.

Their acts in the line of authority cannot be questioned because they took mistaken views of the law, or of their duty under it. If the patent was absolutely void on its face, that is, if it appeared on its face, to be invalid, "either when read in the light of existing law, or by reason of what the court must take judicial notice of; as, for instance, that the land is reserved by the statutes from sale, or otherwise appropriated, or that it was executed by officers not intrusted by law with the power to issue grants of portions of the public domain, it would be subject to assault in any controversy." But where such is not true, and it is attempted to annul it for some official error or misconception, resort must be had to a direct proceeding in a proper tribunal. *St. Louis Smelting and Refining Co. v. Kemp, 14 Otto, 636; Wilson v. State, 47 Ark., 198.*

4. SAME: Same.

It follows that the State could not assail its patent in an action of ejectment, and the complaint did not state a good cause of action at law. But upon the facts alleged, it had an undoubted right to ask that the patent be canceled, and although it may have brought its case on the law side of the docket, the court should have proceeded to try it and administer relief according to the case made.

The answer is not a complete bar to the case made by the complaint; if its allegations be confessed, the patent may be

avoided at the suit of the State, and the defendant shows only the right to have such terms imposed as are equitable and just.

It is a familiar principle of equity jurisprudence that, "When a complainant comes before a court of conscience invoking its aid, such aid will not be granted except upon equitable terms. *Whelan v. Reilly, 61 Mo., 565.*

In suits to set aside conveyances between private parties, this principle has been held to apply, and require that the plaintiff restore the consideration he has in hand. *Stull v. Harris, 51 Ark., 294; Boseman v. Browning, 31 Ark., 364; Ellis v. Ellis, 4 So. Rep., 868.*

It has been held that the sovereign is not bound by any statute of limitations, or barred by the laches of its officers, in suits to enforce a public right; yet it must receive its relief in accordance with the general principles of equity, and not in violation of their terms. *Brent v. Bank of Wash., 10 Pet., 615; U. S. v. Beebe, 17 Fed. Rep., 36.*

5. SAME: Proceeding to annul: Complaint.

In this case the State cannot retain the purchase money and taxes received from the defendant, and ask to receive from a court of equity possession of the land improved by his betterments. It cannot escape a compliance with the terms that its laws impose upon others. The complaint contains no offer to comply with equitable terms. In that respect it is defective, and until it shall be so amended as to remedy this omission, the answer is sufficient. On account of this defect, the demurrer to the answer should have been sustained, and its effect extended back to reach the complaint. We might so treat it here, but as this would result in dismissing the cause without affording the plaintiff an opportunity to perfect his complaint, we will reverse the judgment and remand the cause. The court can render no judgment against the State, but it may impose equitable terms in administering relief and make a full compliance with them, a condition precedent to its enjoyment.

If the plaintiff shall amend its complaint and supply the omission we have indicated, the court will hear the cause, have

an account stated of the amount which plaintiff should pay the defendant, crediting him as in other similar suits by the purchase money, amount paid for taxes, and the value of improvements on the land, and charging him with the rents and profits; and upon the payment of said sum, render a decree canceling the patent. If such amendment is not made the cause will be dismissed. As the plaintiff may not be able to comply with equitable terms until the Legislature meets, and provides, if it so desires, the fund necessary, it would perhaps be well for the court to continue the cause until that time.

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

BLEDSOE v. MITCHELL.

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LANDLORD'S LIEN: *Bill to enforce against tenant's vendee.*

On a bill against a tenant's vendees to enforce a landlord's lien on the proceeds of certain cotton alleged to have been purchased with notice of the lien, there was no evidence to show that the defendants knew that the cotton was produced on land belonging to or rented from the plaintiff, and they testified that they purchased without notice of the tenancy, or that the rent was unpaid. The only evidence tending to prove that defendants bought with notice of a lien of any kind was that of one witness, who testified that he told them that he thought the plaintiff had a mortgage or lien on all the tenant owned, but that he did not tell them there was any claim on the cotton for rent. HELD: That the evidence was not sufficient to show notice to defendants of the plaintiff's lien.

APPEAL from *Poinsett* Circuit Court in Chancery.

J. E. RIDDICK, Judge.

This is a suit in equity to enforce a landlord's lien on the proceeds of two bales of cotton. The complaint alleges that the cotton was produced on lands rented by the plaintiff to one Haner, and that the latter owed the plaintiff a balance of about $60 on the rent. That the defendant purchased the cotton from Haner with notice of the plaintiff's lien, and that the rent was unpaid. The answer admitted the purchase of two bales

of cotton from Haner, but denied that the plaintiff had any lien thereon, and also denied that the defendants had any notice or knowledge of such lien at the time of the purchase, and alleged that they paid for the cotton before they were notified of the plaintiff's lien, or of his claim for rent. It was shown that part of the cotton was produced on land rented from the plaintiff, and that the proceeds of the two bales amounted to about $80. There was no evidence to show that the defendants knew that the cotton was produced on land belonging to the plaintiff, or that the relation of landlord and tenant existed between the plaintiff and Haner. The only evidence tending to prove that the defendants bought with notice of a lien of any kind was that of one witness, who testified that he told them that he thought the plaintiff had a mortgage or lien on all that Haner owned, but did not tell them that the plaintiff had any claim on the cotton for rent. The defendants both testified that they bought and paid for the cotton without any kind of notice of the tenancy of Haner, or of the unpaid rent. The court found that one bale of cotton was purchased with notice of the plaintiff's lien, and gave judgment in his favor for $40.00. The defendants appealed.

Sanders & Watkins and *J. D. Block*, for appellants.

The proof fails to show notice of Mitchell's lien. *Jones on Liens, sec. 580; 77 Ill., 206.*

LANDLORD'S LIEN.

PER CURIAM. The decree in this cause cannot be sustained, because the proof fails to show notice to the defendants of the lien of Mitchell.

Reverse and dismiss the bill.

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WILLIAMS v. RENWICK.

PLEADING: *Action on foreign judgment.*

In an action on a foreign judgment an answer alleging merely that the court which rendered the judgment had no jurisdiction to render it, because it was rendered upon a complaint which on its face disclosed that the plaintiff had no cause of action, shows no want of jurisdiction of the person or subject matter of the controversy, but only an error in the exercise of jurisdiction, and is therefore insufficient.

APPEAL from *Little River* Circuit Court.

R. D. HEARN, Judge.

Williams brought an action against Renwick on a judgment obtained against the latter by default in the State of South Carolina. The defendant answered the complaint, denying, in the first paragraph of his answer, any indebtedness whatever to plaintiff; and, in the second paragraph, alleging that the Court of Common Pleas in South Carolina, which rendered the judgment sued on, had no jurisdiction to render such judgment, but that said judgment was rendered by said court upon a complaint for relief, which upon its face disclosed that said plaintiff, the appellee, had no cause of action against defendant, and that said court had no jurisdiction to render said judgment or any judgment whatever against him, and that the same is void and without force or effect. To this answer the court sustained a demurrer, and the defendant, declining to answer further, judgment was rendered against him for the amount of the judgment sued on, and he appealed.

Dan W. Jones, for appellant.

The authenticated record shows that the court had no jurisdiction of the subject matter. The pleadings show "no cause of action;" the judgment was void; and want of jurisdiction can be pleaded when suit is brought in another State. *11 Ark., 157; 18 Wall., 457; Cooley Const. Lim., *398;* See, also, *47 Ark., 120; 9 Pet., 623.*

The complaint shows no cause of action, It sets up a breach of a covenant of warranty, but alleges neither eviction or ouster, or paramount title. No statute of South Carolina authorizing such a suit was read in evidence, and the court could not take judicial cognizance of such a statute, if there was one. *14 Ark., 603, 610; 30 id., 124, 126; 50 id., 237, 240.* In the absence of this evidence it is presumed that the common law is in force in South Carolina. *30 id., 124; 35 id., 331; 50 id., 237.*

No tortious act of a stranger, by which the covenantee is put out of possession, is a breach of the warranty. *3 Bouv. Inst., p. 625; 3 Wash., R. P., * p. 664; Rawle on Cov. Title, secs. 126–7; 21 Ark., 585; 3 Gilm. (Ill.), 180.* An eviction is necessary. *Rawle., sec. 131; 8 Ark., 368; 1 id., 313; 7 id., 132,* and by title paramount, existing before and at the time of the conveyance. *5 Ark., 395; Rawle., sec. 122; 1 Ark., 313; 8 id., 368; 33 id., 598.*

J. C. Head, for appellee.

The South Carolina court was a court of general jurisdiction; it had jurisdiction over the subject matter and person, and its judgment, however erroneous, is final and conclusive, unless reversed or set aside by a higher court. *Sec. 160, Code S. C.; 11 Ark., 157; 3 Wheat, 234; 7 Cr., 481; 1 Smith, L. C., pp. 826–831; Freeman on Judg., secs. 118, 119, 120, 126; 12 Ark., 218; 11 id., 731; 21 id., 117; McNamara on Nullities, side p. 137; Const. U. S., art 4, sec. 1; Mansf. Dig., p. 156, sec. 1; Freeman Judg., secs. 122, 124.*

PER CURIAM: The answer did not allege want of jurisdiction of the person or subject matter of the controversy, but only error in the exercise of jurisdiction, if error at all. We cannot inquire into that subject. The demurrer was rightly sustained. PLEADING.

Affirmed.

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

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M. & L. R. R. R. v. KERR.

RAILROAD COMPANIES: *Duty as to stock straying upon track.*

The extent of a railroad company's duty to the owner of stock which has strayed upon its track, is that the engineer in charge of the train at the time, shall use ordinary or reasonable care after he discovers the stock, to avoid injuring it; and it is not negligence for a railroad company to fail to keep a lookout for stock.

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

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

It is not the duty of a railroad to keep a lookout for stock over its whole right of way, or to bring the train under control whenever an animal is seen in proximity to the track. A railroad's duty to guard against injuries to animals first arises when the animal first gets upon the track. *48 Ark., 370; 36 id., 607; 37 id., 593; 39 id., 413; 40 id., 336; 41 id., 161.*

J. S. Thomas, for appellee.

The evidence shows gross carelessness on the part of the engineer. Of course the bushes were *conveniently* by the side of the track, according to the engineer's testimony, so as to bring the case within *48 Ark., 366*, but the jury decided the case on the *facts;* there was no error in the instructions, but if they had been given as appellant requested, the verdict would have been the same upon the evidence.

HUGHES, J. This is an action to recover damages for the killing of a mule by the appellant's engine.

The evidence for appellee tended to show that the mule was grazing upon the railroad track, and when the train approached within about one hundred and fifty feet of it, it ran down the track about seventy-five yards, and was struck by the engine and killed; that before it was struck the whistle was sounded several times, but that the speed of the train was not checked.

The evidence for the appellant tended to show that the engineer first saw the mule when it came on the track about one hundred and fifty feet ahead of the engine; that the engineer upon first seeing it, sounded the whistle and called for brakes, and that he was unable to check the train after he first saw it, so as to prevent the engine from striking the mule; that he was keeping a close lookout at the time.

Verdict was given for plaintiff; a motion for new trial was overruled, and the railroad company excepted and appealed.

The court by modifications of the instructions asked for by the appellant, charged the jury, in effect, that if the proof showed that the servants of the company in charge of the train at the time were negligent in keeping a careful lookout, the company was liable In *L. R. & Ft. S. Ry. v. Holland, 40 Ark., 336.* this court, by Judge SMITH, said: "Ordinary care in the management of their trains is the measure of vigilance which the law exacts of railroad companies to avoid injury to domestic animals, and this means practically that the company's servants are to use all reasonable efforts to avoid harming an animal, after it is discovered, or might by proper watchfulness, be discovered on or near the track."

If the intimation supra, that a railroad company is liable, if the engineer in charge of the train when stock is injured, "might, by proper watchfulness," discover the animal on or near the railroad track in time to avoid injuring it, means that a railroad company owes to the owner of stock that stray upon its track a duty to keep a lookout to prevent injuring it, it states the rule too broadly.

In the *Ry. Co. v. Kirksey, 48 Ark., 366,* it is held that a railroad company owes no duty to the owner of stock which has strayed upon its track, except to use ordinary or reasonable care, at the time, to avoid injury to it, aud that the engineer is not bound to keep a lookout over the entire right-of-way and to apprehend danger when an animal is discovered upon it.

The question as to the duty of an engineer to keep a lookout for stock upon the *track* did not arise in the case.

Each case should be determined upon its peculiar circumstances.

RAILROAD COMPANIES: Duty as to stock, etc.

The extent of the duty which a railroad company owes to the owner of stock upon its track, is that the engineer in charge of the train at the time shall use ordinary or reasonable care, after the stock is discovered by him, to prevent injury to it, and this negatives the idea that the engineer is bound to keep a lookout for stock.

Several States, among them Tennessee and Alabama, have by acts of their Legislatures altered the rule by making it the duty of the engineer to keep a lookout for stock.

There *is* an obligation due to *others* from railroad companies to preserve a strict lookout while running their trains, and as the agents of the company, in the absence of circumstances leading to a different conclusion are presumed to keep such lookout, it is a fair inference of fact for the jury that a watchful agent will see stock on or near the track, and they will then determine whether he has used ordinary or reasonable care to prevent injury to it.

It is error for the court to instruct a jury that it is negligence for a railroad company to fail to keep a lookout for stock.

Reverse and remand.

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DEDMAN V. EARLE.

1. MORTGAGES: *Filing for record.*

The placing of a mortgage in the hands of the Recorder with verbal instructions to file but not to record it, is not a filing for record. And where a mortgage thus left with the Recorder was filed and registered under directions given on a subsequent day, the mortgagee acquired no lien by its filing prior to the time when the instruction to record it was given. In such case it was of no effect to mark the instrument filed as of the day on which it was handed to the Recorder.

2. SAME: *Filing without recording.*

In order that a mortgage may become a lien on personal property against strangers, without being filed for record, as provided for in Mansf. Dig., sec. 4750, the words, "this instrument is to be filed but not recorded," or words of similar import, must be indorsed upon it, and signed by the mortgagee, his agent or attorney; and it must then be filed with the Recorder.

3. CONDITIONAL SALES: *Exchange of property by purchaser: Right of vendor.*

The vendee of personal property sold on condition that the title shall remain in the vendor until the purchase money is paid, may before payment exchange the property thus purchased for other property. But such barter will not affect the vendor's title to the property received from him, and confers on him no right to the property for which it is exchanged.

APPEAL from *Cleveland* Circuit Court.

C. D. WOOD, Judge.

R. C. Fuller and *Met. L. Jones*, for appellant.

The mortgage of Earl was not a lien on the horse until he instructed the Recorder to record it. *Mansf. Dig., sec. 4750; 37 Ark., 507; 33 id., 387.*

An unrecorded mortgage, or one improperly recorded, is not a lien against a stranger even though he have actual knowledge. *40 Ark., 536.* See, also, *Jones Ch. Mort., sec. 66.*

In conditional sale the title remains in the vendor, but if the vendor takes a mortgage to secure his debt, he loses his general ownership and must look to his mortgage. *48 Ark., 164.*

In replevin plaintiff must prove title either as general or special owner. *Chitty Pl., p. 213; 25 Ark., 458.* In this case Earl relied on his special title, but that fails because appellant's first became a lien. *37 Ark., 507.*

Earl's mortgage was void for duress. *2 Bay. (S. C.), 211; 9 Johns., N. Y., 201; 10 Pet., 137.* See, generally, *2 Watts. (Penn.), 167; 1 Ball. (S. C.), 84; 6 Mass., 511; 6 N. H., 508.*

Ratcliffe & Fletcher, for appellee.

The mortgage was filed Monday, August 11, and the fact that it was handed the Clerk on Sunday does not affect the filing on Monday. It was sufficient to deposit in the Clerk's office on Monday as a permanent record. *43 Ark., 144; 28 id., 244.*

The complaint alleged general ownership, and any evidence of interest which will sustain the right of possession was competent. The affidavit is not part of the pleadings. *8 Ark., 463; 34 id., 111; 38 id., 413.*

Even if Earl's mortgage was void for duress, he could recover on his title, for the horse stood in the place of the mule. *Schouler on Bailment, sec. 3; 2 Schouler on Per. Prop., 703; 42 Ark., 186.*

McElroy in executing the mortgage did nothing but his duty, and there was no duress. *33 Ark., 156; 18 id., 214.* But the jury decided these questions, and this court will not disturb their findings.

BATTLE, J. This was an action instituted by appellant against appellee to recover the possession of a horse. Each party claims under a mortgage executed by Thomas McElroy. Appellee sent his mortgage by an agent, and caused it to be delivered to the Recorder, with instructions to file, but not to record it. The words, "this instrument is to be filed but not recorded," or words of like effect or substance, were not indorsed upon it. The Recorder made no indorsement, but laid it away and waited to see appellee. In the meantime appellant filed his mortgage with the words, "this instrument is to be filed but not recorded," indorsed thereon and signed. After this appellee paid the Recorder, and directed him to file and record his mortgage. The Recorder then marked it filed as of the day on which it was handed to him, which was a day prior to the day of the filing of appellant's mortgage, and he then recorded it.

1. MORTGAGES: Filing for record.

According to the foregoing facts the mortgage of the appellee was not filed for record until he instructed the Recorder to register it. The placing of it in the hands of the Recorder and verbally instructing him not to register it was not a filing for record. *Bowen v. Fassett, 37 Ark., 507.* Instructions given by appellee to his agent, but not delivered to the Recorder,

were of no avail, as the Recorder could only be governed by the instructions which he received. Appellee acquired no lien by the filing of his mortgage until the instruction to record was given. The antedating of the filing was of no effect.

2. SAME: Filing without recording.

In order for a mortgage to become a lien on personal property against strangers, without being filed for record, the words, "this instrument is to be filed but not recorded," or words of like import, must be indorsed upon it, and signed by the mortgagee, his agent or attorney, and it must then be filed with the Recorder. When this is done the statute provides that it shall be marked "filed" by the Recorder, with the time of filing upon the back of it, "and that he shall file the same in his office, and it shall be a lien on the property therein described from the time of filing, and the same shall be kept there for the inspection of all persons interested; and said instrument shall be thenceforth notice to all the world of the contents thereof without further record except therein provided." *Mansf. Dig., sec. 4750.*

3. CONDITIONAL SALES: Exchange of property: Right of vendor.

Appellant alleges that appellee caused McElroy to be arrested for larceny, and while he was under arrest proposed to him that if he would secure him in the payment of certain debts by a mortgage upon the horse in controversy, he would not prosecute him, and he should be discharged; and that while he was under arrest McElroy accepted the proposition and executed the mortgage, and was thereafter discharged; and contends that the mortgage is void, because it was executed under duress and is contrary to public policy. On the other hand appellee insists that if it be true the mortgage is void, he is entitled to recover the horse, because he says he sold a mule to McElroy on the condition the mule should remain his until the purchase money was paid; that it had not been paid; and that McElroy had traded the mule and received the horse in exchange without his consent. But it is unnecessary to pass upon all these contentions. The purchase money was not due until long after the exchange

was made. If it be true that appellee reserved the title to the mule until the purchase money was paid, McElroy had an interest in the mule which he could sell. He did not become a mere custodian of the mule. He had a right to sell him at such a profit as he could make. *McRae v. Merrifield, 48 Ark., 160; Vincent v. Cornell, 13 Pick., 294; Day v. Bassett, 102 Mass., 445.* His vendee would take only such interest as he had. All appellee was entitled to was his purchase money or the mule. He had no right to the profit, if any was gained. When McElroy traded for the horse the mule still remained appellee's, subject to the condition of the sale. By what means did the horse become his property? He could not treat the exchange as a wrongful conversion of the mule, and elect to waive the tort, and by ratification convert the horse into his own property. That would be entirely inconsistent with the rights acquired by McElroy through the conditional sale. But he did not make such election. On the contrary, he elected to treat the horse as the property of McElroy, and so continued to treat him until other persons acquired an interest in him. He sought to encumber him by a mortgage to secure McElroy's debts, and in the institution of this suit, asked for the possession of him under that mortgage. The horse did not become the property of appellee by the exchange.

Reversed and remanded for a new trial.

FRENCH v. WATSON.

1. STATUTE OF LIMITATIONS: *Exception in favor of infants: Proof of non-age.* Where a plaintiff relies upon the fact of his minority to evade the force of the statute of limitations, he must affirmatively show his non-age at such time as will bring him within the exception of the statute.

2. SAME: *As against trusts: Administrators, etc.*

McGaughey v. Brown, 46 Ark., 25, approved as to the running of the statute of limitations against actions for frauds committed by administrators, and as to the operation of that statute against trusts.

APPEAL from *Desha* Circuit Court in Chancery.

JOHN A. WILLIAMS, Judge.

W. G. Weatherford, for appellant.

The proof in this case tends to show that the executor agreed with his brother-in-law, that the latter should purchase the lands, pay for them with the executor's money, and then convey them to the executor's wife, and that this agreement was carried out. This created a trust. *46 Ark., 32; 48 id., 248.*

The testimony shows the plaintiffs were within the limit for minors to sue, and especially because of the *concealed fraud* in the purchase and its non-discovery until a few months before suit. Mrs. French was covert, absent and non-resident. *Perry on Trusts, sec. 230; 10 How., 187; 4 How. Mechin v. Gravil.*

A judicial sale passes no title until confirmed, and confirmation must be *proven. 47 Ark., 413.* So Stroud had no title when he conveyed to Mrs. Watson, who took with notice of all irregularities, illegalities and void proceedings.

X. J. Pindall and *James Murphy,* for appellees.

The omission of the executor to make oath to his report was a mere irregularity, and cured by the confirmation of the sale. *33 Ark., 575; 31 id., 74.*

The evidence shows that Stroud paid his own money, and that he was amply able to buy.

The testimony shows that the *youngest* of the plaintiff's *must have been* at least 24 years of age, and that hence they are all barred. *46 Ark., 25.* Married women are not excepted. *16 Ark., 671; 32 Ark., 97; 113 U. S., 449.*

A confirmation relates back to the date of sale. *3 Wash. Real Prop. (3d ed.), p. 276.*

PER CURIAM. This is a suit by the heirs of Watson to set aside a deed made in the course of administration by the executors of his estate, upon the ground that one of the executors had caused the lands to be purchased with his means for the benefit of his wife.

STATUTE OF LIMITATIONS: Infancy: Trusts

The defense made by the wife's heirs was the statute of limitations.

The sale was made in 1869, and the executors were discharged in 1873. The plaintiffs sought to evade the force of the statute of limitations by the fact of their minority until within three years of the institution of the suit, which was begun in 1883.

The ancestor, whose estate the executors administered, died in September, 1861—more than twenty-one years before the institution of the suit. The complaint alleges that the ancestor died, leaving the plaintiffs him surviving. The youngest child was, therefore, past twenty-one when this suit was brought, but as the youngest child was a female, and came of age at eighteen, the suit was not brought within three years after reaching her majority. Only one witness testified to the fact of the plaintiffs' ages, and he did not undertake to give more than an approximate estimate of the age of each. Moreover, it is shown that his estimates are of but little value. He gives the date of the marriage of Mrs. French in the same same general way that he testified to the other dates, as being about 1860 or 1861; when the will under which the plaintiffs claim shows that she was married at the time it was executed in 1859; and the date of the birth of the youngest child must be placed more than nine months after the death of her father to reach the witness' lowest estimate of her age.

The affirmative showing of non-age is required of the plaintiffs to bring them within the exception to the statute of limitations.

There is little doubt, from the affluent circumstances of the ancestor and the intelligence of the members of the family, that the exact ages of the plaintiffs could have been readily established. The burden was upon the plaintiffs to do that. We will not disturb rights that have remained so long unquestioned upon mere conjectures as to age.

Every question of law mooted by the appellant was determined adversely to their contention in the case of *McGauhey v. Brown, 46 Ark., 25*, and the judgment will be affirmed.

HATHAWAY V. WERNER.

RULES OF SUPREME COURT: *Dismissal for non-compliance with.*

APPEAL from *Crittenden* Circuit Court in Chancery.

J. E. RIDDICK, Judge.

O. P. Lyles, for appellant.

PER CURIAM: The appellant has not complied with the rules by filing an abstract and briefs. The submission was inadvertently taken; it will be set aside and the appeal dismissed.

It is so ordered.

BELL V. WILSON.

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1. FRAUDULENT CONVEYANCES: *Who may avoid.*

A conveyance to defraud creditors is good between the parties, and against all persons except creditors of the grantor, who are in position to assail it.

2. SAME: *Same.*

In ejectment, where both parties claim title derived from a common source, the plaintiff cannot avoid the conveyance under which the defendant claims by showing that it has been adjudged a fraud upon the rights of creditors in a suit to which he (the plaintiff) was not a party.

APPEAL from *St. Francis* Circuit Court.

M. T. SANDERS, Judge.

W. G. Weatherford, for appellants.

1. The Allen decree did not avoid the deed to J. W. Moore, *ab initio*, but merely subjected the land to the payment of Allen's debt. Wilson was not a party, but a stranger to this

decree, and can claim nothing under it. The deed was *void* only as to those creditors who took the proper steps to enforce their rights. *38 Ark., 28; 47 id., 309; 2 Paige, 567; Vol. 2, N. Y. Chy., Coop. ed., notes to Corning v. White.*

2. Plaintiff is barred by limitation. *Mansf. Dig., sec. 4471.*

3. Whether the purpose of Mrs. Moore was honest or fraudulent, is not now material. If *bona fide*, she is bound; if fraudulent, she cannot take the advantage of it. *11 Ark., 411, 718.* The execution purchaser had no better right than she had. *31 Ark., 259; 30 id., 266.*

Geo. Sibley, for appellee.

The decree set aside the deed to J. W. Moore, as void against creditors, and was a nullity to all intents and purposes. The appellants' grantors took nothing but the right to have the land sold to satisfy their debt; if they failed to do so, then any other creditor has the right to subject it to their debts.

The deed being set aside at the suit of appellants' grantors, they are estopped to deny appellee's title. Reviews the authorities cited by appellants, and contends that they make against him. *38 Ark., 28; 47 id., 309.*

COCKRILL, C. J. The plaintiff in an action of ejectment against Bell relied upon a Sheriff's deed executed in 1881, in pursuance of a judgment rendered in 1879 against a Mrs. Moore who was the common owner of title of both parties.

Eleven years prior to the rendition of the judgment, the judgment defendant had conveyed the lands described in the Sheriff's deed to her grandson, J. W. Moore.

In a suit brought by one Allen, a creditor of Mrs. Moore, the St. Francis Chancery Court declared the conveyance by Mrs. Moore to her grandson a fraud upon Allen's rights as a creditor, set the deed aside and ordered that the lands be sold to pay his debts.

The decree was introduced in evidence by the plaintiff in this cause to show that the conveyance to the grandson,

through whom the defendant claims title, had been canceled, and that the title was thereby divested from the grandson and vested again in Mrs. Moore; and the court tried the cause upon that theory.

But the decree established nothing except that the conveyance was void as against Allen's right to enforce the payment of his debt.

The plaintiff in the case, being a stranger to that suit, took nothing by the decree and could build no estoppel against J. W. Moore or his grantee upon it.

FRAUDULENT CONVEYANCES: Who may avoid.

The conveyance was good between the parties and against all the world except creditors of Mrs. Moore, who were in position to attack it for fraud. *Millington v. Hill, 47 Ark., 301; Norwood v. Driggs, 50 ib., 42.* If the plaintiff in this action occupied the position of a creditor entitled to attack the conveyance, he could avoid it upon proper proof. *Hershey v. Latham, 42 Ark., 305; Waite on Fraudulent Conveyances, p. 51.* But the Allen decree showing that the deed had been adjudged a fraud upon the rights of another creditor in a suit to which the plaintiff in this action was not a party, did not prove that the conveyance was a fraud on his rights.

Reverse the judgment and remand the cause for a new trial.

BELL v. WILSON.

Opinion on motion for reconsideration.

It is not ruled in this case, as counsel seems to suppose, that a subsequent creditor or purchaser may not attack the deed of Moore as a fraud upon his rights. See *Adams v. Edgerton, 48 Ark., 419; Driggs v. Norwood, 50 Ark., 42.* It is only determined that the Allen decree was not evidence of that fact in this suit.

Motion denied.

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KILLOUGH V. PAYNE.

1. CONSIDERATION: *Payment of legal debt.*

The payment of a sum of money by one who is already legally bound to pay it, is not a valid consideration for a contract.

2. STATUTE OF FRAUDS: *Promise to accept debtor's draft.*

An oral agreement by a third party to accept for a creditor his debtor's draft for the amount of his debt, is in effect a promise to pay the debt, and unless it is made upon a new consideration, is void under the statute of frauds. [*Chapline v. Atkinson, 45 Ark., 67.*]

APPEAL, from *Cross* Circuit Court.

J. E. RIDDICK, Judge.

Payne sued Killough & Erwin in a justice's court, alleging that they were indebted to him in the sum of $26.65 for money had and received for his use and benefit from Edgar, Gage & Co. On appeal to the Circuit Court the defendants filed an answer denying that they received any sum for the use of the plaintiff. On a trial before a jury the facts proved were in substance as follows: Edgar, Gage & Co., owed W. E. Reeves $274 for ties furnished them, and he gave his draft on them for that amount to the defendants, Killough & Erwin. The draft was presented for payment and Edgar, Gage & Co. indorsed upon it their acceptance payable thirty days after date. When the acceptance matured, they refused to pay it because of the fact that the plaintiff, Payne, had notified them that Reeves owed him $26.65 for hauling some of the ties furnished and had warned them to hold that sum for him. To remove this objection to a payment of the acceptance the defendants then verbally agreed with Edgar, Gage & Co. that they would pay Payne's claim if he would get an order on them from Reeves for the amount of it. On this promise being made by the defendants, the full amount due on the draft was paid to them. At the time of this transaction, Reeves was trading with the defendants. After his dealings with them had ceased, and about seven months after the payment of the

draft, Payne presented an order from Reeves on them for the amount of his claim, and they refused to pay it. The court refused to instruct the jury that if the amount collected on the draft was legally due the defendants from Edgar, Gage & Co. at the time of its payment, then the promise of defendants to pay Reeve's order was without consideration and void. The verdict and judgment were for the plaintiff, and the defendants appealed.

N. W. Norton, for appellants.

1. No acceptance, not in writing, shall be sufficient to charge any person in this State. *Mansf. Dig., sec. 459.*

2. The payment of an undisputed debt is not a sufficient consideration for a promise to pay another sum of money. *35 Ark., 572; 40 id., 180; 45 id., 290.*

3. When an acceptance, not in writing, is tolerated at all, the order must be presented in a reasonable time. *1 Dan. Neg. Inst., secs. 569, etc.; 44 Am. Dec., 253; 4 Curtis, 25; 2 Wheat., 66; 33 Am. Dec., 289; 8 Porter, 263.*

4. The promise being in parol was void; but if in writing, it would have been void for want of consideration, or at most, only binding for a reasonable time. *2 Wheat., 66.*

Sanders & Watkins and *J. D. Block*, for appellee.

No consideration was necessary for the promise to pay Payne. Where a party receives money under an express promise to pay it to another, he must do so, no matter how he obtained it, unless some rule of public policy contravene. The question of consideration does not enter into or support the action for money had and received. *4 Wait Act. and Def., p. 506.* But there was a consideration, the avoiding a law suit.

No question of diligence or reasonable time in which the demand was made can be urged, for the promise was unconditionally to pay Payne. The instructions correctly stated the law.

CONSIDERATION: STATUTE OF FRAUDS.

PER CURIAM. There is no evidence tending to prove that Killough & Erwin received any money for the use of Payne. There was only a promise by them to accept the draft of Reeves in favor of Payne.

The consideration of this promise was the payment, by Edgar, Gage & Co., of an undisputed debt due from them to Killough & Erwin, which was evidenced by a draft accepted by Edgar, Gage & Co. in favor of Killough & Erwin; but the payment of a sum which one is already legally bound to pay is not a valid consideration for a contract.

There being no new consideration for the promise by Killough & Erwin to pay Payne's debt, it is a collateral undertaking within the statute of frauds and is void. *Chapline v. Atkinson, 45 Ark., 67.*

Reverse and remand.

TRAMMELL V. ANDERSON.

EXECUTION: *On justice's judgment.*

Under section 4103 Mansfield's Digest, no execution can be issued on the judgment of a justice of the peace after five years from the date of its rendition. After that time the power of the justice to issue execution expires and cannot be revived by *scire facias,* or in any other way peculiar to courts of superior jurisdiction.

APPEAL from *Stone* Circuit Court.

J. W. BUTLER, Judge.

T. N. Baker recovered judgment against the appellee, Anderson, before a justice of the peace on the 27th day of January, 1881. On the 12th day of October, 1886, after the expiration of five years from the date of the judgment, Baker sued out an execution thereon which was levied upon the personal property in controversy in this suit. At the constable's sale of the property the appellant, Trammell, purchased it, and the appellee brought this action of replevin against him to re-

cover it. The case having been submitted for trial to the court, the finding and judgment were for the plaintiff, and the defendant appealed. Section 4103, Mansfield's Digest, is as follows: "Executions for the enforcements of judgments in a justice's court, except when filed in the Clerk's office of the Circuit Court of the county in which the judgment was rendered, may be issued by the justice before whom judgment was rendered, on the application of the party entitled thereto, at any time within five years from the entry of the judgment, but not afterward."

Blackwood & Williams, for appellants.

The statute of limitations on all judgments is ten years (*Mansf. Dig., sec. 4487*), and an execution on a justice's judgment issued after five years is not void. *76 Ala., 405; 16 Wisc., 493; 82 Ind., 537; 13 S. C., 120; 18 N. Y., Bank v. Spencer; 6 Yerger* (*Tenn.*), *521*. It was at most voidable only. The prohibition is for the benefit of the debtor, and he may waive it. As long as a judgment remains unsatisfied, execution may be issued. *14 Ark., 524*.

Robert Neill, for appellee.

Section 4103 Mansfield's Digest, means precisely what it says, that after the expiration of five years an execution *shall not issue. 8 Cal., 513; 20 Iowa, 79; 3 Duer, 52; Freeman on Ex., par. 29* (*ed. 1888*).

Justices' judgments cannot be revived. *Mansf. Dig., secs. 3921, 4034*.

The cases cited by appellant arose under statutes entirely different from ours, quoting them.

The writ was void, and a void writ protects nobody.

EXECUTION: On justice's judgment.

PER CURIAM. Section 4103 of Mansfield's Digest contains a positive inhibition against the issuance of an execution upon the judgment of a justice of the peace after five years from the date of its rendition.

We must construe the statute to mean what it plainly says, and hold that after five years the power of the justice of the peace to issue execution expires. The power may not be revived by *scire facias*, or in any other way peculiar to courts of superior jurisdiction (*Hicks v. Brown, 38 Ark., 469*), and therefore no presumption of a legal right to issue the execution after the lapse of five years can be indulged. *Freeman Executions, sec. 27.* The execution is void.

Affirm.

STATE v. STANLEY.

COUNTY PRISONER: *Contract for labor of.*

Sections 1213, 1214, Mansfield's Digest, provide that persons convicted of misdemeanors may be hired out by the Sheriff for a period not exceeding one day for each 75 cents of the fine and costs until the same are paid. Under this statute the Sheriff entered into a contract with a person, to whom he hired a convict, by which the latter was required to labor twenty-four months in satisfaction of a fine and costs amounting to $283.90. HELD: That such contract was contrary to public policy, and void.

APPEAL from *Nevada* Circuit Court.

C. E. MITCHEL, Judge.

This is an action on a bond given for the hire of a person convicted of a misdemeanor in the Circuit Court, and hired out by the Sheriff to the defendant, Stanley. The complaint states that the fine and costs adjudged against the convict amounted to $283.90, and that by the terms of his bond the defendant, Stanley, bound himself to pay that sum to the Sheriff for the use of Nevada County for the labor of the convict during a period of twenty-four months; that the Sheriff proceeded in such hiring under the direction of the County Court, and that the defendant's bond was filed in that court and approved thereby at a regular term; that "said convict thereupon became and was subject to said defendant, and entered upon service with him,

as by law required." The bond and the judgment of the Circuit Court are exhibited, and the complaint admits that the hiring exceeded "one day for each 75 cents of the fine and costs." The bond exhibited is payable to the county. It does not appear from the complaint or exhibits that the hiring was directed by the judgment of the Circuit Court. The complaint was dismissed on demurrer, and the plaintiff appealed. Section 1213 Mansfield's Digest, is as follows:

"When any person shall be convicted of any misdemeanor under the laws of this State by any court of competent jurisdiction, the court shall render judgment against the person so convicted, which judgment shall direct that the person convicted be put to labor in any manual work-house, or on any bridge or other public improvement, or that the person be hired out to some person as hereinafter provided, until the fine and costs are paid, which shall not exceed one day for each 75 cents of the fine and costs."

By section 1214 it is made the duty of the Sheriff, immediately after the conviction of a person of any misdemeanor, to hire him out, and to take from the person hiring him a bond to the State for the use of the county for the payment of the sum for which he is hired.

W. E. Atkinson, Attorney General, for appellant.

The duty of the Sheriff to hire out convicts is statutory, and not dependent on the directions of the court. *Acts of 1877, sec. 5.* The act was for the protection of counties, and to reduce their expenses. *Ib., secs. 1-3.* The provision in section 4 was for the personal protection of the convicts. *Endlich on Int. St., sec. 459.*

The wrong of an officer not imputed to the State. *40 Ark., 256; 42 id., 118.*

The parties having received the benefits of the contract are estopped from setting up objections to its validity. *23 Iowa, 58; 9 Ohio, 201; 36 Ark., 583; 21 ib., 447; 10 Sawy, 464; 71 Ala., 347; Bigelow Est., 657.*

Smoote, McRae & Arnold, for appellees.

The law requires the court to direct the hiring, and if it fails to do so the Sheriff is without authority. *Mansf. Dig., secs. 1213, 1214; 37 Ark., 437.* See, also, *secs. 1222, 1226, Mansf. Dig.*

2. The hiring was for less than 75 cents per day, and the bond was void. *Sec. 1213, Mansf. Dig.; 37 Ark., 448; ib., 437; 19 id., 346; 25 id., 209; ib., 376; 29 id., 386; 2 Pars. Cont. (6 ed.), p. 673.*

3. The contract being illegal, the doctrine of estoppel does not apply. Authorities *supra. 19 Ark., 346; 25 id., 210.* Besides the complaint does not allege that the convict performed the labor, nor deny escape. *Sec. 1214 Mansf. Dig.*

COUNTY PRISONER. Contract for labor of.

PER CURIAM: There was no theory upon which the convict could have been reqnired to labor twenty-four months in satisfaction of a fine and costs amounting to $283.90, and the contract of the Sheriff with the defendant is therefore an unlawful attempt to deprive the convict of her liberty and for that reason is contrary to public policy and void.

The question of the liability of Stanley, for the services of the convict during such time as she may have been lawfully detained, is not presented or decided.

Affirm.

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FORT V. STATE.

1. INSTRUCTIONS: *Assumption of guilt.*

A clause in an instruction by which the jury are told that a witness for the State is an accomplice, will not be construed to assume that the defendant is guilty, where it appears from the whole charge that no assumption is warranted to the effect that the court intended to interfere with the jury's right to believe the testimony of the witness, but only to inform them that if they believed it, other evidence connecting the defendant with the commission of the offense charged, would still be required to authorize his conviction.

2. SAME: *Refusal of unnecessary charge.*

Where a charge to the jury fairly covers every matter pertaining to a defendant's guilt or innocence, it is not error to refuse prayers for other instructions.

3. EVIDENCE: *Acts of co-conspirators.*

On the separate trial of one of two defendants jointly indicted for a burglary alleged to have been committed by breaking into a building with intent to steal the funds of a county, evidence that his co-defendant in his absence had proposed to the Deputy Treasurer to obtain through the latter moneys from the county treasury, is admissible where there is proof that the defendants together renewed the offer at another time, and where there is also proof tending to show that their conduct on both occasions was part of a conspiracy to induce the deputy to aid them in committing the offense.

4. PRACTICE IN SUPREME COURT: *Evidence favorable to appellant.*

Where evidence is favorable to the party against whom it is introduced, or is not objected to by him in the court below, its admission cannot be assigned as error.

5. EVIDENCE: *Appearances: Stating conclusion of fact.*

On a trial for burglary, a witness who had examined the door of a vault, and an ordinary lock which fastened it, was permitted to state that force had been applied from the outside to break the lock. HELD: That as the statement was only a conclusion of fact, drawn from appearances which could not be produced to the jury, it was not reversible error to admit it.

6. SAME: *Opinion of witness.*

But where on such trial a witness who had also examined the broken lock and door, and testified fully to the conditions he observed, was asked the question, "Do you think the inner vault door was opened first and the lock broken afterwards," it was not error to refuse to allow him to answer, as the question called for a speculative opinion not necessarily based on what he had observed.

7. SAME: *Corroborating testimony of accomplice.*

The defendants were charged with a burglary committed with intent to rob the county treasury. A witness for the State who had been the Deputy Treasurer, testified that after agreeing to aid the defendants in obtaining access to the public money his "nerve" failed him, a few days before the burglary, and at the request of the defendants, he then gave them the combination to the safe in which the money was kept, and they declared their intention to commit the crime without further assistance. By other testimony it was shown that the offense was committed by some one who had the combination to the safe. One of the defendants admitted that he had entertained a proposition from the deputy to take the combination and commit the burglary. Several witnesses testified to the other defendant's confession, that he had joined a conspiracy and obtained the combination for the same purpose. It was also proved that both defendants, who resided three miles from the county seat, where the

Treasurer's funds were kept, came to town without ostensible business, on the night the burglary was committed; that they left before daylight, and afterwards denied having been in town during that night. HELD: That the evidence of the accomplice was sufficiently corroborated to sustain a conviction.

APPEAL from *Sebastian* Circuit Court.

JOHN S. LITTLE, Judge.

The appellants, J. D. Fort and H. W. Fort, were indicted by the grand jury of Logan County for the crime of burglary charged to have been committed on the night of February 17, 1887, by breaking and entering the court house of that county, with intent to steal certain public moneys and school funds then being in that building. They obtained a change of venue to the Circuit Court of Sebastian County for the Greenwood District, in which they were tried and convicted. The evidence shows that on the night mentioned in the indictment the safes of the County Treasurer and Sheriff, kept in the court house, were opened, and a large sum of money was taken from the former. The Treasurer's safe was in the vault of the Circuit Clerk's office which had two iron doors, the inner of which was fastened by a lock and key, and the outer by a combination lock. At the time of the burglary, Hawkins Corley was the County Treasurer's deputy, and knew the combination to the latter's safe. He was a witness for the State, and his testimony was in substance as follows:

A few weeks before the offense was committed, the defendant, J. D. Fort, applied to him to borrow $500. Three or four days later the defendant, H. W. Fort, applied to him to borrow for himself and the defendant, J. D. Fort, the sum of $1000. Subsequently and before the burglary, both the defendants proposed to borrow about $4000 with which to buy a stock of goods, and that the witness should lend it to them and become a partner in their business. The witness on each of these occasions declined to let the defendants have any money, saying that he could not lend the public funds. About ten days before the burglary, the defendants met witness, and after drinking with him, expressed a desire to have a private conversation

with him, to which he assented. They then asked him if he knew that the county treasury was going to be robbed. He replied that he did not know it. They said it was going to be robbed, and asked him if it was going to be done, "why they (the three) had not as well have some as anybody?" The witness replied that if the robbery was going to be committed, they (meaning the three) had as well have some of the money as anybody else. They then asked him if he knew the combination to the safe door, and he replied that he did. In reply to an inquiry made by the defendants, the witness told them that there was then in the treasury about $21,000. His further testimony was to the effect that in this conversation he agreed to aid the defendants in stealing the county funds; but that a few days afterwards he told them that he did not believe he "had the nerve," and they would have to let him off. That they were unwilling to "let him off," but told him that if he could not participate in the burglary, to give them the combination to the safe, "and they would do the work." That on the Tuesday or Wednesday preceding the Thursday on which the offense was committed, he gave the defendants the combination of the safe on a piece of paper. That on his expressing a fear that if the safe was opened by the combination he would be implicated, the defendant, H. W. Fort, said he would break the safe to pieces.

The fifth clause of the court's charge to the jury is as follows:

You are instructed that the witness, Hawkins Corley, is an accomplice, and that a conviction of defendants cannot be had upon his testimony unless corroborated by other evidence tending to connect the defendants with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. And if such corroboration does not appear in the testimony, you should acquit. But if you find from the evidence that the testimony of witness, Corley, has been corrob-

orated by the evidence as above indicated, and if such corroboration considered in connection with Corley's testimony, and all the other facts and circumstances in proof in this cause, satisfies your minds of the guilt of the defendants beyond a reasonable doubt, you should convict."

Duval & Cravens, for appellant.

1. Corley's confession was not supported by such evidence as the law requires. The testimony of an accomplice should be corroborated by "evidence admitting of no suspicion as to such parts as satisfactorily show that he has not fabricated the story." "He should be confirmed in some fact affecting the individual he accuses." It should reach the identity of the person charged. *Whart. Cr. Ev., secs. 441–2; Roscoe Cr. Ev., sec. 130; 42 Vt.. 95; 55 Barb., 450; 3 Camp., 131; 3 Stark, 34; 38 How. Pr., 369; Mansf. Dig., sec. 2259.*

2. Opinions of witness, save certain well known exceptions, are not evidence, and Wilkins' evidence is not admissible. *2 Best on Ev., sec. 511, p. 864; Dyer, 53.* The evidence upon which the witness arrived at his conclusion was proper, but not the conclusion or opinion itself. *11 Mo., 230; 7 Mo., 231.*

3. If there was a reasonable doubt of the absence of defendant, he was entitled to an acquittal. *17 Pac. Rep., 522; 42 Mich., 261; 31 Mich., 1.*

This feature was not touched in any of the instructions given. *Whart. Cr. Ev., 19th ed., sec. 333; 86 Penn. St., 54; 95 id., 418; 50 Mich., 233; 65 Ga., 756, etc.*

4. The court erred in instructing the jury that Hawkins Corley was an accomplice. That was a fact for the jury. *50 Ark., 534; 36 id., 126; 9 N. W. Rep., 698; 11 Pac., Rep., 799; Const. Ark., art 7, sec. 23.*

5. The introduction and use of the bail bond in comparison with the slip found on the safe was error. *32 Ark., 337; 1 Gr. Ev., secs. 577–8; Whart. Cr. Ev. (9th ed.), secs. 555–7; 10 Cent. Law Journ., 121; 39 Md., 90; 17 Am. Rep., 540; 9 Cow., 94; 2 Johns. Cas., 210; 2 Park. C. C., 210; 22 N. J.*

L., 212; 28 Penn. St., 318; 27 Md., 6; 14 id., 573; 56 id., 439; Leigh., 216; 1 Duval (Ky.), 335; 3 Brev., 51; 1 Hawks., 6; 1 Ired., 16; 21 Ill., 375; 32 Ark., 338; 9 W. S., 270, and many other cases.

W. E. Atkinson, Attorney General, and *T. D. Crawford,* for appellee.

1. Hawkins Corley, the accomplice, was sufficiently corroborated. *110 Mass., 104.*

2. Wilkins' evidence admissible; he stated merely what the appearance of the door suggested to his mind, after stating what the facts were. *117 Mass., 122, 127; 17 Mich., 99; 41 Iowa, 219; 84 N. C., 756; 66 Md., 419.* It was impossible to bring the punch and door into court, and it was the best evidence obtainable under the circumstances.

3. All the facts surrounding the alleged crime should be proven, and it was not improper to admit Corley's testimony that the Forts had approached him to borrow the county money. *43 Ark., 99; 18 Mich., 228.*

4. The instructions given fairly covered the questions of *alibi* and reasonable doubt.

5. The slip found was admitted as part of the *res gestæ.* The objection to its comparison with Fort's signature fails, because the paper was proved genuine. *32 Ark., 337.*

1 INSTRUCTIONS: Assumption of guilt.

COCKRILL, C. J. In the course of its charge the court told the jury that Hawkins Corley, upon whose testimony the State relied for a conviction, was an accomplice. The appellants, without making specific objection to that part of the charge at the trial, but relying solely upon a general objection to the entire charge, now single out that clause, and argue that it is erroneous because it assumes that they are guilty. A survey of the whole charge does not warrant the assumption, but leaves the unmistakable impression that the court did not intend to interfere with the jury's right to believe Corley's statement, but to inform them that if they believed it, it would still re-

quire other evideuce connecting the defendants with the commission of the offense to authorize a conviction. The charge fairly covered the whole subject pertaining to the defendants' guilt or innocence, and no objection worthy of serious reflection is urged against any other part of it. As it sufficiently covers every other phase of the case, it was not error to refuse other prayers for instructions.

2. SAME: Refusing unnecessary charge.

Our attention is directed to many objections to the admission and rejection of testimony. Most of them relate to rulings of the court which were clearly right, or were not prejudicial to the defendants. Of the former class is the objection in Hiram Fort's case to the testimony of Corley, to the effect that Jeff Fort made propositions to obtain money through him from the county treasury, at a time when Hiram was not present. Proof was adduced to the effect that the two together renewed the offer, and a foundation for the testimony was laid also, by proof tending to show that their conduct on these occasions was part of a conspiracy to induce Corley to aid them in robbing the treasury.

3. EVIDENCE: Acts of co-conspirators.

On the other hand, the admission of the evidence of the witness offered by the State to prove that a writing, supposed to have been left on the scene of the crime by one of the perpetrators, was the work of one of the defendants, could not have prejudiced him, because the witness' testimony was altogether favorable to him; and it cannot be said that the court erred in permitting the bail-bond, which it was conceded contained the defendant's genuine signature, for the purpose of showing by comparison that the defendant wrote the criminating paper, because no objection was made, at the trial, to its introduction.

4, PRACTICE IN SUPREME COURT: Evidence favorable to appellant.

Again, Wilkins testified on behalf the State, as to the condition of the safe-locks and doors after the burglary, and was permitted, against the defendant's objection, to state that force had been applied from the outside to break the lock of the inner vault door, which had been secured by an ordinary

5. EVIDENCE: Appearances.

lock and key. This, however, was only a conclusion of fact drawn from appearances—it was in reference to an ordinary transaction which any man of common understanding was capable of comprehending, but which could not be reproduced or described to the jury precisely as it appeared to the witness; and while it may not be the right of a party to demand an expression of opinion of a witness under such circumstances, it is not reversible error to permit it. *Commonwealth v. Sturtivant, 117 Mass., 122; McIntosh v. Livingston, 41 Iowa, 219; 1 Thompson on Trials, 379.*

6 SAME: Opinion of witness

Whittaker, on the part of the defendant, who had also examined the locks and doors, was allowed to testify fully to the conditions he observed, and it was not error to refuse to allow him to answer the question, "Do you think the inner vault door was opened first and the lock broken afterwards?" The question called for a speculative opinion, not necessarily based on what he had observed. It called for a more comprehensive opinion than Whittaker had given.

7. SAME: Corroborating testimony of accomplice.

It is argued that there is no evidence corroborating the testimony of the accomplice which tends to connect the defendants with the commission of the offense.

To test the legality of a verdict under such circumstances, the rule of appellate courts is to take the strongest statement of the case against the defendant that the evidence would warrant the jury in finding, if the facts were specially found. Pursuing this course we have this state of facts, outside of the accomplice's testimony.

In Jeff Fort's case we have his admission, upon the witness-stand, that he entertained a proposition from Corley to take the combination of the Treasurer's safe and enter the scheme to rob the treasury, and that he agreed to submit the matter to his brother Hiram, which he says he did; and in Hiram's case we have the testimony of several witnesses to his confession that he had joined in the conspiracy and obtained the combination of the safe from Corley to effect the burglary. It

was proved that both the defendants were farmers residing some three miles from the county seat, where the Treasurer's funds were kept; that they were in town on the day of the burglary, and left, as though for home, late in the afternoon; that they returned to the town after dark on an inclement, blustering winter night, without any ostensible cause, leaving before daylight, and that they afterwards denied having been in the town during the night. The burglary was committed that night by some one who had the combination which opened the safe, and who shattered the lock after the safe was opened as a blind to detection.

These facts certainly tended to connect the defendants with the commission of the offense, and the jury was warranted in finding that they were sufficient corroboration of the testimony of the accomplice.

Let the judgment be affirmed.

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WHITE v. WHITE.

1. ADVANCEMENT: *Purchase by father in name of son.*

A purchase of land by a father in the name of his son, is presumed to be an advancement. And this presumption will not be overcome by proof that the father took possession of the land, and after making improvements held it for the period of seven years, enjoying the rents and profits, paying the taxes, and claiming it as his own, with the knowledge of the son, and without objection or claim of ownership on his part, where it is also shown that the son was a minor at the date of the purchase, and during nearly all the time of the father's possession resided with the latter as a member of his family; and that the father, at the time of the purchase, declared that it was made for the son.

2. STATUTE OF LIMITATIONS: *Relation of parties.*

In such case in view of the relation between the parties, the father cannot avail himself of the statute of limitations to defeat an action brought by the son for the recovery of the land.

APPEAL from *Washington* Circuit Court in Chancery.

J. M. PITTMAN, Judge.

William J. White brought an action of ejectment against his father, J. S. White, to recover a tract of land, claiming title thereto under a conveyance executed to him in the year 1874 by E. D. Ham. The defendant interposed the statute of limitations as a bar to the action, and set up as a further defense that he paid all the purchase money for the land and that the conveyance to the plaintiff was in trust for his benefit. His answer was made a cross-complaint, by which he prayed for a decree divesting the plaintiff of title to the land and vesting it in himself. The cause was transferred to the equity docket. The answer to the cross-complaint admitted that the defendant purchased the land from Ham and paid the purchase money therefor, but denied that the conveyance was intended to create a trust, and alleged that it was made as an advancement from the defendant to the plaintiff. On the hearing the court below found that the defendant had held adverse possession of part of the land for seven years next before the suit was commenced and as to that part, decreed in his favor. For the recovery of the residue judgment was rendered for the appellant. The evidence showed that at the date of the conveyance W. J. White was a minor living with his father, and that after he became of age, and until his marriage in 1881, he continued to reside with his father as a member of the latter's family. He remained on the defendant's farm a year after his marriage, and during that year they were partners in cultivating the defendant's lands and also such part of the land purchased from Ham as had been reduced to a state of cultivation. The land in controversy was about two and a half miles from the defendant's, house and neither of the parties had ever resided upon it when this litigation was begun. It was entirely unimproved at the date of its conveyance to the plaintiff. Before 1879 about twenty-two acres had been fenced and put in cultivation. It was this improved part of the tract which the court found had been adversely held by the defendant. The plaintiff appears to have participated in

the work of improving and cultivating it under the defendant's direction and supervision. The defendant paid the taxes, and when all or any part of the improved land was rented it was done under a contract made with him, and the rents were paid to him. The plaintiff cultivated part of the land after he ceased to reside with the defendant, and the latter testified that this was done under an agreement to pay him rent. There was some other evidence tending to show that such an agreement was made. But the defendant in his testimony denied that he had ever rented any part of the land. The evidence discloses no controversy as to the title prior to the year 1886, in which the suit was brought. The defendant testified that Ham held the land under a tax title, and that he had the deed made to the plaintiff because he was advised that the title could be "better defended" in his son's name, and that he had no intention of giving the land to the plaintiff. One witness testified that about the date of Ham's conveyance the defendant exhibited to him a deed conveying the land in controversy to the plaintiff, and stated that it was made "as a deed of trust" to avoid trouble about the title. There was some evidence tending to show that the plaintiff had not claimed to be the owner of the land until a short time before bringing the suit. On the part of the plaintiff a witness testified that defendant, on the day the land was bought, stated that he purchased it for the plaintiff. Others testified to subsequent declarations made by the defendant at different times between 1875 and 1886, to the effect that the land was bought for the plaintiff or belonged to him. And one witness testified that the defendant stated a short time before the suit was commenced that he was unwilling to let the plaintiff have the land because his other children objected, and it would create trouble in his family.

L. Gregg, for appellant.

When a father causes conveyance to be made to the son, the law presumes it to be an advancement, and the proof must be clear and convincing that a trust only was intended. *44 Ark.*,

365; 47 id., 62; 48 id., 17; 45 id., 481; 41 id., 62; 1 Ld. Cas. in Eq. (4th Am. ed.), 314 et seq., notes to Dyer v. Dyer. The claim is stale. *41 Ark., 301.*

2. The proof fails to sustain the plea of adverse possession. *3 Wash. R. P., p. 141, *491; Tyler Eject. (1st ed.), 861, 875, 885; 4 How., 289; Greenl. Ev., vol. 2, sec. 430, note 5; Abbott's Tr. Ev., p. 715, par. 37.* The occupation of the father by reason of relationship, was not hostile in its inception. *8 Ark., 83; 10 id., 211.*

J. D. & J. V. Walker, Sam H. West and *B. R. Davidson,* for appellee.

1. The proof shows that the deed was a trust for the benefit of the father, and so recognized by the plaintiff and all members of the family for years.

2. The father claimed and held adversely for the full period of limitation after the son was of age, and the son rented from him. *28 Ark., 153; 31 id., 471; 34 id., 547; 40 id., 62, 69; 11 id., 249.*

ADVANCEMENT: STATUTE OF LIMITATIONS.

PER CURIAM. The presumption of the law is that the purchase of the land in controversy was by way of advancement to the son. *Robinson v. Robinson, 45 Ark., 481.* The proof does not overcome this presumption.

The statute of limitations does not aid defendant under the facts of this case. The occupancy of each was with reference to parental and filial duty. *White and Tudor's Leading Cases in Eq., vol. 1, pt. 1, p. 331; Sidmouth v. Sidmouth, 2 Beavans, 447.*

The decree is reversed with costs, and the cause remanded with direction to the Washington Circuit Court to enter a decree giving plaintiff possession of the premises sued for.

HARVEY V. CRAWFORD COUNTY.

COUNTIES: *Liability for costs upon acquittal for misdemeanor in justice's court.*

APPEAL from *Crawford* Circuit Court.

J. S. LITTLE, Judge.

Charles F. Harvey is a justice of the peace for Crawford County, and in May, 1887, George Galbraith was brought before him on a charge of felony. An examination was had, upon which it appeared that Galbraith was not guilty of the felony, but was guilty of a misdemeanor. He was thereupon held to answer the latter charge, and on a trial by a jury, was acquitted. Harvey subsequently presented to the County Court a claim for the fees which accrued to him in the misdemeanor case, and it was rejected. He appealed to the Circuit Court, where the claim was again disallowed, and from the judgment there rendered against him this appeal is prosecuted.

Sections 2343, 2348 and 2351, Mansfield's Digest, are as follows:

Sec. 2343. In all criminal or penal cases, if the defendant shall be acquitted, except in cases where the prosecutor shall be adjudged to pay the costs, or, in cases of felony, if convicted, shall not have property to pay the costs, the same shall be paid by the county.

Sec. 2348. In all prosecutions in cases less than felony, in courts of justices of the peace and in other inferior courts, the prosecutor, or some person for him, shall enter into bond, with good and sufficient security, for the payment of all the costs which may accrue in said prosecution.

Sec. 2351. It shall be lawful, however, for the justice or other officer, when he has strong reasons to believe that the person applying for a warrant has been, in plain violation of the criminal laws of this State, maltreated, either in person or property, to permit such person to prosecute without giving

the bond required in section 2348: *Provided*, That the person so applying for a warrant shall make affidavit that he is unable to give security for the costs which may accrue in said prosecution.

The appellant, *pro se*.

Counties are liable for costs where the defendant is acquitted, and there is no judgment against the prosecutor for costs. *Rose Dig., p. 215, sec. 13; 37 Ark., 226; 44 id., 31; Mansf. Dig., sec. 2348.*

COUNTIES: COSTS.

PER CURIAM. The county is not liable for costs upon acquittal for a misdemeanor in any case in which the justice of the peace should have exacted a bond for costs, but did not. *Stalcup v. Greenwood Dist., etc., 44 Ark., 31.*

The judgment is affirmed.

PUMPHRY V. PUMPHRY.

1. DOWER: *Provision in lieu of: Widow's election.*

Sections 2583, 2584 Mansfield's Digest, providing "that if land be devised to a woman, or a pecuniary or other provision be made for her by will in lieu of dower, 'she shall be deemed to have elected to take such devise or provision, unless within one year after the death of her husband she shall enter on the lands to be assigned for dower, or commence proceedings for the recovery or assignment thereof,'" apply to all cases where a settlement upon the wife is made by the husband other than by will, whether of lands or personalty, or where personalty is bequeathed by him in lieu of dower, or where land is devised, or a jointure or other provision in lieu of dower is made for the wife by another than the husband. In either of such contingencies, the widow's intention to renounce the provision made for her in lieu of dower, must be evinced within twelve months after the husband's death and in the manner required by section 2584.

2. SAME: *Same.*

But where lands of which the husband dies seized are devised by him to the wife, or where he devises lands to her and also bequeaths to her personal property, she may in either of such cases make her election between the testamentary provision and dower, and by a deed of release executed to the heirs, renounce the benefits of the will, at any time within eighteen months after the husband's death, as provided in sections 2594–2598.

APPEAL from *Grant* Circuit Court.

J. B. WOOD, Judge.

By the will of Nathan Pumphry, he devised to his widow, the appellee, eighty acres of land, which was his homestead, or a part of it, for her natural life or during widowhood. The widow, after the death of her husband, remained on the land thus devised, and sixteen months thereafter executed, as required by law, a deed by which she released to the heirs of her husband, all her rights to said property under the will. She then filed a petition in the Probate Court for dower. She claims that she is entitled to occupy the homestead, and also to dower in the other lands and in the personal property. On appeal to the Circuit Court, the relief prayed for in the petition was granted, and from the judgment there rendered against the defendants, they have prosecuted this appeal.

Thomas B. Martin, for appellants.

The will does not in express terms declare that its provisions are in lieu of dower, but it disposes of all the testator's property; the inference that he intended her to have the provision and dower also is excluded. *29 Ark., 428; Scribner on Dower, 455 et seq.*

The apparent conflict between sections 2584 and 2598 is only apparent. The former fixes the time within which she must make her election, and the latter only fixes a period within which she shall convey the real estate.

The opinion as to the time in *19 Ark., 424*, is *obiter dictum*. That question was not in the case, but in *Sigler v. Bolton, 29 Ark.*, that was *the* question, and it was held the widow must elect within one year. See *29 Ark., 429*, citing *35 Barb., 482; Scribner on Dower, 473*.

Ratcliffe & Fletcher, for appellee.

The sections were all enacted at the same time by act February 28, 1838. *Rev. St., ch. 52.* They evidently provide for an election in two classes of cases, one to be made in twelve,

the other in eighteen months. Otherwise they are irreconcilably in conflict. They cannot be reconciled on the theory that the first refer to the *election*, which must be followed as provided in the last by the execution of a deed, etc. By section 2584, an entry or suit is all that is necessary, and this was all required at common law. *2 Hawkins (N. C.), 375.* But why provide then in section 2597 that "such renunciation by deed," etc., "shall be deemed sufficient notice." The entry or suit would be notice, and there would be no necessity for further provision; or why provide in section 2598 that unless such renunciation be made within eighteen months, the widow *will be deemed to have elected* to take under the will, etc.

The late Jabez M. Smith, counsel for appellee, in a brief prepared in this case, contended that the first sections applied to the modern jointures, or jointures made either by the husband or others in lieu of dower, and the latter sections to devises by the husband to his wife, *citing Bright on Husb. and Wife, vol. 1, pp. 321, 329, 408, 295, 296, 433–4, etc., etc.; Black. Com., book 2, side pp. 129, 132, etc., 515, 516, etc.; 27 Hen., VIII, c. 10, sec. 6; Scribner on Dower, ch. 15, p. 370, note 6, 372, 373, note 15, etc.; Bright H. and W., pp. 413 to 467, 546 to 557, etc.; 29 Ark., 422; 19 Ark., 424.*

Section 2594 creates a new rule by which dower is barred, and there is reason for longer time to elect.

In this case there was no necessity for an election at all. The will only gave the widow part of the homestead for life or widowhood; this was not his to give. Under our laws she was entitled to this and much more. There is nothing in the will to exclude the idea of dower. A devise of "all my estate" is not inconsistent with dower, for dower is the wife's estate and not the husband's; it is an incumbrance on his property. *Stewart on H. and W., sec. 274; 10 Paige, 266, 272–3; 5 Johns. Chy., 489; 5 Selden, 502; 2 Denis, 430; 2 How. (Miss.), 692; 1 Wash. R. P., 320, 322.*

COCKRILL, C. J. The controlling question on this appeal is, whether a widow to whom lands of which her husband died seized have been devised and personal property bequeathed by the husband, must, if she desires to take dower under the statute, make her election to do so by entering upon the land to be assigned as dower, or by bringing suit for its assignment within a year after the death of her husband, as provided by sections 2583, 2584 Mansfield's Digest, or whether she may do so by executing to the heirs a deed of release and quit-claim of the lands devised within eighteen months after his death, under authority of sections 2696–8?

The case comes within the terms of either set of provisions, if we look to one without recurring to the other, and the question is, how shall the statute be construed when all are viewed together?

Both the twelve and eighteen month limitations are found in the fifty-second chapter of the Revised Statutes of 1838, under the title of "Dower." As the chapter was never published in the session acts of the Legislature, we take it to be one of those enacted by the General Assembly at the suggestion of the revisers, who were appointed to prepare a code of civil and criminal laws under the act of October 6, 1836.

The first seventeen sections, including the twelve month limitation in question, were copied without material change from the Revised Statutes of New York. They prescribe what lands the widow shall be endowed of, and then provide that if land shall be given or assured in jointure to an intended wife, or a pecuniary provision made for her in lieu of dower, to which she assents in the manner pointed out by the statute, she shall not be entitled to dower in his lands. *Mansf. Dig., secs. 2579, 2781.* It is then provided that if the jointure or pecuniary provision in lieu of dower, is made without the woman's assent before marriage, or if made after marriage, she shall have the right to elect whether she will take dower in the lands, or the provision that was intended to be in lieu of it.

Mansf. Digest, sec. 2582. Then follows the provisions whith give rise to this appeal, viz.:

"Section 2583. If land be devised to a woman, or a pecuniary or other provision be made for her by will in lieu of dower, she shall make the election whether she will take the land so devised or the provision so made, or whether she will be endowed of the lands of her husband.

"Section 2584. When a woman shall be entitled to an election under either of the two last preceding sections, she shall be deemed to have elected to take such jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof."

Now, if the land is devised to a woman by her husband, the case will plainly fall within the letter of these provisions, if there is nothing else in the statute to indicate a contrary intention, and she would be required to make her election within twelve months after her husband's death to entitle her to dower. That is the construction the statute has always received in New York.

But provisions were added to our law which are not found in the New York statute, and which do not readily harmonize with all that we had borrowed from it, and from that cause confusion arises.

Personal property was not the subject of dower at common law, and the New York statute did not extend the right to that species of property. For that reason the provisions in relation to the widow's election, which we borrowed from the New York statute (which was in turn founded on the statute of *27th of Henry VIII, 4 Kent Com., 56*), do not profess to bar dower on failure to renounce the will, in anything except lands. But in our act provision was made, subsequent to these sections, for dower in personal property.

It was further provided that if the husband should devise land or bequeath slaves to his wife, and die seized thereof, the provision should be taken in lieu of dower unless the will declared otherwise; and the bar was not limited to dower in lands, but plainly extends to every species of property of which the widow may be endowed. But since personalty has been made the subject of dower, doubtless an equitable estoppel would arise to the claim of dower in personalty under sections 2582-3, as well as under the subsequent sections. This would be in analogy to the relief given by the courts of chancery from the strict legal construction of the statute of 27th Henry VIII.

The statute, instead of vesting the widow's right to elect between the land or slaves offered by the husband's will and her right to dower, upon the general provisions of sections 2583-4, which were broad enough to cover it, specifically prescribes a different time and mode by which she shall evidence her dissent in such cases.

It was to be done within eighteen months after the death of her husband, by executing to the heirs a deed of release and quit-claim of the lands and slaves provided for her by the husband's will (sections 2594-8). Recording the deed was declared to be notice of the widow's renunciation of the provisions of the will.

The abolition of slavery has removed the only species of personal property to which these provisions of the statute related, and a devise of lands is all that is now embraced within their terms.

DOWER: Provisions in lieu of: Widow's election.

We have then two several provisions of the same act, apparently prescribing different limitations, within which the widow may make her election to take dower instead of the benefits of the will. It is argued that the provisions may be reconciled by construing the twelve month limitation as prescribing the period within which the widow must manifest her election to take dower by entry or suit, and the second as allowing her

the full period of eighteen months within which to execute to the heirs a release of the lands devised to her. The result of that construction would be only to make a failure to execute the deed within eighteen months revoke a previously declared renunciation. But the statute manifestly intends that executing and recording the deed in the manner and within the time prescribed by the statute, shall in itself constitute a complete renunciation of the benefits of the will. If it is necessary that the execution of the deed of release should be coupled with the entry or suit prescribed by section 2584, in order to perfect a renunciation, why prescribe that the filing of the deed for record should be notice of the renunciation? The entry or institution of suit, which, it is argued, are the only evidence of renunciation, would be notice in themselves. As if to emphasize the fact that the execution of the deed in the manner and time prescribed by the statute should be regarded as a renunciation, and to distinguish it from the other methods prescribed in section 2584, the statute denominates it a "renunciation by deed" in sections 2597-8.

But renunciation by deed is confined by the terms of the statutes to a *devise* of *lands by the husband* to the wife. If a settlement is made by the husband upon the wife other than by will, whether of lands or personalty, or if personalty is bequeathed by the husband to the wife in lieu of dower; or if land is devised, or a jointure or other provision in lieu of dower is made by another than the husband, such as would put the widow to her election under the English statute (conditions not likely now to arise), the limitation of twelve months on the right of election is the only one found in the statute to govern, and the intention to renounce the provision made in lieu of dower in either of these contingencies, should be evinced within the time and in the manner pointed out by section 2584. The unambiguous specific direction of the statute as to the time and manner of making the renunciation when the husband devised land to the wife, is inconsistent with the

previous general provision as to election contained in that section, and to that extent the general provision must yield to the special. But as the former covers a wider range than the latter, both may stand and have operation in the manner indicated.

2. SAME: Same.

It follows that when lands of which the husband died seized are devised by him to his wife, the widow may within eighteen months after his death make her election between the testamentary provision and dower.

As one year is the limitation where the testamentary provision of property other than lands is intended to stand in lieu of dower, what shall be the limitation where the husband devised and bequeathed lands and personalty, as was done in this case?

The widow renounced the provisions of the will by executing to the heirs a deed which was acknowledged and recorded sixteen months after the death of her husband. The Circuit Court declared that her election was in time.

That conclusion follows from the construction we have placed upon the statute. When the widow is put to her election between her husband's devise and her dower, she must renounce all the provisions of the will if she wishes to take dower. She cannot take the bequest under the will and get dower in the lands, or hold the lands under the will and get dower in the personalty. *Bolton v. Seigler, 29 Ark., 429.*

If compelled to make her election as to the bequest within twelve months, she would be debarred of the eighteen months privilege which the statute grants her. Her right to dower in lands is certainly of equal dignity with her dower right in personalty, and there is nothing in the act from which we should conclude that it was the intention of the Legislature to abridge the former right merely because a bequest of personalty is coupled with the devise of land.

The provisions of the statute have heretofore been adverted to by the court, but no attempt has been made to recon-

cile them. *Bob v. Powers in the 19th Ark.* is the first case in which either provision is mentioned.

That was a suit by a negro for his freedom, determined in 1858. His claim of manumission rested in part upon a will. The point settled by the court was that the executor should hold the slave until the time for the widow's election to renounce a legacy left her by the will had expired. The opinion says that eighteen months is the period allowed for that purpose, but the time within which the election should be made was not material in that case, one year from the death of the testator not having expired when the cause was tried in the Circuit Court, and more than eighteen months having elapsed when it was remanded for a new trial by this court. It was not essential, therefore, for the court to compare the two provisions and ascertain which should govern, and the one year provision was not adverted to.

In the case of *Bolton v. Seigler, 29 Ark., 418*, on the other hand, the court regarded the twelve month limitation as applicable to the case of a pecuniary provision for the wife made by the husband's will in lieu of dower. The case is in consonance, we think, with the meaning of the statute on that point.

The judgment will be affirmed.

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BLOCK V. VALLEY MUTUAL INSURANCE ASSOCIATION.

1. LIFE INSURANCE: *Right to, fixed by contract.*

Whether a policy of life insurance be issued by a mutual benefit society created for benevolent purposes, or by a company the organization of which is financial and contemplates gain, the rights of one claiming insurance under it must be ascertained by the contract itself without regard to the character of the company to be made liable.

2. SAME: *Same: Assignment of policy.*

A clause in a policy of life insurance providing that it "may be assigned, transferred, or set over, by and with the consent" of the company issuing it, authorizes an assignment by the beneficiary only, and not by the insured.

3. SAME: *Same.*

A policy of insurance issued by a company organized as declared in its by-laws, "for the purpose of mutually associating together a number of individuals into an agreement whereby the survivors mutually contribute for the relief of the representatives, legal heirs, or assignees of those of their number whom death may strike down," and whereby the company undertakes to pay to a person named therein as a beneficiary a stipulated sum within ninety days after the death of the person to whom it is issued, upon condition that certain payments therein provided for are promptly made to the company on maturity, and providing that a failure to make any of such payments for thirty days after call, shall have the effect to cancel the contract, is an ordinary insurance policy. And the party obtaining it has no power to change the beneficiary it names unless he is expressly authorized to do so by the policy itself, or by the company's articles of association or by-laws, where these are by the terms of the policy made a part of it.

APPEAL from *Cross* Circuit Court.

J. E. RIDDICK, Judge.

Sanders & Watkins and *J. D. Block*, for appellants.

The association is a mutual benefit society, and the laws governing ordinary life insurance policies do not apply. The distinction is this: In regular insurance the party named as beneficiary takes a vested interest in the policy from date of the contract, and no one except the beneficiary can assign it. Whereas, in a benefit certificate the party to whom the fund is directed to be paid, has no interest or estate in it until the death of the member, and the direction is contingent and testamentary according to the rules of the association and the will of the member. *Bacon on Benefit Societies, sec. 306 et seq.; Niblack on Mut. Ben. Soc., secs. 171, 193, 194, 196, 201, 204; 31 Fed. Rep., 177; 74 Ga., 669; 38 N. W. Rep., 1; 3 Mackey, D. C., 68; 30 Fed. R., 117; 28 Minn., 447; 11 Alt. Rep., 84; 11 N. E. Rep., 449; 18 ib., 657; 63 N. H., 535; 18 N. E. Rep., 657; 11 id., 331.*

This was not a contract with the beneficiaries, but with the *member* and *his* assigns. See article 1 of by-laws. *144 Mass., 589; 142 id., 224; 106 Ind., 593.* The charter and by-laws are a part of the contract. They must be read as part

of it, and together, and if the certificate is contrary to the charter and by-laws, it must yield. *82 Ky., 350; 60 Tex., 535; 42 Ohio St., 579; 43 id., 4; 102 Ind., 262.* The first beneficiary holds no vested right in the benefit fund, and the new appointment must govern. *111 Ind., 125*, and cases *supra. 1 Sugden on Powers, p. 288; 17 Alt. Rep., 57; 21 N. E. Rep., 1074; 15 Alt. Rep., 125; 28 Minn., 449; 63 N. H., 535; Bacon, sec. 306.*

N. W. Norton, for appellees.

The contract in this case was an ordinary insurance policy, and gave a vested estate and interest in the beneficiaries from the date of the policy. *Bacon Ben. Soc., sec. 304; 17 Alt. Rep., 419; Bliss Life Ins., secs. 339, 348; Bacon, 292–3.* Under article 1, by-laws, the policy was payable to Guthrie's wife and children, and they alone could assign their vested interest. *Supra.*

2. A *firm* (Block Bros. & Co.) cannot be a "relative" or "dependent," and had no insurable interest in Guthrie's life, and the same objections lie to an assignment without interest. *Bacon, secs. 302, 454.*

3. The consent of the association to the transfer was not obtained. Notifying the association afterwards was not sufficient.

HEMINGWAY, J. One Charles B. Guthrie obtained a policy of insurance upon his life from the Valley Mutual Insurance Company. It undertook, upon the conditions therein named, to pay to Mrs. Martha A. Guthrie, James M. Harvey and Alice Guthrie, $1000 within ninety days after proof of the death of Charles B. Subsequently Charles B. and Mrs. Martha A. Guthrie assigned the policy to the plaintiffs, who thereafter paid all dues and premiums as they matured, according to its terms. Upon the death of the said Charles B. the plaintiffs claimed the amount due upon the policy by virtue of the assignment, and the beneficiaries therein named by virtue of the provisions of the policy.

The court found that the plaintiffs acquired, by the assignment, the interest of Martha A. Guthrie, and no more. That they were entitled to recover her interest in the fund and three-fourths of what they had advanced in keeping the policy alive, while James M., Harvey and Alice Guthrie were entitled to recover the balance. Judgment was rendered accordingly.

As grounds for reversal the appellants urge:

First—That the insurance company is not a regular insurance company, but a mutual benefit company.

Second—That the policy of an insurance company differs from the certificate of a mutual benefit company in this, that the rights of the beneficiary in the one are vested upon the issuance of the policy, while those rights in the other are subject to be divested at any time until the death of the insured, by the substitution of another beneficiary.

The record contains no part of the company's charter or articles of association, and but one clause of its by-laws. It is as follows:

"The object of this association shall be for the purpose of mutually associating together a number of individuals into an agreement, whereby the survivors mutually contribute for the relief of the representatives, legal heirs or assignees of those of their number whom death may strike down."

The policy sued on contains no reference to any other purpose than one of insurance, and provides the ordinary safeguards against the acceptance of bad risks, as well as against the continuance of risks accepted, unless the stipulated payments upon it are promptly made as they mature. These payments include "annual dues" and "mortality assessments," and a failure to pay either for thirty days after call, effects a cancellation of the policy. It contains this clause, upon which appellant relies especially:

"This certificate may be assigned, transferred, or set over by and with the consent of the association, granted by its president or secretary."

The record discloses nothing further as to the character of the company. Upon this the learned counsel for appellants say, that they assume that it will be conceded to be a mutual benefit society. What feature is disclosed that does not belong to a mutual insurance company? The first by-law, in making a general declaration of its purpose, declares that it is to afford relief; but also declares that the relief will be given to "the representatives, legal heirs or assigns of those of their number whom death may strike down," and this is exactly what insurance companies are required to do. Yet this is not benevolence, for it is undertaken for a stipulated profit, the continued payment of which is a continuing condition to its existence. If any other character of benevolence was contemplated by the company the record does not disclose it. Certain it is, that the policy exhibited contains no intimation of its existence.

We have no statute distinguishing between insurance companies and benefit companies with insurance features. Such statutes have been enacted in other States; they define the properties of the latter that entitle them to privileges or exemptions not accorded the former. The distinguishing feature generally is, that they contemplate gain, while these contemplate benevolence only. Within the scope of their benevolence is included, with many fraternal objects, the providing of a fund to be paid upon the death of members, in which this is regarded as but an incident of the main object. Subjected to the tests made in those States, we have found no decision which leads us to think that the contract sued upon would be viewed in any other light anywhere than as an ordinary insurance policy. It exactly fits the definition of an insurance policy, as made by Mr. Justice Gray, which has been generally adopted as correct. *Commonwealth v. Weatherbee, 105 Mass., 160; Niblack Mut. Ben. Societies, sec. 163.*

It is said that the character of the benefit association is dual: First, fraternal; second and incidentally, financial. *Bacon Benefit Societies, sec. 283.* If the incident be eliminated

from the case at bar there is nothing left. That stamps it an ordinary insurance policy. *State ex rel. Graham et al. v. Miller et al., 66 Ia., 26; State v. Citizens Benefit Assn., 6 Mo. Ap., 163; Farmer v. State ex rel. Carruthers, 7 S. W. Rep., 220; People ex rel, Blossom v. Nelson, 46 N. Y., 477.*

1. INSURANCE: Right to fix by contract.

Moreover, we have found no case which recognizes any distinction between the mutual insurance and the mutual benefit society, except in States where the statute makes a difference. But regardless of the character of the company, the rights of persons claiming insurance arise out of and depend upon contract, and must be ascertained and fixed by contract. Although the object of the company in entering into the contract may be benevolent, this purpose can import no new meaning to the unambiguous terms of a writing.

When the courts are invoked, the contract measures the rights of one and the obligation of the other party, and relief must be granted, if at all, according to its terms. *Niblack on Mut. Ben. Societies, secs. 163 to 165; Bacon on Benefit Societies, sec. 304; Holland v. Taylor, 11 Ind., 125.*

2. SAME. Assignment of policy.

That the member of a mutual benefit society may change the beneficiary named in the certificate has been frequently held; not, however, because of the character of the society, but because of the stipulation contained in the certificate expressly authorizing it. In most cases such certificates as have been the subject of judicial discussion, contained express stipulation that the beneficiary named might be changed; in others the articles of association or by-laws contain such provisions and are by the terms of the policy made a part of it. The effect in each case is the same.

3. SAME: Same.

If such a purpose was entertained in making the contract sued upon it does not appear. The clause set out provides that the policy may be assigned. This does not mean that another beneficiary may be substituted by the insured, for substitution and assignment are quite different things; it simply intends that the beneficiary may assign his interest. The in-

sured had no interest to assign. That was vested in the parties named. *Bliss Life Ins., sec. 318; Bacon Ben. Soc., sec. 392.* He had no power of substitution, because none is reserved in the contract, or in the charter or by-laws of the association, incorporated into the policy.

The learnred counsel have shown very commendable industry in examining authorities, and equal skill in presenting them. We have carefully examined every case cited, and very many to which we have found reference elsewhere. The result is that we are satisfied that the judgment of the Circuit Court is correct, and it is affirmed.

BAZEMORE V. MULLINS.

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1. MORTGAGES: *Redemption: Condition of.*

Where a debtor executes two mortgages to his creditor, one upon lands and the other upon chattles, to secure different debts, and afterwards procures satisfaction of both by a parol release to the mortgage creditor of his equitable interest in the land, and is thus enabled to place the chattels beyond the reach of the mortgagee, equity will not permit him to redeem from the land mortgage without requiring payment of all he owes upon both accounts.

2. SAME: *Equity of redemption: Statute of frauds: Estoppel.*

A mortgagee may purchase from his mortgagor, the equity of redemption in the mortgaged lands; and where a creditor holding two morgtages from the same debtor—one being a conveyance of land by deed absolute in form, and the other upon chattels—gives his debtor upon a fair settlement, a release of all indebtedness in consideration of a parol release to him of the equitable interest in the land; and the mortgage debtor thereafter places the chattels beyond the reach of the mortgagee, equity will not aid the mortgagor to avoid the parol release of his interest in the lands by reason of the statute of frauds, but will permit the equitable title to vest in the mortgagee by estoppel.

APPEAL from *Columbia* Circuit Court in Chancery.

B. F. ASKEW, Judge.

Bazemore and Harper brought an action of ejectment against Payne and Bailey to recover two tracts of land. They

claimed title to one of the tracts under a conveyance executed by Bailey Baker, and to the other under a deed from J. S. McWilliams. O. W. Mullins was made a party defendant, and filed a separate answer, alleging that he purchased and paid for the lands sued for, and caused his vendors to convey them to the plaintiffs by way of mortgage, to secure a loan of $250 from the plaintiffs to him. He also alleged that the debt had been paid, and made his answer a cross-complaint, praying that the plaintiffs be compelled by decree to convey the lands to him. The cause was transferred to the equity docket, and a receiver was appointed to take charge of the property. The court found that the deeds were mortgages to secure a debt which had been paid, and decreed that the plaintiffs should convey to Mullins by quit-claim deed. They appealed.

Marshall & Coffman, for appellant.

1. The final settlement made by the parties, and the verbal sale of the land, settle this question in favor of appellants. A deed absolute on its face, which operates as a mortgage by reason of a defeasance, may, by the cancellation of such defeasance, become absolute, and this without any reconveyance. *Wash. R. P., 4th ed., p. 62.* Part performance of a verbal sale of lands often takes it out of the statute of frauds. *40 Ark., 391; 5 N. Y. Chy. An., p. 952, note; 39 N. W. Rep., 146.* It is impossible to lay down any general rule, but the courts will not allow the statute to be used as a cloak for fraud, especially so when the party cannot be, or the other party will not, put him, in *statu quo.*

2. The consideration of the two mortgage deeds not only included the amount originally advanced Mullins, but all supplies subsequently furnished, and the same have not been paid unless the settlement is allowed to stand. And Mullins, by his acts and silence, is estopped to deny this. *33 Ark., 465; Rose Dig., pp. 307-8.*

3. But Mullins must do equity; he must pay appellants the balance due them, the security for which has been surrendered, and thus put himself in position to ask equity. Or the court should decree the balance due a lien on the lands, and then sold to pay it.

J. M. Kelso and *Smoote, McRae & Arnold*, for appellee.

1. The deeds were made to secure only $250. If this amount had not been paid, appellants can recover the possession only of the land, and hold the rents until their debt is discharged. But they could not recover the title. *7 Ark., 310; 13 id., 533; 2 Story Eq. Jur., secs. 788–90.* The $250 was paid and discharged. The payments in 1883–4, are applied by the law to the oldest items in the account successively. *38 Ark., 285; 30 id., 745; 34 id., 285; 39 id., 248; 47 id., 112.* This extinguished the mortgage.

2. The parol sale of the land was within the statute of frauds, and something more than the payment of the purchase money was necessary. *1 Ark., 391; 18 id., 466; 21 id., 533.* Nor can this parol contract enlarge the operation of the deeds so as to keep them in life and make them a security for debts other than those secured by them at first. *30 Ark., 745; 32 id., 645; 38 id., 285.*

The delivery of the securities and the removal of the property covered by the chattel mortgages, do not take the case out of the statute. The corn and cotton had been delivered before suit, and appellants had no lien on the money paid. Besides these amounted to no more than the payment of the purchase money, which is not sufficient.

COCKRILL, C. J. The conveyances which Mullins caused to be made to the appellants by way of security for his indebtedness were absolute in form. There is a conflict in the testimony as to what indebtedness they were intended to secure. Mullins' statement that they were intended to secure only the sum of $250, which the appellants lent him in January,

1883, is not very probable, because the deed to the Baker tract was not executed until long after that indebtedness had been paid according to his theory; and he took from the appellants a bond to convey to him the other tract upon the payment of $900 in January, 1885, when it was estimated that that was the sum that would be due by him on settlement at the close of that year. But in the view we take of the cause that question ceases to be material.

1. MORTGAGES: Redemption: Condition of.

Mullins had also executed chattel mortgages to secure all his indebtedness to the appellants. At the close of 1885, a settlement was reached by mutual agreement. The lands in dispute were valued at $400; Mullins orally released to the appellants, all further claim to them and received a credit upon his account for that amount. He discharged the balance due upon his account by delivery of corn, and payment of cash to the appellants, and received from them a receipt showing the full payment of all his indebtedness, and demanded and obtained satisfaction upon the record of his chattel mortgages.

He took the chattels which had been released from the mortgages into Louisiana and there disposed of them, retook the corn and converted it to his own use, and now actively invokes the aid of a court of chancery to invest him with the title to the land.

He alleges in his complaint that he had discharged his entire indebtedness to the appellants. It appears from his own testimony, however, as it does from all the other evidence in the cause, that the claim of payment alleged in his complaint, is based solely upon the release of his equitable interest in the lands, the delivery of the corn, and the cash payment made in the settlement above referred to.

But if the lands are taken from the appellants, and their value and that of the corn withdrawn from the terms of the settlement, Mullins' debt will be in a great part unpaid; but the security which the appellants held for its payment is gone, and Mullins cannot or will not restore it. It is manifest that it

would be inequitable under such circumstances to cancel the deeds to the appellants without first requiring Mullins to pay to them his entire debt. That would only be requiring him to do equity. *Anthony v. Anhony, 23 Ark., 439; Morgan v. State, ante.*

2. SAME: Equity of redemption: Statute of frauds: Estoppel.

But there is another consideration which puts a final quietus upon Mullins' claim for relief. His own testimony shows that upon a fair settlement with the appellants, he released his interest in the lands to them for an adequate consideration, a part of which was the cancellation of securities which they held for payment of his debt, which was greater than the value the parties placed upon the lands.

The law does not inhibit the mortgagee from purchasing the equity of redemption from his debtor, but demands the utmost fair dealing of him in the transaction. There is not a suggestion of unfairness or oppression in this case on the part of the appellants in making the settlement or taking the release. There is nothing to show that the lands were not taken at their fair market value. The price was fixed by arbitrators, one of whom was selected by Mullins, and the other by the appellants, and the proof shows that Mullins would not agree to any settlement whatever until the appellants consented to take the lands in part payment at the price fixed by the arbritators. He does not undertake to controvert these facts, but relies upon the statute of frauds to consummate his scheme. He argues that he has sold an interest in the land by parol, and that the payment of the purchase money does not alone constitute a part performance of the contract sufficient to take it out of the operation of the statute.

But it is a settled doctrine of equity never to lend its aid to one who invokes it for the purpose of perpetrating a fraud. Mullins is in that attitude. He induced the appellants to surrender to him the securities they held for his debt, and now when the court cannot place them in *statu quo,* seeks to annul his compact and leave them without land or security. In such

a case the courts withhold their aid, and leave the deed, which is absolute in form, to carry the estate in fee as it purports to do. *Pugh v. Davis, 96 U. S., 332; Trull v. Skinner, 17 Pick, 213; 2 Wash. Real Prop., *496, sec. 24.* As was explained by Chief Justice Shaw, in *Trull v. Skinner, supra,* the equitable interest of the party at fault is in such case divested, not by way of transfer, nor strictly speaking by way of release working upon the estate, but rather by an estoppel arising from the voluntary act of the party having the equitable interest, just as it is accomplished when one withholds his conveyance from record and permits his grantor to convey to a *bona fide* purchaser without notice. The doctrine allowing a conveyance to absorb an interest in land which the conveyance alone did not convey, in order to prevent injury being done to one without fault, is of frequent application, and is illustrated by the cases of *Bramble v, Kingsbury, 39 Ark., 131,* and *Gill v. Harden, 48 ib., 409.* In the latter case one who had executed an absolute deed to have effect only as a mortgage, and who remained in possession of the land which he conveyed, was denied the aid of equity to assert his title against an innocent purchaser, from the holder of the legal title because the proof showed that he was not in position to ask equity. We make application of the same principle to the facts of this case.

The decree will be reversed and the cause remanded with instructions to dismiss Mullins' cross-complaint, to cause the receiver to pass his accounts and pay what he has collected to Bazemore & Harper, and to award them possession of the lands.

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BURGETT V. APPERSON.

1. HOMESTEAD: *Sale of: Certiorari: Practice.*

The Probate Court has no jurisdiction to sell the homestead of a decedent during the minority of his children. But where the lands of an estate are sold in a body for the payment of debts, it is not error on *certiorari* to refuse to quash an order confirming the sale on the ground that part of the lands constituted the homestead of the deceased, and that the sale was made during the minority of his child. In such case the Circuit Court, having in the proceeding by *certiorari* no guide ennabling it to separate the lands which the Probate Court had power to sell from those constituting the homestead, the heir will be left to his action at law for the possession of the latter.

2. PROBATE COURT: *Sale of lands: Execution of order made on appeal.*

Where on appeal from a judgment refusing to sell the lands of a decedent for the payment of his debts, an order of sale is made by the Circuit Court and certified to the Probate Court, it becomes the judgment of the latter by its entry there. And although a subsequent appeal from the judgment of the Circuit Court will suspend the power of the Probate Court to execute such order, its jurisdiction to execute it will be restored from the time when the Circuit Court on the affirmance of its judgment, and in accordance with the mandate of this court, enters a new order directing the sale.

3. SAME: *Same.*

A sale of the lands before the new order is certified to the Probate Court for execution, although made pursuant thereto, is irregular, and it is error to approve it. But such sale, being supported by a valid judgment, is not void after confirmation.

4. SAME: *Same.*

Where the lands of an estate, offered for sale under a valid order of the Probate Court, are not sold for the want of a bid equal to two-thirds of their appraised value, no new order condemning them to sale is required by section 184 Mansfield's Digest. But under that statute it is only necessary for the court to provide for the execution of the judgment previously entered by directing that the lands shall be offered for sale to the highest bidder at the end of twelve months after the first offering and on a day fixed for that purpose. A sale made without such new direction is irregular, but where it takes place after the expiration of the year, it is not void when confirmed.

5. CERTIORARI: *When granted.*

The writ of *certiorari* may be used not only to correct a want of jurisdiction, but also the erroneous proceedings of an inferior tribunal. But it will not lie to review mere errors at the instance of one who has lost the right of appeal by his own fault or who neglects to apply for the writ as soon as possible

after the necessity of resorting to it arises. It is not a writ of right, but one of discretion, and will not be granted except to do substantial justice.

6. SAME: *As a substitute for appeal.*

Certiorari cannot be used as a substitute for appeal where the latter is provided, except by a party who could have appealed. But one who, without fault or neglect on his part, loses the opportunity of becoming a party to a proceeding, in the nature of a suit *in rem*, and of thereby acquiring the right of appeal, may, within proper time, resort to the writ of *certiorari*.

7. SAME: *Same: Limitation.*

The period within which the writ of *certiorari* may be granted is not limited by statute. Where, however, it is sought as a substitute for appeal, the time within which an appeal might have been prosecuted is adopted by analogy. But this is not like a statutory rule, binding upon the courts, and the writ is awarded where the ends of justice demand it.

8. SAME: *To quash order confirming sale.*

On *certiorari* issued at the instance of the heir-at-law of a decedent, it is error to refuse to quash an order confirming a sale of the latter's lands where it appears that the sale was made on the application of the only creditor of the estate, and that a body of land comprising 1634 acres, and appraised at $79,340, was sold in bulk to pay a debt amounting to only $10,000; that the creditor was the purchaser, but has paid no money and received no deed; that all the proceedings with reference to the sale except the order directing it, were marked by such irregularities as tended to prevent other persons from bidding; that the heir was an infant of tender years at the time of such proceedings, and that the administrator in whose name the sale was conducted, and who was also the guardian of the heir, was at the time the sale was made and confirmed an imbecile, incapable of attending to any business; that the right of appeal from the order of confirmation was lost through an erroneous act of the Probate Court, and that the heir applied for the writ without delay after arriving at years of discretion.

APPEAL from *Crittenden* Circuit Court.

J. E. RIDDICK, Judge.

W. G. Weatherford, for appellant.

No affidavit, as required by *Mansf. Dig., sec. 176*, accompanied the report of sale; nor was there any sworn evidence of any kind before the court. No affidavit, as required by *sec. 184, ib.*, nor any order of court requiring the sale twelve months thereafter was made; nor was there any judicial action of any kind. But lands worth, as appraised, $79,000 were *sacrificed* at $17,000, and *this was not paid.*

No deed was executed (*sec. 177-8, ib.*), so the fee to the land remains in the only heir.

The administrator was her guardian, and there was no one to except or object for her. Besides, her guardian was an imbecile, and incapable of protecting her, if he had so desired, and there was no one to appeal for her.

Certiorari, under the circumstances, was her proper and only remedy. *Secs. 1368-9; 30 Ark., 17; 44 id., 267; 25 id., 420; 11 id., 604; 12 id., 85.*

Any one interested may appeal (*12 Ark., 98; 41 id., 106*); and if there was no opportunity to appeal, or the appeal is lost through no fault of theirs, *certiorari* will lie. *21 Ark., 267; 25 id., 524; 37 id., 321; 25 id., 345; 28 id., 87. Certiorari* is one of the *modes* of *appellate review. 39 Ark., 351; 41 id., 107; 12 id., 98.*

2. The Probate Court had no jurisdiction when the order of sale was made. The appeal took the case *out of its jurisdiction. 35 Ark., 300; Freeman Void Jud. Sales, sec. 7; Freeman on Judg., sec. 121.* And the Probate Court could do nothing until the *mandate of the superior court was filed. 41 Ark., 108; 10 Ark., 454.*

3. But if it had jurisdiction, this court should quash its proceedings for *irregularity and illegality.* Having jurisdiction on *certiorari* (*supra*), it acts as a revising court, and may quash for any illegality apparent on the record. *11 Ark., 604; 25 id., 420; 35 id., 95; 44 id., 267; 39 id., 351; 21 id., 267.*

The cases in which this court has declined to interfere were cases in which the probate proceedings were collaterally attacked, and where, of course, there was no appellate control—cases generally where equity was invoked, but no ground of chancery jurisdiction shown. See *13 Ark., 179; 19 id., 499; 25 id., 58; 31 id., 74.* In all these cases *deeds were executed.* Also, *44 Ark., 269-271; 38 id., 80; 47 id., 419.*

Until confirmation a deed conveys no title; the whole proceeding is under the court's control to confirm or reject. *38*

Ark., 80; 47 id., 419; 34 id., 353; 23 id., 41; Rorer on Sales, secs. 1 and 2; Freeman Void Sales, sec. 41.

The court orders the sale, terms, notice, etc. (*Mansf. Dig., secs. 173-4*); administrator to report under oath (*sec. 176*); execute and acknowledge deed, etc. (*secs. 177-178*); appraisement—two-thirds value (*secs. 180-3*). On failure to sell, administrator must report under oath; *then the duty of the court to order sale at end of one year*, and the administrator to carry into effect *the order. Sec. 184.* No authority to sell *without this* order. *26 Ark., 256.*

Persons under disability not bound to except to the settlements; they will be heard after their removal in frauds, etc. *39 Ark., 158.* No court will confirm sale which it *never ordered.*

The homestead could not be sold during the minority of the heir. *47 Ark., 445; 48 id., 236; 49 id., 75; 50 id., 329.* The court cannot correct this by assigning homestead, but must affirm or *quash* the proceeding. Mrs. Peete is not an innocent purchaser. She confesses that her grantor *never had title.*

4. The decree in the United States Court not *res judicata*, because *set aside* and the cause dismissed.

O. P. Lyles, for appellees.

Whether or not the Probate Court made any order for a re-offering at the end of twelve months from the first offer is not material, as the law fixed the time; the sale occurred and was confirmed, and the confirmation reaches back and cures all former omissions or defects. *31 Ark., 74; 25 id., 52; 38 id., 78.*

Certiorari is not a proceeding to reverse. *29 Ark., 173; 25 id., 429.* Nor can it be used when an appeal could have been taken. *37 Ark., 318; 25 id., 518.* Errors of jurisdiction only are proper. *25 id., 518; 39 id., 347.* May be quashed. *44 Ark., 509.*

Inadequacy of price is not sufficient to set aside a sale in the absence of fraud. *Ark. Rep.*

Defective will not vitiate it. *13 Ark., 509; 31 id., 82; 13 id., 177.*

All presumptions are in favor of the sale, it being a proceeding *in rem. 12 Ark., 84.* The sale is good, even if procured by fraud, *provided* the purchaser did not participate in the fraud. *44 Ark., 267, 271.*

A confirmed sale passes the title. *25 Ark., 52; 38 id., 78.* It was a proceeding *in rem. 19 Ark., 499.*

The postponement of the sale was proper and for the benefit of the estate. *18 How. U. S., 143; 5 Johns. (N. Y.), 343.*

The law fixed the time of the sale at the end of one year; no new order was necessary. *Mansf. Dig., sec. 183.*

The decree in the United States Court is *res judicata,* and there should be a time when litigation should be conclusive, even against an infant.

The whole matter should have been transferred to equity and ended.

COCKRILL, C. J. The appellant, who is the daughter and sole heir of Isaac Burgett, deceased, presented her petition to the Circuit Court for a writ of *certiorari* to quash an order of the Probate Court confirming a sale of her father's lands made by the administrator to pay debts. The court caused the writ to issue, but quashed it upon an inspection of the record.

It appears from the Clerk's return to the writ that the Probate Court refused to order a sale of the lands upon the petition of Apperson, who was a creditor of the estate. Apperson appealed to the Circuit Court and there obtained an order of sale. The administrator prosecuted an appeal from the judgment of the Circuit Court, but it was affirmed here. The cause was remanded to the Circuit Court and an order was entered there directing the administrator to make the sale at a time and upon terms named in the order. The original order

of sale made by the Circuit Court had been certified to the Probate Court for execution, but no action was taken under it pending the appeal. The latter order was never certified to the Probate Court, but the administrator offered the lands for sale in pursuance of the new direction of the Circuit Court, and reported to the Probate Court that it had not been sold because no one had bid two-thirds of the appraised value. The report was received and approved, but no other order was made. Something more than a year thereafter, without further authority from the court, the administrator offered the lands for sale without regard to their appraised value; and Apperson, the creditor upon whose petition the order of sale had been made, became the purchaser at the sum of $17,000. No money was paid on the purchase, but Apperson executed his notes for the purchase money, and received from the administrator what is termed in the record, a certificate of purchase. These proceedings were reported to the Probate Court and were there approved, when the administrator immediately resigned. No deed has been made.

The petitioner alleges that she was an infant during these transactions, and had no information of them; that the administrator was her guardian; that at the time the sale was confirmed by the Probate Court, his condition of body and mind was such that he was incapable of protecting her interest; that a part of the land which was sold was her father's homestead at the time of his death; that it is described in the petition for, and in the advertisement of, sale, and in the administrator's report of sale, as the "Burgett home place." It also appears that Apperson was the only creditor of the estate at the date of sale; that his debt amounted to about $10,000, principal and interest, and that a body of land comprising 1634 acres and appraised at $79,340, was offered in bulk to pay his debt. These facts are substantiated by the Probate Court record, except as to the petitioner's age and want of informa-

tion, and the condition of her guardian, which appear from the petition and by affidavit adduced at the hearing.

This proceeding was begun a short time after the petitioner was apprised of the facts, and within less than a year after she had reached the age of 18, which is the age of majority for females. The suit was begun three years and eight months after the order of confirmation.

The Circuit Court declared that the errors complained of did not render the sale a nullity, and for that reason declined to interfere.

1. HOMESTEAD: Sale of: Certiorari: Practice.

That the Probate Court had no jurisdiction to sell the homestead during the minority of any of the decedent's children is the settled law of this State. *McCloy v. Arnett, 47 Ark., 445; Nichols v. Shearon, 49 ib., 75; Stayton v. Halpern, 50 ib., 329.* But as that fact did not avoid the sale of the lands, which the court had jurisdiction to sell, and as the Circuit Court had no guide in this proceeding to separate the one from the other, it was not error to decline to interfere upon that ground and leave the petitioner to her action at law for the possession of the homestead tract.

It must be conceded that the Probate Court proceeded irregularly in every step taken in that tribunal after entering the Circuit Court's order of sale upon its records; but none of the errors go to the jurisdiction of the court, and, consequently, its action is not void. The errors are as follows:

2. PROBATE COURT: Sale of land: Execution of order made on appeal.

It approved the administrator's execution of the order of sale without learning from the record what disposition this court had made of the matter on appeal. The character of judgment it is to execute when an appeal has been prosecuted to the Circuit Court, should be ascertained from a certified copy of the record of that court; and if the matter is brought to this court for review, it should receive the certificate after the mandate of this tribunal has reached the Circuit Court. But, in this instance, the order of sale which had previously become the Probate Court's judgment by entry there (presumably before the

appeal here was sued out) was affirmed, and the jurisdiction of that court to execute it, which had been suspended by the appeal, was restored, at least from the time when the Circuit Court entered its order in accordance with the mandate. After that it was not without power to proceed. *Green v. Clark, 24 Vt., 136; Durham v. Durham, 16 Gray, 577; Curtis v. Beardsley, 15 Conn., 518.*

3. SAME: Same.

The court erroneously approved the offering of the lands for sale by the administrator, when no time had been previously fixed by it for a sale, and subsequently approved the report of the sale to Apperson made more than a year afterwards under like circumstances. But a sale upon a day other than that fixed by the order, if made in pursuance of a subsisting judgment of a superior court, is not a nullity after confirmation. It is an irregularity only, and like selling without notice of sale, or without notice of the application to sell, which the statute requires, does not render the sale void, according to a long line of decisions beginning with *Borden v. State, 11 Ark., 12.*

4. SAME: Same.

The statute which requires that lands which have been offered by an administrator and not sold for want of a bid equal to two-thirds of their appraised value, shall not be re-offered within twelve months (*Mansf. Dig., sec. 184*), does not require a new order condemning the lands to sale. That judgment has already been entered in accordance with another provision of the statute (*sec. 173*), and the day fixed for its execution having passed, it only remains for the court to provide anew for its execution. (*Secs. 174, et seq.*) The sale and confirmation, after the expiration of the year, were not, therefore, made without a valid judgment to support them, and are not nullities.

5. CERTIORARI: When granted.

But a want of jurisdiction is not the only defect that the writ of *certiorari* is capable of reaching. The statute prescribes that it may be used to correct erroneous proceedings as well as want of jurisdiction. *Mansf. Dig., sec. 1368.* The writ is granted in two classes of cases, first: where it is shown that the inferior tribunal has exceeded its jurisdiction; and, second,

where it appears that it has proceeded illegally and no appeal will lie, or that the right has been unavoidably lost. *Roberts v. Williams, 17 Ark., 43; Randle v. Williams, 18 ib., 383; Allston, ex parte, 17 ib., 580; Lindsay v. Lindley, 20 ib., 581; Derton v. Boyd, 21 Ark., 264; Vance v. Gaylor, 25 Ark., 32; Tucker v. Yell, ib., 420; Wyatt v. Burr, ib., 476; Payne v. McCabe, 37 Ark., 321; Pearce, ex parte, 44 ib., 514; Howard v. State, 47 ib., 439–40.*

The cases in our reports in which it is said the writ cannot be used for the correction of erroneous proceedings in the exercise of jurisdiction, are cases in which laches in not appealing were imputable to the petitioner, and the question of jurisdiction alone was presented; as in *Carolan v. Carolan, 47 Ark., 511; Phelps v. Buck, as guardian, etc., 40 ib., 219,* and *Ry. v. Barnes, 35 ib., 95;* or, as in the case of *Haynes v. Simms, 39 Ark., 399,* where the circumstance which prevented the appeal was probably (it was said) a valid excuse for not appealing, but the inferior court, which had jurisdiction, had proceeded regularly, and there was a legal remedy which would prevent injustice if the party was really aggrieved.

Mere errors are never reviewable on *certiorari* at the instance of one who has lost the right of appeal by his own fault, or who neglects to apply for the writ as soon as possible after it becomes necessary to resort to it; and the aid of the writ is never granted except to do substantial justice. It may be refused even where there are no laches on the part of the petitioner and errors are apparent upon the record, if the judgment appears upon the whole to be right; and even when prejudicial errors are apparent, it will be refused if great public inconvenience will result from its issue. *Moore v. Turner, 43 Ark., 243.* It is upon these considerations that it is denominated a writ of discretion and not a writ of right, and it is in part at least for the purpose of informing the conscience of the court for the intelligent exercise of this discretion that the statute provides that testimony may

be heard on the return of the writ. *Rutland v. Commissioners, 20 Pick., 77; Hyslop v. Finch, 99 Ill., 179.*

6. SAME: As a substitute for appeal.

It cannot be used as a substitute for appeal to correct errors where an appeal is provided, except by a party who could have appealed; and as the heir is not made a party to the record in our probate proceedings to sell lands of a decedent, and cannot ordinarily prosecute an appeal (*Arnett v. McCam, 47 Ark.*), he cannot use the writ as a substitute for appeal. But the application to sell lands in such cases is in the nature of a proceeding *in rem.* (*Adams v. Thomas, 44 Ark., 267; Waples Pro. in Rem., secs. 578–9, 566*), and as the heir is a party in interest, the court may upon his petition cause him to become a party to the record, and so clothe him with the right of appeal. If he neglects to become a party he cannot use the writ of *certiorari* as a substitute for appeal. But if he has lost the opportunity of becoming a party and thereby of acquiring the right of appeal without his fault, he has lost his appeal without fault and may, within proper time, resort to the writ of *certiorari. Derton v. Boyd, 21 Ark., 264.* There is no statute limiting the period within which the court may grant the writ, but where the effort is to use it as a substitute for appeal, the time within which the appeal might have been prosecuted is adopted by analogy. But as this is not a binding rule, like the statute, the courts have not strictly adhered to it, but award the writ where the ends of justice demand it.

7. SAME: Same: Limitation

8. SAME: To quash order confirming sale.

The question now is, ought the writ to be used for the petitioner's benefit? The statement of the case shows that no hardships will be entailed upon the purchaser. He has paid no money; and has received no deed, so that no one claiming under him could have been led to believe that he was the true owner. He was instrumental in procuring the sale in bulk of more lands than appear to have been required for the payment of his debt; he was a party to the record and is presumed to have known that irregularities existed, the natural tendency of

which was to redound to his benefit by preventing others from bidding at the sale which he brought about.

Upon the other hand does the petitioner show a valid excuse for not becoming a party to the proceeding and prosecuting her appeal? She was not apprised by the record that any time had been fixed for the sale of the land, and lost her right to take the necessary steps to prosecute an appeal from the judgment of confirmation, by the erroneous action of the court in confirming a sale made on a day not fixed by its order. But the defeat of an appeal by the erroneous action of the court, is one of the established grounds justifying a resort to *certiorari*. *McMurray v. Milan*, 2 *Swan.* (*Tenn.*), *176*. Her guardian may be said to have had knowledge of the sale, because he was the administrator in whose name it was conducted, but the uncontradicted proof adduced at the hearing was to the effect that he was an imbecile at his house when the sale was made, incapable of attending to any business, and his resignation as administrator appears to have been prepared and held in abeyance only until the order of confirmation could be made. The petitioner was, herself, an infant of tender years, and appears to have acted without delay after arriving at years of discretion.

The court erred in refusing to quash the order confirming the sale to Apperson. The judgment will be reversed and the cause remanded, with instructions to do so.

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DAVIE V. DAVIE.

1. APPEALS: *From what decrees allowed.*

Where a decree determines the right to property, and directs it to be delivered up, or directs its sale, and the plaintiff is entitled to have the decree carried into immediate execution, it is to that extent final and may be appealed from, although a further decree may be necessary to adjust an account between the parties. In such cases the appeal is allowed to prevent irreparable injury pending the suit. It is also allowed from a decree, which, without ending the suit, finally determines a distinct and severable branch of the cause. But although a decree is in the form of a final order, and adjudicates the proportionate interests of the parties in certain lands, an appeal therefrom is premature where the decree does not direct its execution, but looks to further judicial action, on the coming in of a master's report, to determine what sums shall be charged as liens upon the several interests, and whether some of them shall be sold to satisfy the same.

2. SAME: SAME: *Interlocutory orders.*

The first subdivision of section 1265 Mansfield's Digest does not grant an appeal from an introductory order, but provides only for the review of such an order, on appeal from the final judgment.

APPEAL from *White* Circuit Court in Chancery.

M. T. SANDERS, Judge.

This was an action of ejectment brought by Edward Davie and others against J. M. Davie, for the recovery of a section of land to which they claim title as heirs at law of J. C. Davie. The defendant claims the land as devisee of Caroline M. Davie deceased, the widow of J. C. Davie, alleging in his answer that she acquired title under certain conveyances executed by the heirs. One of these conveyances was executed by Elizabeth A. Finch in consideration of $1000. The interest of M. E. Clement in the land was acquired, as alleged, by a purchase from her guardian for the sum of $333. It was also alleged in the answer that J. C. Davie sold the land in controversy to Watson, Weld and others for $5000, and that at the time of his death he held their notes for the purchase money, and they held his bonds for title. That the widow (Caroline M.) purchased the land from the said vendees of her deceased husband,

and paid to the administrator of the deceased the amount due on their notes, which she took up and surrendered to them. That said vendees thereupon transferred to her their title bonds, and that having thus become the equitable owner of the land, she devised it to the defendant by a will which has been duly probated, and that since her death he has made valuable improvements.

The answer was made a cross-complaint, and the cause was transferred to the equity docket. The answer to the cross-complaint denies the sale alleged to have been made by Watson and others to Caroline M., and alleges that the conveyances from the heirs to her were obtained by false and fraudulent representations.

On the hearing the court below rendered a decree, which, after the usual recital of the submission of the cause proceeds as follows:

"Upon consideration whereof, it appearing J. D. Garrison, A. J. Garrison, Edward Garrison, Mrs. M. A. Hallaman, Mrs. M. McCutchen and H. Q. Finch are entitled to have and recover of and from the defendant one-fourth of the lands in controversy, as the heirs at law of Elizabeth A. Finch, sister of J. C. Davie, deceased; that Edward N. Davie and Mary E. Clement, as heirs at law to Ashbourne Davie, brother of J. C. Davie, deceased, are entitled to have and recover of and from the defendant two-thirds of one-fourth of the lands in controversy, it is, therefore, considered, ordered and adjudged by the court that the plaintiffs, J. D. Garrison, A. J. Garrison, Edward Garrison, M. A. Hallaman, M. McCutchen and H. Q. Finch, have and recover from the defendant one-fourth of the lands in controversy, to-wit (describing the land); and that the plaintiff, Edward N. Davie and M. E. Clement, have and recover of the defendant two-thirds of one-fourth of the above described tract or parcel of land, and all costs herein expended. And it is further ordered by the court that this cause be referred to R. H. McCulloch, as Special Master herein, who is

directed to take and state an account of the amount of purchase money paid or expended to Louis H. Weld and others by Caroline M. Davie, at the surrender to her of their title bonds; also, the amount of taxes paid, and all valuable and lasting improvements made on said lands by the defendant since the death of Mrs. Caroline M. Davie; also, the amount of the reasonable rental value of said land and premises from the year 1882, inclusive, to date. The Master is further instructed to charge J. D. Garrison, A. J. Garrison and Edward Garrison, and M. A. Hallaman, Mrs. M. McCutchen and H. Q. Finch, with such *pro rata* or proportional part of the one thousand dollars received by their mother, Elizabeth A. Finch, as the value of the land herein recovered by them bears to the interest she was entitled to in the whole estate, both real and personal, of J. C. Davie, with 6 per cent. interest; also, to charge M. E. Clement with such *pro rata* part of the three hundred and thirty-three dollars received by her as the value of the land recovered by her bears to her entire interest, real and personal, in said estate of J. C. Davie, with 6 per cent. interest, and report at the next term of this court."

From this decree the plaintiffs have prosecuted an appeal.

The first subdivision of section 1265 Mansfield's Digest, is as follows.

"Sec. 1265. The Supreme Court shall have appellate jurisdiction over the final orders, judgments and determinations of all inferior courts of the State in the following cases, and no others:

"*First:* In a judgment in an action commenced in the inferior courts, and, upon the appeal from such judgment, to review any intermediate order involving the merits and necessarily affecting the judgment."

W. R. Coody and *S. S. Cockroft*, for appellants.

Argue the merits.

COCKRILL, C. J. The right of appeal is limited in general to final judgments and does not extend to interlocutory orders. *Batesville & Brinkley Ry., ex parte, 39 Ark., 82.* The object of the limitation is to present the whole cause here for determination in a single appeal, and thus prevent the unnecessary expense and delay of repeated appeals. A judgment in equity is understood ordinarily to be interlocutory when inquiry as to matter of law or fact is directed preparatory to a final adjudication of the rights of the parties. *Russell v. Beebe, 19 How., 283.* But "where the decree decides the rights to the property in contest and directs it to be delivered up, or directs it to be sold, and the complainant is entitled to have it carried into immediate execution, the decree must be regarded as final to that extent, although it may be necessary for a further decree to adjust the account between the parties." *Forgay v. Conrad, 6 How., 206; Thompson v. Dear, 7 Wall., 342.* The appeal is allowed in such cases to prevent irreparable injury pending the suit. It is allowed also where a distinct and severable branch of the cause is finally determined, although the suit is not ended. *State v. Shall, 23 Ark., 601; Dunn v. Nichol, 25 ib., 129.* But the unnecessary splitting of causes by courts of chancery creates confusion and difficulty in practice and is condemned. *Tucker v. Yell, 25 Ark., 431; Hicks v. Hogan, 36 ib., 298; Drake v. Thyng, 37 ib., 228; Forgay v. Conrad, 6 How., sup.*

1. APPEALS: From what decrees allowed.

In this case while the decree takes the form of a final order in adjudicating the parties' proportionate interests in the land, it is apparent that the court has not fully adjudicated that branch of the cause. The relative interests of the parties in the land has been ascertained and determined, but the cause is retained with a reference to a Master who is directed to report at a subsequent term, and the court is yet to determine, upon the coming in of the report, what amounts shall be charged as liens upon the several interests, and whether there shall be a sale of some of the interests to satisfy the same.

The decree does not direct its execution, but looks to further judicial action before that event. The plaintiffs can suffer no injury by awaiting the termination of the litigation.

2. SAME: Same: Interlocutory orders.

The first subdivision of section 1265 Mansfield's Digest does not undertake to grant the right of appeal from an interlocutory order, but provides only what the law was without it, that such an order can be reviewed on appeal from the final judgment. The appeal is premature. Cases *supra; Cohen v. Weiss, 44 Ark., 344; Ry. v. Simmons, 123 U. S., 52; Gray v. Palmer, 9 Cal., 632.*

Appeal dismissed.

GOSNELL V. STATE.

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DENTISTRY: *Act regulating practice of, constitutional.*

The act of April 4, 1887, which provides that every person engaged in the practice of dentistry in this state at that date shall cause his name to be registered with a board of examiners, and making it a misdemeanor to engage in such practice after the expiration of three months from the passage of the act without a certificate from said board, does not deprive the citizen of the right to follow a lawful vocation by requiring him to do so upon a condition with which he cannot comply, and is not unconstitutional.

APPEAL from *Franklin* Circuit Court, Ozark District.

G S. CUNNINGHAM, Judge.

J. V. Bourland, for appellant.

Reviews the denistry act, section by section, and contends:

The act is void, becauses it proposes to make liable to fine, etc., an act not *malum in se,* unless conditions are complied with, which it is, or may be impossible for one to comply with. It is a bill of pains and penalties; it makes it a crime to pursue a useful avocation; deprives a party of natural rights, as well as social rights; deprives him of his property without due process of law, and without compensation; and without opportunity to comply with the unreasonable exactions of the act, etc.

The Legislature has power, no doubt, to *regulate* the useful professions as a police regulation, by reason of tests of skill and ability, but it should not be used to violate private rights without notice or pretense of notice.

The appellant did the substantive act required, namely, applied to register, less than three months after the appointment of the board. *Sec. 8.*

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellee.

Similar acts have been upheld as valid in many of the States. *Acts, Indiana, 1887, p. 58; 16 N. E. Rep., 193; 25 W. Va., 1; 9 Sup. Court Rep., 231; Acts 1881, Illinois, p. 77; Iowa, 1882, p. 36; Kansas, 1885, p. 169, and 1887, p. 216; Georgia, 1885, p. 64; Mo., 1883, p. 114; Minn., 1889, p. 60; N. J., 1884, p. 102; Miss., 1886, p. 34, and others; 10 N. E. Rep., 99; Cooley Const. Lim. (5th ed.), 197, 201.*

HUGHES, J. Upon an indictment under the act of the General Assembly of 1887 (page 259), regulating the practice of dentistry in this State, appellant was convicted and fined, and appealed to this court.

The proof showed that he was a resident of the State and had been and was, at the date of the passage of the act, practicing dentistry in Franklin County, and that he failed to procure a certificate from the Board of Dental Examiners authorizing him to practice the same, in accordance with section five of said act, within three months after the passage of the same, and that he practiced dentistry on the 10th of April, 1888. The act was approved 4th of April, 1887, the board was appointed the 6th day of May, 1887, and organized the 28th of said month. After the first meeting there was no other meeting of the board before the finding of the indictment.

By resolution at their first meeting the board fixed their annual meetings at such time and place as the State Dental Association might hold its annual meetings. The substance of a resolution passed by the board at its first meeting calling

on all dentists to come forward and register, was published in the Arkansas Gazette.

On the 14th of July, 1887, appellant applied by letter to the secretary of the board to register and was informed that the time had expired for registration, and that he would have to come before the board and be examined. He afterwards applied to be registered as of July 14, 1887, and was not permitted to register.

It is contended that the act deprived appellant of a right to follow a lawful occupation; that it is unreasonable, unwise and unconstitutional.

DENTISTRY: Act regulating practice of.

Whatever may be thought of the hardships the act might work, it was not impossible for the appellant to have complied with section 5 thereof, which provided that, "every person engaged in the practice of dentistry or dental surgery within this State at the time of the passage of this act, shall, within three months thereafter cause his or her name and residence or place of business to be registered with said board of examiners, upon which said board shall issue to such person a certificate duly signed by a majority of the members of said board, and which certificate shall entitle the person to whom it is issued to all the rights and privileges set forth in section 1 of this act." It is not to be presumed that the board would not have acted upon the registration of the name of the applicant. Had it failed to act it might have been compelled to do so by mandamus.

A number of States have acts regulating the practice of dentistry and medicine, with provisions similar to the act we are considering, and yet we have found no case in which any of these acts have been declared unconstitutional. On the contrary, they have been repeatedly held to be constitutional by the highest courts. Indiana has a "dentistry act" very similar to this, except that the applicant must show that his diploma is from a college of good repute, or that he has continuously practiced since May 29, 1879, or he must be ex-

amined by the board. See Acts 1887, p. 58. The board is required to meet annually at the time and place fixed for the meeting of the Indiana State Dental Association, or oftener, at the call of any three members of said dental association. The validity of the legislation was called in question in *Wilkins v. State, 16 N. E. Rep., 193*, upon grounds other than those urged here, but the same reasoning applies. The court say: "The legislative judgment that the welfare of the public requires that those practicing the dental profession shall possess the necessary skill and learning, and shall obtain a certificate, is probably conclusive; but if it were not, the court must take judicial knowledge that it is a profession requiring skill. The fact that the dentist employs his professisnal skill upon an important part of the body is, of course, known to everyone, and cannot be unknown to the courts. As this is known, it must follow that it may also be judicially known that one unskilled in the profession may injure the person who employs him. As this is so, then, as we have seen, the Legislature may prescribe the qualifications of those permitted to practice the profession. The board of examiners, established under the law, is the lawfully constituted authority, and from it the certificate required by law must be obtained. The Legislature, as the law-making power, has authority to prescribe the method of procedure. Its authority does not end with declaring what qualifications he who enters upon the practice of that profession shall possess. As it has plenary power over the whole subject, it alone must be the judge of what is wise and expedient, both as to the qualifications required and as to the method of ascertaining those qualifications. The courts cannot exercise any supervisory power over the Legislature as long as it keeps within the limits of the Constitution. Doubt must be resolved in favor of the validity of the statute." (Citing cases.) "As the Legislature has exclusive power over the entire subject, it is our duty to uphold

the statute as it comes to us from the Legislature with the executive sanction."

In *State v. Dent, 25 W. Va., 1*, the constitutionality of a similar act regulating the practice of physicians and surgeons was considered. The court say (*pp, 20, 21*): "Of course, the courts have no right to decide or consider whether the Legislature has acted wisely in determining what are the requisite qualifications which one must possess before he can practice medicine. This is obviously a purely legislative question. * * * If this court, under such law and general declarations as to what should be the proper functions of government, undertake to declare void an act of the Legislature, which, according to our notions, violated these indefinite fundamental principles of government, simply because we deemed the legislative action, though within the scope of their authority, arbitrary, unjust or oppressive, we would be clearly usurping authority; and I cannot see that the situation of our citizens would be improved by being subject to the arbitrary and unlimited control of the courts. On the contrary, it seems to me that this would constitute the worst of all tyrannies." This case, upon error to the Supreme Court of the United States, was affirmed. *129 U. S., 114.*

This doctrine was thus expressed in *Hederich v. State, 101 Ind., 564*: "Whether a statute is or is not a reasonable one is a legislative, and not a judicial question. Whether a statute does or does not unjustly deprive the citizen of natural rights is a question for the Legislature and not for the courts. There is no certain standard for determining what are or are not the natural rights of the citizen. The Legislature is just as capable of determining the question as the courts. Men's opinions as to what constitute natural rights greatly differ, and if the courts should assume the functions of revising the acts of the Legislature on the ground that they invaded natural rights, a conflict would arise which would never end, for there is no standard by which the question can be finally determined."

Judge Cooley says: "Nor can a court declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected by the Constitution." *Cooley Con. Lim., 5th ed., 197.*

At another place this author says: "The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law-making power." *Id., 201.*

In *Richardson v. The State, 47 Ark., 564,* which was an indictment for practicing medicine without registration, as required by statute, Judge Smith said: "Such legislation is a valid exercise of the police power of the State. The object is to protect the public health against the impositions of charlatins and empirics, who pretend to an art requiring skill, without a previous special training."

It is competent for the Legislature to regulate the practice of dentistry and dental surgery in such way as will not deprive the citizens of the right to follow a lawful avocation. While it was and is unlawful to practice dentistry or dental surgery after the lapse of three months from the passage of the act, without the requisite certificate, the appellant may make his application, and proof that he was practicing at the date of the passage of the act, and thereupon he will be entitled to a certificate authorizing him to practice. Affirm.

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HICKEY v. THOMPSON.

1. MARRIED WOMEN: *May engage in farming: Liability in respect to separate business.*

The statute (Mansfield's Digest, section 4625), which empowers a married woman to "carry on any trade or business * * * on her sole and separate account," uses the term "business" in the sense of employment, and confers upon a married woman the right to engage in farming on her separate account. While thus engaged she may purchase property and supplies to be used in her business of farming, and will be liable therefor to the same extent as if she were unmarried.

2. SAME: *Same.*

While the defendant, a married woman, was engaged in farming on lands belonging to herself and on her separate account, her husband, acting as her agent, bought goods to be used in her business of farming from the plaintiff, who, believing that the husband was the owner of the farm and cultivated it on his own account, charged the goods to him. HELD: That the wife was liable for the goods.

3. SAME: *Same: Estoppel.*

Where a wife gives her note for the amount of an account for goods purchased by her husband as her agent, and to be used in her separate business, she is not thereby estopped from showing that any part of the account was for a debt which she could not legally contract, and for which her husband was solely liable. But the execution of the note raises a presumption that it was given only for such articles as the wife was liable for; and in an action on the note the burden is upon the wife to prove that it embraces an amount for which she is not liable.

4. PRACTICE: *Suit on note not due: Waiver.*

Where a suit is brought on a note before its maturity, that fact, if available as a defense, is waived by a failure to take advantage of it on the trial.

APPEAL from *St. Francis* Circuit Court.

M. T. SANDERS, Judge.

W. G. Weatherford, for appellant.

The note of a married woman, who joins with her husband, is void. *14 Ark., 270; 16 id., 196; 39 id., 242; 27 id., 351.* When enforced in equity, it must be *in rem.* against her property, and not against her. *Ib., supra.* Even then it must appear that she entered into the engagement *which created the*

original indebtedness with the intent *to bind her separate property*, and so understood *at the time by the person with whom she contracted. Schouler Dom. Rel., 226.* In this State it must appear that the contract *was made* with reference to her separate estate. *29 Ark., 350-447; 30 id., 392, 773; 32 id., 451.* The common law disabilities remain since the Constitution of 1874, unless removed by statute. *39 Ark., 361.*

The act of April 28, 1873 (Digest, chapter 104), was for her *protection;* converted her property into separate estate; exonerated it from liability for, or control by, her husband; empowered her to trade or carry on business, sue and be sued, etc. The power to devise, bequeath and convey as a *femme sole* was conferred subsequently by the Constitution of 1874. She always had power to take hold, manage or charge her *separate real estate*, but she was empowered to enter the field of trade and business, and made liable for what she did. *30 Ark., 728.* She is not liable for her husband's debts, nor any other, except those contracted with *reference to her separate estate*, or as a *sole trader. 48 Ark., 223; 33 id., 265; 43 id., 163.* The Constitution and the act of 1873 do not enlarge the wife's capacity to *contract*, but to *secure* to her property which would pass to her husband. So the provision empowering her to carry on trade may imply the power to contract in relation to the business. But the purchase and sale of real estate is not a *separate business*, within the meaning of the statute, which relates to *mechanical, manufacturing or commercial pursuits. 71 N. Y., 199.*

Sanders & Watkins, for appellee.

Carrying on and engaging in a general planting and farming business is a separate trade, business or vocation, under the act of 1873, as much so as the sale of goods, manufacture of wares, or engaging in mechanical pursuits, and *71 N. Y., 200*, and *43 Ark., 167*, is not opposed to this construction. See *Schouler on H. and W., sec. 309; 126 Mass., 332; 51 Wisc., 204.*

It is true the credit was given her husband, but when it was ascertained he was only her agent, they at once sought the principal and took her note, and she is bound. *Thompson v. Davenport*, decided in 1829.

She was a sole trader, and as such liable on her contracts in the course of trade.

BATTLE, J. Appellees sued appellant, Jennie C. Hickey, on three several promissory notes executed by her on the 14th of February, 1881, each for the sum of $266.41, aggregating $799.23, and bearing interest from the date of their execution. They allege that she was a married woman at the time when the debt evidenced by the notes was contracted, but that she had a separate estate, and was carrying on a trade and business on her sole and separate account, and that the debt sued for was for moneys, goods and supplies advanced and sold to her for the maintaining and carrying on her separate business of farming and planting, and were used by her in that way. She denied contracting the debt; pleaded that she was a married woman when it was contracted and the notes were executed; and denied that she was carrying on a trade and business on her sole and separate account. The issues were tried by a jury, and a verdict was returned in favor of appellees, and her motion for a new trial having been overruled, she appealed.

There was evidence adduced in the trial tending to prove that appellees sold and advanced moneys, goods and supplies, to be used and consumed in improving and cultivating a certain farm, and raising crops thereon; that believing that the husband of the appellant was the owner of the farm, and cultivated the same on his own account, they charged the moneys, goods and supplies to him; that afterwards they discovered that the farm was owned, claimed and cultivated by appellant; that she was engaged in the cultivation and raising crops thereon on her sole and separate account; that in the borrowing of the money and the purchasing the goods and sup-

plies he was acting as her agent; and that when they discovered that fact they requested her to settle the account as her own indebtedness, and she did so by executing the notes sued on. If this evidence be true were appellees entitled to recover judgment against her on the notes?

1. MARRIED WOMEN: May engage in farming: liability, etc.

The validity of the notes depends upon her right to engage in farming. Did she have such right? The statute expressly empowers a married woman to "carry on *any* trade or business," on her sole and separate account. It authorizes her to become something more than a trader in the commercial sense. It says she may carry on any "business." The primary signification of the word "business" is employment—"that which employs time, attention and labor." It is clear it was used in that sense in the statute; for it expressly provides, that she may carry on any trade or business, "and perform *any labor or services* on her sole and separate account," and that her earnings "from her trade, business, *labor or services*, shall be her sole and separate property, and may be used or invested by her in her own name." It does not limit her right to engage in trade or business, but says she may carry on *any* trade or business. It follows then she may engage in farming. *Mansf. Digest, secs. 4624, 4625, 4626; Netterville, v. Barber, 52 Miss., 168; Snow v. Sheldon, 126 Mass., 332; Krouskop v. Shontz, 51 Wisc., 204; Schouler on Husband and Wife, sec. 309.*

Walker v. Jessup, 43 Ark., 163, cited by appellant in her brief, has no application to this case. In that case, the defendant, who was a married woman, purchased lands at an administrator's sale upon a credit, and executed her bond for the purchase money. The object of the suit was to recover a personal judgment against her on the bond, and a decree of foreclosure and sale. This court held that the plaintiff was not entitled to a personal judgment against her. The question involved in this case was not considered or discussed in that case.

The effect of the statute authorizing a married woman to "carry on any trade or business" on her sole or separate account, is to invest her with all the rights, powers and privileges of a *femme sole* in respect to her separate business and the property invested therein, and subject her to the liabilities she would be subject to in respect thereto if she were unmarried. The right and capacity to purchase property in her own name, to be used about her separate business, is a necessary incident to the power conferred upon her to conduct the business on her separate account. It is unreasonable to suppose that the intention of the statute, when it gave her this power, was to leave her under her common law disability to bind herself by contract. The grant of the power, without words of limitation, necessarily carries with it the right to conduct business in the way and by the means usually employed in carrying on the same. Conceding her this power, her right to purchase on a credit cannot be doubted. Having this right, it necessarily follows that she can be compelled, through the courts, to abide by and perform such contracts to the same extent that she could be if she were unmarried. To save any question upon this point, the statute expressly authorizes her to be sued alone in respect to her separate business, and provides that judgments recovered against her may be enforced against her sole and separate estate and property to the same extent and in the same manner as if she were a *femme sole*. *Mansf. Dig., sections 4625, 4626, 4630; Nispel v. Laparle, 74 Ill., 306, 308; Young v. Gori, 13 Abb. Pr., 13 in foot note; Freeking v. Rolland, 53 N. Y., 422; Camden v. Mullen, 29 Cal., 564; Stewart on Husband and Wife, sec. 453.*

2. SAME: Same.

The fact that the moneys, goods and supplies were charged, under a misapprehension of the facts, to her agent, does not relieve appellant of liability for the same. Appellees are entitled to judgment against her for the amount due therefor. This doctrine is well settled. *Story on Agency, secs. 446* and *cases cited; Meacham on Agency, secs. 695, 698.*

3. SAME: Same: Estoppel.

The notes having been executed by appellant for money, advanced and goods and supplies furnished to her to be used in a business carried on by her on her sole and separate account, the presumption is, the amounts thereof are correct. To the extent of her capacity to carry on a business on her sole account she is subject to the presumptions in which the law indulges against those endowed with full capacity to act for themselves. But she is not estopped by the notes from showing that any part of them was given for debt she could not legally contract, or for which her husband was solely responsible; and if such a fact should be shown, appellees would not be entitled to a judgment for such part. The burden of proving the part for which she was not liable, if any, rested upon her. Having failed to make such proof, appellees were entitled to recover the full amount of the notes. *Klotz v. Butler, 56 Miss., 337.*

4. PRACTICE: Suit on note not due: Waiver.

One of the notes sued on matured after the commencement of this action, and appellees recovered judgment for the amount due thereon. Appellant now insists that the judgment should be set aside on that account; but she did not avail herself of that fact as a defense against the recovery of the judgment, and only in her motion for a new trial objected to it by saying that the verdict was excessive. She waived this defense, if it was a defense, and cannot take advantage of it after the trial.

Judgment affirmed.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY v. BIGGS.

1. STATUTE OF LIMITATIONS: *Against action for damages by nuisance.*

Where a nuisance is of a permanent nature, and its erection and continuance are necessarily an injury, the damage it causes may be fully compensated at once, and the statute of limitations runs against an action therefor from the time the nuisance is constructed. But where, although the structure constituting a nuisance is of a permanent character, its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations does not begin to run until the happening of the injury complained of.

2. SAME: *Same.*

In 1873 the defendant railway company built an embankment for its road-bed through the Red river bottom near the land of the plaintiff. The embankment was constructed above the overflow to which that river is subject, and has since been maintained in its original condition. The plaintiff brought this action to recover damages sustained in the year 1885, through the destruction of her levees, fencing and crops by an overflow of her lands, which, as she alleges, resulted from the construction of said embankment without sufficient openings to permit the passage of the water. HELD: That the statute of limitations began to run against the plaintiff's action from the time the damage sued for was sustained, and not from the time when the road-bed was constructed.

APPEAL from *Hempstead* Circuit Court.

C. E. MITCHEL, Judge.

Appellee sued the railway company, and alleged that she owned certain lands lying on Red river, Arkansas, a short distance north of defendant's railway. That defendant's railway had been constructed through the Red river bottom in 1873, and had been carelessly and negligently constructed and maintained ever since. That by reason of said railway track having been kept and maintained at a great elevation above the said Red river bottom without sufficient openings, plaintiff's land had, on the 17th of April, 1885, been overflowed, and the water had been caused to remain longer thereon. That the

levees and fencing had been washed away, and the crops destroyed to her damage $8000.

The defendant answered, admitting the construction and completion of its railway entirely through Red river bottom in 1873, and that it did not touch any of plaintiff's land, but it denied that its railway was negligently or carelessly constructed, or that it had been carelessly or negligently maintained since its construction. It also admitted that the Red river bottom was subject to overflow, and that its road-bed, in order to make its road serviceable, had been constructed above overflow. It denied that the openings were insufficient to carry off the water, or that plaintiff had been damaged by reason of any act of omission or commission on its part.

Second—The statute of limitations of three years was then pleaded.

Third—The answer then alleged that the railway and road-bed had been built through Red river bottom in 1873, by the Cairo and Fulton Railroad Company, under and by virtue of its charter granted by the State of Arkansas; that it was skilfully and carefully constructed under its charter rights, which were specifically pleaded, and that it had ever since been carefully maintained in the exact same condition as when built. That if plaintiff had been damaged thereby the injuries were unavoidable, for which defendant was not responsible.

Fourth—That the defendant was the successor of the Cairo and Fulton Railroad Company, by reason of its consolidation with the St. Louis and Iron Mountain Railway Company, and was thereby the owner of the property, rights, franchises and charter of said Cairo and Fulton Railroad Company.

The testimony tended to show that the railroad embankment was built in 1873. That the Red river bottoms had been overflowed, including appellee's lands, in 1866, 1867, 1869, 1876 and 1885. That by reason of insufficient openings in said railway embankment, the water in cases of unusual overflow, was impeded and rose higher and remained longer upon

plaintiff's lands than it had formerly done. That in 1885 plaintiff's crops were destroyed and her levee broken by water "set back" from the railway embankment.

The following instructions, as asked by defendant, were refused

I.

"The jury are instructed that to entitle the plaintiff to recover, it must be proved that the said defendant, in building its railroad, or in constructing some part of its works in connection therewith, so obstructed or impeded some natural stream or flow of water in such a careless and unskilful manner as to cause the same to overflow the premises of the plaintiff, thereby causing the damages complained of; and that such unskilful work was done and embankment built, within three years next before the commencement of this action; and if plaintiff fails to prove either of the above facts, your verdict must be for the defendant."

IV.

"The jury are instructed that if they find from the evidence that the defendant did, by erecting its railway embankment south of Red river, upon its own grounds and upon grounds not belonging to plaintiff, and by want of sufficient culverts or openings through said embankment, wrongfully obstructed the flow of water from above the same and from plaintiff's premises, whereby the damage complained of was done, nevertheless, if you find from the evidence that said embankment was built and constructed more than three years next before the commencement of this suit, then the plaintiff is barred by the statute of limitations, and you will therefore find for the defendant."

V.

"The jury are instructed that, if they find from the evidence that the embankment and trestles of the defendant complained of in this suit, were built and completed more

than five years prior to the bringing of this suit, then their verdict must be for the defendant railway company."

The verdict being for $960, a motion for a new trial was filed and overruled, and defendant appealed.

The only defense urged in the court below and here is the statute of limitations.

Dodge & Johnson, for appellant.

The injuries complained of were barred by the statute of limitations of three years. *35 Ark., 362; ib., 622; 39 id., 463.*

Scott & Jones, for appellee.

The decisions in *39 Ark., 463*, and *35 id., 622–6*, are not applicable. There the injury complained of was damage to land by reason of depreciated market value by reason of erection of a nuisance.

The true rule as to nuisances permanent in their character, but *not necessarily* injurious, but may become so, is that the statute does not run until the injury actually happens. *Sec. 16 East, 215; 2 Gr. Ev. (7th ed.), sec. 433; Wood on Nuisances, sec. 865; Wood on Limitations, 180; 1 El. B. & E., 622; 10 C. B. (N. S.), 763; Angell on Lim. (5th ed.), sec. 300; 11 Tenn., 382, S. C. 14 A. & E. R. cases, 284; 17 id., 45; 11 id., 562; ib., 509; 12 N. E. Rep., 427; 11 id., 264; 38 N. W. Rep., 545; 17 N. E., 171; 11 Atl. Rep., 888; 49 Ark., 418; 36 N. W. Rep., 339; 36 N. W. Rep., 451; 16 N. E. Rep., 239.*

SANDELS, J. The alleged nuisance was constructed in 1873. The injury complained of was in 1885. It is argued by the appellant that the statute of limitations began to run against appellee upon the construction of the nuisance. *Ry. Co. v. Morris, 35 Ark., 622;* and *Ry. Co. v. Chapman, 39 Ark., 463*, are relied on as establishing this contention. The facts in those cases make them clearly distinguishable from this case.

The rules applicable to the recovery of damages for the construction and continuance of nuisances in cases of this kind are stated satisfactorily to this court by numerous au-

STATUTE OF LIMITATIONS: Nuisance.

thorities, as follows: Whenever the nuisance is of a permanent character and its construction and continuance are *necessarily* an injury, the damage is original, and may be, at once, fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. *Ry. v. Morris, 35 Ark., 622; Ry. v. Chapman, 39 Ark., 463.* But when such structure is permanent in its character, and its construction and continuance are *not necessarily* injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of. *Roberts v. Read, 16 East, 215; 2 Grl. Ev., 433; L. & N. Ry. v. Hays, 14 A & E. Ry. Cases, 284; Troy v. Cheshire Ry. Co., 23 New Hamp., 83; Wood on Nuisances, sec. 865; Wood on Limitations, 180; Angell on Limitations, 300.* This case falls within the latter class.

Affirm.

VAUGHAN V. MCGANNON.

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PARTNERSHIP: *Authority of co-partner: Pleading: Evidence.*

A due bill executed by one of two partners is the liability of both where it is executed in the name of the partnership business, and as evidence of a partnership debt. And where in an action thereon against both partners, commenced in a justice's court, without other pleading than the filing of the due bill, the authority of the party executing the instrument is denied by his co-defendant, no amended or further pleading by the plaintiff is necessary to the admission of evidence competent to establish the partnership.

APPEAL from *Washington* Circuit Court.

J. M. PITTMAN, Judge.

Vaughan brought an action in a justice's court against McGannon & Sanders on the following instrument, which was filed without written complains:

"MARCH 1, 1887.

"Due G. W. Vaughan, $131.65 for cattle.

"W. J. SANDERS,

"P. M. MCGANNON."

Sanders made no defense. McGannon filed an answer, in which he alleges that the due bill was not signed by him or by any person authorized by him to sign it.

On appeal to the Circuit Court, the cause having been submitted to a jury, and McGannon having testified that he did not execute or authorize any one to execute the due bill, and that he and Sanders were not partners in buying and shipping stock, the plaintiff asked leave to amend his pleading so as to aver a partnership liability on the part of McGannon. The court refused to permit the amendment, and the plaintiff then offered to prove by Sanders that he and McGannon were partners in purchasing and shipping stock at the time the due bill was given, and that he executed it for cattle purchased for the partnership. The plaintiff also offered to prove that McGannon had admitted the existence of the partnership, and had paid similar due bills executed by Sanders, on the purchase of cattle by the latter for himself and McGannon. But the court refused to permit such evidence to be given to the jury. The verdict and judgment were for the defendant, McGannon, and the plaintiff appealed.

L. Gregg, for appellant.

Evidence of the partnership was admissible, and no amendment to the pleadings was necessary to admit it. *42 Ark., 503; 37 Ark., 592; 19 Fed. Rep., 727; Mansf. Dig., secs. 5075, 5080–84; 26 Ark., 405; 42 Ark., 58.*

PER CURIAM. If Sanders and McGannon were partners, and the due bill in question was executed by one of them in the name of the partnership business as evidence of a partnership debt, it was the liability of both. No amendment of the plaintiff's pleadings was necessary to authorize proof of the

PARTNERSHIP: Pleading: Evidence.

partnership. The court erred in excluding the testimony relating to that fact.

Reverse and remand.

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LEVY V. SAYLE.

1. MORTGAGES: *To secure future advances: Recoupment.*

Where a mortgage is executed to secure the price of goods to be thereafter furnished by the mortgagee upon the demand of the mortgagor, and the mortgagee, after furnishing part of the goods stipulated for, refuses to supply the residue, he may recover the value of the goods actually advanced. But his right to such recovery is subject to the right of the mortgagor to have the amount thereof reduced to the extent of any loss directly traceable to the mortgagee's breach of the contract, and fairly within the contemplation of the contracting parties, as a natural result of such breach, and which could not have been avoided by reasonable effort on the part of the mortgagor.

2. SAME: *Same:*

In an action by such mortgagee to recover for the goods furnished, an answer setting up a counter-claim, arising out of the plaintiff's breach of the contract, but which fails to allege any substantial loss, or state any fact entitling the defendant to recoup more than nominal damages, is insufficient on demurrer where the contract itself contains no guide for the measurement of damages.

APPEAL from *Jefferson* Circuit Court.

J. A. WILLIAMS, Judge.

The appellees, Sayle & Co., brought an action against the appellant, Levy, upon his note for $252.83, and upon an account amounting to $257.39.

The answer of the appellant admits that he executed the note sued on and afterward purchased certain other goods and merchandise aggregating (including the note) $502, but states that the whole of said indebtedness was contracted under an agreement with the appellees by which they agreed to furnish him during the year 1885, goods and merchandise, upon his application, to the amount and value of $1250, to assist him in carrying on his mercantile business—the amount to be due and payable on December 1, 1885; and that to secure and make

certain the payment to appellees of said debt, he executed a deed of trust upon his homestead, which was of ample value to protect the appellees. That after appellees had furnished goods to the value of $242.03, they demanded from appellant his note for said sum, due in ninety days, with 10 per cent. interest after maturity, and promised appellant that if the note was not paid at maturity, the same should be renewed, and that under this agreement the note sued on was given. That appellees continued to supply him with goods under the contract to the amount (including the note) of $502, and for the amount of the open account they demanded another note for said sum of like tenor and effect, which appellant declined to execute. That appellees notified him that unless he executed the note they would not furnish him any more goods, and would permit his note given them to go to protest. That he still declined, and they had failed and refused to carry out their contract, and permitted the note to go to protest, and had circulated the report that he had defaulted in payment of his commercial paper, thereby injuring him in his commercial standing. That he had made contracts to supply various planters, to assist them in making their crops, based upon the contract with appellees, and likewise was forced to make default in this respect. He says that his homestead, upon which he gave appellees a deed of trust, was his most available asset on which to secure credit, and he could not negotiate for credit upon the same, owing to the incumbrance in favor of appellees, and was therefore almost bankrupt by the failure of the appellees to comply with their contract.

The deed of trust, which is exhibited with and made part of the answer, contains the following provision: "This conveyance is in trust, nevertheless, that whereas, the said party of the first part (Levy) is, or will be, indebted to the party of the third part (Sayle & Co.), and the said parties of the third part agree and obligate themselves to furnish, on demand of the first party, goods and merchandise to assist and enable said

first party to carry on his mercantile business to, the amount of $1250, more or less, as may be necessary in the said business; the exact amount to be ascertained from the books of said third parties, the whole to be due and payable on the first day of December, 1885. Now, if said party of the first part shall well and truly pay unto the said parties of the third part," etc., stating the usual conditions.

A demurrer to the answer was sustained, and the defendant declining to plead further, judgment was rendered against him for the sums sued for and interest.

N. T. White, for appellant.

1. The demurrer admits that appellees violated their contract and refused to carry it out. The rule is that plaintiff must be without fault in the thing of which he complains, and the defendant must be in fault. *Bish. on Cont., sec. 1418, note 6.* For every breach of a contract the law implies some damages, however slight. *44 Ark., 439; 35 id., 492.* Every person is entitled to a certain remedy in law for all injuries or wrongs he may receive in person, property or character. *Const., art. 2, sec. 13; 3 Pars. on Cont., sec. 9, p. 217; 1 Smith Lead. Cases, 105; 3 Sum., 189; 2 Greenl. Ev., 254; 2 Suth. on Dam., pp. 248-265, 297-8-9.* Appellant was certainly entitled to nominal damages, and in our view, much more. The only fault attributed to appellant is the failure to execute notes and pay interest, which by the contract he was not required to do.

A contract by which the amount to be performed by the one, and the consideration to be paid by the other, are made certain and fixed, cannot be apportioned, and the right to recover in one depends upon his having complied with the terms of his contract, or at least a willingness on his part to fully comply therewith. *2 Pars. on Cont., p. 520; 9 Ark., 394; 22 id., 158; 19 id., 262; 2 Pick., 267, notes.* Even when the contract is apportionable and the party entitled to recover the value

of the goods sold, the right is subject to the right of the purchaser to *recoup* the damages he has sustained by reason of the failure of the seller to comply with the contract. *1 Parsons on Cont., p. 558, note "W."* See, also, *13 Wend., 258; 16 Barb., 36; 5 Denio, 406; 16 Ohio, 238; Bish. on Cont., 1421; Benj. on Sales (4th ed.), sec. 871, note "G."*

2. The note was given without consideration and for the accommodation of appellees, and no suit should be maintained thereon.

J. W. Crawford and *W. S. McCain*, for appellees.

1. Counsel admits that when there is an entire contract to deliver goods consisting of distinct parcels within a specified time, and the seller delivers part and the purchaser retains the part delivered after the seller has failed to perform his contract, the seller may recover the value of the goods delivered, subject to the right of recoupment for damages for failure to comply in full with the contract. *2 Pars. on Cont., *p. 523; 9 B. & C., 386; 33 Ark., 755; 3 Ark. (An. ed.), note 2; 39 Ark., 280; 5 id., 651; 46 Mo., 320; Sedgw. on Dam., 254.*

2. Appellant suffered no damages. The measure of damage when a vendor fails to deliver goods, is the difference between the contract price and the value of the goods at the time they should have been delivered. *Sedgw. on Dam., 260; 6 McLean, 102; 2 Suth. on Dam., 254 and 365; 39 N. W. Rep., 887; Benj. on Sales, sec. 870; 3 Wheat., 200; 6 Wheat., 109; 2 Ark., 397; 47 Ark., 519; Hare on Cont., 446; 7 Hill, 61.* If the market price, at the time of delivery, was as low, or lower than the contract price, the plaintiff is entitled to no damages. *3 Pars. on Cont., *p. 204; 6 McLean, 497; Sedgw. Dam., 260.* There can be no damage where there is no contract price. All defendant had to do was to go into the market and buy, and thus avoid all damage. *2 B. & C., 624.*

The damages claimed are too remote. *36 Ark., 36; 2 Gr. Ev. (Redf. ed.), 256, note 4; 3 Pars. on Cont., *p. 178.* Profits are not included. *Ib., *181; 2 Gr. Ev., 256, note 5,* especially

those arising from collateral undertakings. *Wood's Mesne Dam. (1st Am. ed.), p. 14, sec. 12; 30 Ark., 50; 34 id., 767; 37 id., 620; 12 Mo., 313; 30 id., 491.*

While the weight of authority seems to be that for the violation of every legal right, nominal damages, at least, are allowed, yet there are authorities the other way. *23 Md., 531; 18 id., 479; 8 Humph., 225; 22 Vt., 231.* But the allowance of nominal damages in this case, would not have altered the judgment. *De minimis non curat lex.* A judgment which is only erroneous for not giving nominal damages, will not be reversed unless such damages would entitle plaintiff to costs. *9 Mich., 32; 1 John. C., 256; 5 Md., 250; 1 Suth. on Dam., p. 815, note 2; 6 S.E. Rep., 165.*

COCKRILL, C. J. Where a mortgage is executed to secure to the mortgagee the price of goods thereafter to be furnished upon the demand of the mortgagor, and the mortgagee violates his contract after it is partially performed, the rule governing the rights of the parties under the contract is fully and concisely stated by Judge Campbell, of Mississippi, in the following language: "We hold the contract evidenced by the deed of trust not to be an entire contract, but separable, and hence apportionable, so that the parties who furnished supplies under it are entitled to enforce their security *pro tanto*, subject to the right of the grantors in the deed of trust to have a reduction of the demand of the creditors to the extent of any loss directly traceable to the breach of contract by the other party and fairly within the contemplation of the contracting parties, as a natural result from such breach of contract, and which could not by reasonable effort have been avoided by the parties disappointed." *Coleman v. Galbreath, 53 Miss., 303.* See *Grisard v. Petty, 45 Ark., 117.*

1. MORTGAGES: To secure future advances: Recoupment

2. SAME:

The question here is, do the allegations of the defendant's answer bring him within the rule? The contract itself furnishes no guide for the measure of damages, and the recoupment by the defendant could be only nominal and inappreciable in the

absence of allegations of actual, substantial loss arising from the violation of the contract. *Ry. v. Mudford, 44 Ark., 439.*

It is not alleged that the same class of goods which the plaintiff had agreed to furnish, could not have been purchased in the market; or that the mortgage, which the defendant had executed to the plaintiff, had hindered or impeded him in getting credit from others for such goods; or, that he was without means, or other property to furnish a basis of credit, to purchase them; nor is any other fact alleged upon which a recovery of more than nominal damages could be sustained. Moreover, the answer alleges what was, probably, a sufficient excuse on the part of the plaintiff for refusing to furnish additional goods.

Affirm.

HARMON V. KLINE.

ESTOPPEL: *To claim house as part of realty.*

The plaintiff and defendants with other citizens of a town—of the council of which the plaintiff was a member—having subscribed to a fund for building a city jail, located it on school land adjoining the town, and agreed that whenever the State sold the land they would move the building to a lot to be provided by the town. The land was subsequently sold by the Sheriff, who, in making the sale, announced that the jail building did not go with it, and the plaintiff bought the land with that understanding. HELD: That the plaintiff was estopped to treat the building otherwise than as personalty belonging to the town.

APPEAL from *Johnson* Circuit Court.

G. S. CUNNINGHAM, Judge.

A. S. McKennon, for appellant.

The calaboose was part of the realty and passed to plaintiff when he purchased from the State the land upon which it was situated. *Tiedeman on Real Property, secs. 2, 3 and 4.* He became the owner of everything thereon and then attached to the freehold. *14 Ark., 431; 23 Ark., 19;* The

Sheriff had no power to reserve anything attatched to the freehold in making the sale, and no agreement or understanding between the town authorities and citizens of Coal Hill, could change the nature of the property. The State was not a party to this agreement and was not bound by it.

The appellees *pro se.*

The appellant is estopped from claiming the structure. *16 Ark., 511; 52 Am. Rep, 529; 53 id., 622; 111 Ill., 202; 33 Kans., 264.*

ESTOPPEL.

SANDELS, J. The parties, plaintiff and defendants, live at the Town of Coal Hill. They, with other citizens, subscribed to a fund to build a city jail. Plaintiff (who was then a member of the town council) and defendants, with other citizens, determined to locate said jail on school land belonging to the State, adjoining the town, and agreed that whenever the State sold said land they would move the house off to other land, to be provided by the town. At the sale of the lot the Sheriff announced that the house did not go with the land, and plaintiff bought the land with that understanding. Subsequently he acquiesced in the use of the jail by the town. At length he announced that he intended tearing down the jail and constructing near his residence a "storm house." Defendants thereupon, at night, moved the jail off plaintiff's land, and he brought this suit for the alleged trespass. There was verdict and judgment for the defendants, and the plaintiff appealed.

A house built upon the land of another, without permission and agreement, becomes part of the realty, but where permission is first obtained and agreement had to that effect, the building remains personalty. Under the facts of this case, plaintiff is estopped to treat the building otherwise than as personalty belonging to the Town of Coal Hill.

Affirmed.

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ARNETT V. GLENN.

HUSBAND AND WIFE: *Payment to husband on wife's note.*

Although a husband is expressly authorized to collect a note payable to his wife, and belonging to her separate estate, he cannot accept in its payment the satisfaction of his own debt, unless it is shown that she has either expressly or impliedly assented to such use of her funds.

APPEAL from *Independence* Circuit Court.

J. W. BUTLER, Judge.

John W. Glenn executed to Bertie Arnett, a married woman, his promissory note for $300, which she loaned to him out of her separate estate. She brought this action against him on the note, and by his answer he claims a credit for $185.53, alleging that he paid that sum to the plaintiff's husband, and that the latter received it as his wife's agent. The evidence shows that the alleged payment was made on a draft which the plaintiff's husband drew in favor of a creditor of the husband, and to satisfy the latter's debt. It also appears that the draft was paid on the husband's promise that it should be credited on the defendant's note. The credit was allowed in the court below, and judgment rendered for the balance due on the note. Plaintiff appealed.

The appellant, pro se.

The husband's powers as agent in fact are measured as in other cases, by the scope of authority conferred. They are the same as if he were acting for a stranger. *22 N. J. Eq., 599; 56 Miss., 321; 14 Ind., 552–3, 241; 99 Miss., 566; Story on Agency, sec. 21.* See, also, *Rudd v. Peters, 41 Ark.; Acts Dec. 15, 1875.*

The husband had no authority to appropriate the wife's estate to the payment of his own debt. *Cases supra.* Appellee had full knowledge of the misappropriation.

Robert Neill, for appellee.

The husband was clearly the agent of the wife, *Mansf. Dig., sec. 4637; Story Agency (5th ed.), secs. 54, 66,* and she is bound

thereby. Where one of two innocent persons must suffer, by the misconduct of a third, the party who by his own acts and conduct has enabled such third person to practice a fraud or imposition, must suffer. *Story Agency, sec. 56.*

The usual course of dealing, all warranted appellee in treating with the husband as her agent, and the part payment to him, was *pro tanto* a good defense. *39 Ark., 321; 1 Am. and E. Enc. Law, note 1, p. 340; 42 Ark., 99.*

HUSBAND AND WIFE.

PER CURIAM. If the husband held the note with the express authority to collect it, he could only have made such collection as would inure to the benefit of his wife. He could not accept in its payment, the satisfaction of his own debt without proof that the wife gave her assent, either express or implied, to this misuse of her funds. *Williams v. Johnston, 92 N. C., 532; Belton Compress Co. v. Belton Brick Co., 64 Texas, 337.*

There was no proof that Mrs. Arnett ever authorized such conduct. The judgment is reversed and cause remanded.

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TITSWORTH V. FRAUENTHAL.

REPLEVIN: *For undivided interest in crop.*

Where a tenant's crop is subject to his landlord's lien for rent, and also to the lien of a mortgage executed to a third party, its purchase by the landlord for a consideration which includes the satisfaction of the rent, extinguishes his lien but gives him an absolute title to an undivided part of the cotton equal in value to the amount for which his lien existed. As to the remaining interest in the crop, the landlord's right is subject to the mortgage. But, as the mortgagee has no superior title to any particular part of the crop, and is only an owner in common with the landlord, he cannot maintain replevin against the latter for his undivided interest.

APPEAL from *Logan* Circuit Court.

JOHN S. LITTLE, Judge.

Frauenthal brought replevin in a justice's court against Titsworth for two bales of cotton. On appeal to the Circuit Court the action was tried by the court, which found that in 1886 Totten Jones was a tenant upon Titsworth's farm, and raised five bales of cotton, of which the two bales in controversy were a part. That a few days before the institution of this suit, Titsworth purchased of Jones in one transaction all of said cotton, and after deducting from the price thereof the rent due to him and the amount of a bill for supplies furnished Jones, paid to the latter the balance of $90.00 in money. That three bales of the cotton were sufficient to satisfy the rent and the bill for supplies. That the two bales sued for were of the value of $40 each, and that all the bales were at the time they were replevied "in one lot or pile" on defendant's farm and in his possession. That prior to Titsworth's purchase, all the cotton was conveyed to Frauenthal by a mortgage deed which had been filed in the Recorder's office of the proper county, and that at the time the suit was brought the mortgage was in full force—its conditions had been broken and Frauenthal was entitled to possession under it. The court thereupon declared the law to be that Titsworth's purchase extinguished his lien as landlord and he held the cotton as purchaser; that his title was good against Frauenthal only to the extent of said lien; and that as Titsworth had failed to show that the two bales sued for were received in satisfaction of his lien, Frauenthal was entitled to recover them. Judgment was rendered accordingly and Titsworth appealed.

C. A. Lewers, for appellant.

1. Landlord's lien superior to mortgage. *37 Ark., 43; 31 id., 557; 36 Ark., 525.*

2. As long as the lien continued, coupled with possession, replevin would not lie without discharging the lien. *Wells on Repl., secs. 100, 123, 124.* The amount of appellant's claim for rent and supplies should have been tendered. *36 Ark., 525; 35 id., 225.*

3. A tender of rent does not discharge the lien. *38 Ark., 329.* Nor is the lien waived by taking a mortgage. *36 id., 96.*

4. Replevin does not lie by one owner in common against another for an undivided interest. *Wells on Replevin, sec. 186, et seq.; 24 N. Y., 596.*

Trover was the remedy, not replevin; or perhaps an action for money had and received, over and above the amount of appellant's claim, could have been maintained.

Sam Frauenthal, for appellee.

The legal title to *all* of the five bales was in appellee. *36 Ark., 572;* and appellant had no title to any of it, and could not replevy a bale of it. *Ib.* A landlord has only a lien for rent and supplies, which is simply a charge on the property. *31 Ark., 597 (600).* When the debt is satisfied the lien is extinguished. *Ib., 601.* Now, the three bales were amply sufficient to satisfy his claim, and he could not hold under his claim of purchase against the mortgagee, even with possession. *35 Ark., 169.* Titsworth's claim being paid by the three bales, the other two were properly awarded to appellee. *34 Ark., 93 (102.)* Substantial justice has been done, and this court should not reverse for mere matter of form or mistake in the matter of proceeding. *Ib.*

REPLEVIN: For interest in crop.

PER CURIAM. The plaintiff's title to the two bales of cotton replevied, was no greater than to the other bales of the same lot. The landlord's lien was extinguished, as the court held, by the transfer of the cotton upon which the lien existed, but the title of the landlord to an undivided interest in the cotton, equal in value to the amount of the lien extinguished, became absolute by his purchase. As to the remaining interest, he was only a purchaser whose rights were subject to the mortgage. But the mortgagee had not a superior title to any particular part of the lot of cotton, but at most was only an owner in common with the landlord.

Replevin cannot be resorted to as a means of partitioning property held in common. *Hart v. Morton, 44 Ark., 447*, and cases there cited. *Ward v. Worthington, 33 ib., 830.*

It was error therefore to allow the action to be maintained.

Reverse and remand.

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McQueeny v. Phœnix Insurance Company.

1. Insurance: *Against fire: When contract entire.*

When a gross sum is paid as the premium for an insurance against fire, the policy constitutes an entire contract although the amount for which it issues is apportioned to distinct items.

2. Same: *Same: "Premises" insured.*

Two houses situated thirty feet apart but in the same inclosure, were insured for separate sums in consideration of the payment of a gross premium. The policy contained the following clause: "If, during this insurance, the above mentioned premises shall become vacant or unoccupied, * * * then and from thenceforth, so long as the same shall continue vacant or unoccupied * * * this policy shall cease and be of no force. * * *" Held: That the two houses comprised the "premises" insured, within the meaning of the policy, and so long as either of them was occupied the policy was not suspended.

APPEAL from *Garland* Circuit Court.

J. B. Wood, Judge.

L. Leatherman, for appellant.

The two houses comprised the premises, and so long as either house was occupied, the premises were not vacant. The contract was entire and the consideration in gross, and hence not apportionable. See *28 Am. Rep., 116; 77 Am. Dec., 244; 78 Ill., 167; 32 N. Y., 405; 59 N. Y., 387; 38 Am. Rep., 195; 72 N. Y., 118; 8 Atl. Rep., 424; 34 Am. Rep., 106; 30 N. W. Rep., 808, 862.*

No proof of loss was necessary. Denial of liability waives proof of loss. *13 West. R., 47; 8 S. W. Rep., 453; 6 Bush., 652; 30 Pick., 389; 111 Mass., 110.*

HEMINGWAY, J. The appellant brought suit against the appellee upon a policy of insurance, whereby, in consideration of a stated premium, it insured him against loss by fire in the sum of $1000, the amount being apportioned as follows: $600 upon a residence and $400 upon a frame house held to let. It was alleged and admitted, that both houses were destroyed by fire during the term of the policy.

The policy contained the following clause: "If, during this insurance, the above mentioned premises shall become vacant or unoccupied, or if the occupation or the possession of such premises is changed, except as herein specially agreed to in writing upon this policy, then and from thenceforth, so long as the same shall continue vacant or unoccupied, or shall be so appropriated, applied or used, this policy shall cease and be of no force and effect."

The two houses covered by the policy were about thirty feet apart and in the same enclosure. At the time of the fire one was occupied by the assured as a residence, while the other was unoccupied.

The company paid the loss on the residence, but declined to pay the loss on the other house because it was vacant; the assured instituted this suit to recover the loss upon the latter house. The controversy depends upon the construction of the clause recited.

The appellant contends that the two houses comprised the premises within its meaning, and that the premises were occupied so long as either house was occupied.

The appellee contends that each house comprised separate premises within its meaning, and that upon either house becoming vacant, the insurance upon it was suspended. The court sustained the contention of appellee, and this raises the only question presented for our consideration.

The appellee insured two houses for separate sums. The consideration paid was a gross sum. The rate of insurance is

not disclosed; whether it was the same upon each house or different does not appear.

The construction of this and similar clauses in policies of insurance have often received judicial consideration, and there is perhaps no question upon which the conflict between different courts is more clearly defined. An examination satisfies us that the cases decided in different courts cannot be harmonized, and we have attempted to ascertain and follow those most in consonance with correct principle.

The learned judge who tried this cause, following one line of decision, seems to have considered that the clause should be construed in the same way in this contract, as a like provision would be construed in a several policy on each of the subjects insured. In other words, that the contract though entire in form is divisible in substance. That it was competent for the parties to make such a contract is conceded. That they so intended is not obvious from the clause under consideration. The natural significance of the terms employed is, that if the entire premises should become vacant the entire policy should cease during such vacancy. If the parties had intended to make a separate contract as to each subject of the contract, their purpose might have been easily accomplished by saying that if the premises or any part thereof should become vacant, the insurance, *pro tanto*, should cease. Such intention is often so manifested in similar policies, and we see no reason why it would not have been done in this case, if it had been entertained.

Mr. Parsons says: "If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." *2 Parsons on Contracts, p. 519; Johnson v. Johnson, 3 B. & P., 162; Miner v. Bradley, 22 Pick., 457.*

In the case of *McClurg v. Price, 59 Penn. St., 420*, it is said: "If the consideration is single the contract is entire, whatever

the number or variety of the items embraced in its subject."

Our attention is called to no case in which the correctness of this statement of the general rule is denied or questioned. It has been stated and approved by many authors and courts.

But it is said that, "A policy of insurance is a contract so different from those in which these general rules have been laid down, that it is doubtful whether they can be applied to this peculiar contract, or in what manner the application of them should be made." *Quarrier v. Peabody Ins. Co., 10 W. Va., 530.* In what the difference consists, or why those general rules which the wisdom of our jurisprudence has formulated to govern in the consideration of contracts should not be applied in construing insurance policies, is not stated nor apparent to us. We can see no good reason why a contract, which, if made between individuals, would be entire, should be divisible if made between an individual and an insurance company.

1. INSURANCE: When contract entire.

Mr. Wood and Mr. May each seemed to think that the general rule applies to insurance policies, and that where the amount of insurance is apportioned to distinct items, but the premium paid is gross, the contract is entire. *May on Insurance, secs. 189, 277; Wood on Insurance, vol. 1, p. 384.*

This view is sustained by the courts of last resort in the States of Maine, Massachusetts, Pennsylvania, Maryland, Virginia, Wisconsin, Michigan and Minnesota. It receives support from the courts of New Hampshire and Vermont, although not expressly approved by them; and the Supreme Court of West Virginia, in a case much like the one before us, held the contract entire. *Day v. Charter Oak Ins. Co., 51 Me., 91; Lovejoy v. Augusta, 45 Me., 472; Richardson v. Maine Ins. Co., 46 Me., 394; Friesmuth v. Agamon Ins. Co., 10 Cush., 587; Kimball v. Howard Ins. Co., 3 Gray, 583; Gottsman v. Ins. Co., 56 Penn. St., 210; Fire Assn of Phila. v. Williamson, 26 Penn. St., 196; Associated F. Ins. Co. v. Assum, 5 Md., 165; Bowman v. Franklin Fire Ins. Co., 40 Md., 620; Moore v. Virginia Fire Ins., Co., 28 Gratt. (Va.), 508; Hinman v. Hartford Ins. Co., 36*

Wisc., 159; Schumitsch v. Am. Ins. Co., 48 Wisc., 26; Ætna Ins. Co. v. Rash,, 44 Mich., 55; Plath v. Minn. Ins. Co., 23 Minn., 479; McGowen v. Peoples Mut. F. Ins. Co., 54 Vt., 211; Baldwin v. Hartford Ins. Co., 60 N. H., 422; Bryan a. Peabody Ins. Co., 8 W. Va., 605.

Opposed to this view we find decisions of the courts of last resort in the States of New York, Illinois, Missouri, Kentucky and Nebraska, and the decision before referred to in *Quarrier v. Peabody Ins. Co., supra; Merrill v. Ag. Ins. Co., 73 N. Y., 462; Peoria, etc., v. Aunpaow, 51 Ill., 283; Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.), 9; Koontz v. Hannibal, etc., 42 Mo., 126; Loenher v. Home Mutual Ins. Co., 19 Mo., 628; State Ins. Co. v. Schreck, 43 N. W. Rep. 340.*

The force of the Kentucky case is much impaired by the fact that it relied on the case of *Clark v. The New England Ins. Co., 6 Cush. (Mass.), 342,* which has never been followed in its own State, but impliedly overruled in several later cases.

The New York Supreme Court had held such contracts entire, before the case of *Merrill v. Ag. Ins. Co., supra,* was decided; *Smith v. Empire Ins. Co., 25 Barb., 497;* and since then the Superior Court of the State has held such a contract entire. *45 N. Y. Superior Ct., 402.*

The decision of *Merrill v. Ag. Ins. Co., supra,* is placed upon the fact that there was a separate valuation of the subjects of insurance. It is more reasonable, we think, to hold that the sole effect of the apportionment of the amount of insurance to the different subjects insured is to limit the extent of the insurer's risk, upon each item, to the amount named. It cannot be said to make a several contract as to each subject of insurance, for a consideration is necessary to each contract, and the consideration being in gross, there is no way to apportion it to the several contracts so as to sustain each by its proper consideration. It would not do to apportion it according to the amount of the risk upon the different items,

for it is not true that the rates are uniform, but they vary according to the hazard of the risk.

This court, in the case of *Jackson v. Jones, 22 Ark., 158*, held a contract to sell 1500 bushels of wheat at 40 cents per bushel to be an entire contract, There the subject of the contract was divisible and the consideration apportionable; but the parties had manifested a desire to make one contract and not 1500, and the court declined to substitute, by construction, other contracts for the one made by them. That contract was much more favorable to the contention of the appellee than the one we are considering. Undertakings of the appellee are divisible and might be the subject of several contracts; but the consideration paid by the appellant was not divisible upon any basis disclosed by the contract, and there could not be a division into several contracts unless there could be an apportionment to each of its consideration.

2. SAME: Same.

Determined by the ordinary rules, this contract was entire. We see no reason why it should be determined by any other rule. As it was entire, the two houses comprised the premises, and so long as one of them was occupied the policy was not suspended.

The judgment is reversed and the cause remanded for a new trial.

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

NOVEMBER TERM, 1889.

BING v. STATE.

INSTRUCTION: *Invading province of jury.*

An instruction that if the jury believe a witness "has any bias or leaning to one side or the other * * * they should find that leaning or bias against the party in whose favor the witness leant" invades the province of the jury and is therefore erroneous.

This appeal is from a conviction for the unlawful sale of intoxicating liquor to a minor. The evidence offered to sustain the charge consisted of the testimony of the person to whom it was alleged the liquor was sold; and with reference to his testimony the court gave to the jury the following instruction, which was objected to by the defendant:

"That if the jury believe that the witness has any bias or leaning to one side or the other, the law is that they should find that leaning or bias against the party in whose favor the witness leant; that is, if the witness has any leaning or bias in favor of the State, his testimony is to be taken most strongly against the State; or, if the leaning or bias be for the defend-

ant, his testimony is to be taken most strongly against the defendant."

APPEAL from *Crawford* Circuit Court.

H. F. THOMASON, Judge.

C. J. Frederick, for appellant.

The only witness for the State contradicts himself and proves nothing. The burden of proof is on the State. *Mansf. Dig., sec. 1989.*

The oral instruction invaded the sole province of the jury. *Article 7, section 23, Constitution; 49 Ark., 448; 37 Ark., 592; 43 id., 289; 45 id., 165; 45 id., 492; 28 Ark., 531.*

W. E. Atkinson, Attorney-General, and *T. D. Crawford*, for appellee.

The record shows that other instructions were given, and that the court instructed the jury as to the credibility of the witnesses.

"The entire charge should be set out. It would be manifestly unfair, in many instances, to judge the charge by an isolated part of it." *Jones v. Nichols, 46 Ark., 209.*

The instruction is one of that class of charges that might, perhaps, with propriety, be omitted in ordinary cases, since it is impossible for any jury of ordinary intelligence to avoid reaching the same conclusion without the court's aid. It is not more objectionable, however, than would be an instruction to the jury that if they find a witness has testified falsely, they will attach no weight to the testimony. It says to the jury if they find any witness is biased that they should construe his testimony with that in view. The jury are left free to say whether any or all of the witnesses in the case were or were not biased, and if they were found to be so biased, *to decide what weight should be attached to their testimony.*

The courts have given a very rigid construction to the clause of the Constitution inhibiting judges from charging juries with regard to matters of fact, but we have searched in

vain for a case holding an instruction similar to this to be within that inhibition.

PER CURIAM: The instruction complained of invaded the province of the jury and is erroneous. INSTRUCTIONS.

Reverse and remand for a new trial.

MOORE v. STATE.

PUBLIC ROADS: *Notice to attend working.*

A notice given on Saturday to attend a road working on the following Tuesday, Wednesday and Thursday, was not a sufficient warning to work on Tuesday—because three full days did not intervene—but was good as to the other days.

APPEAL from *Desha* Circuit Court.

B. F. Grace, Special Judge.

The appellant, Moore, was convicted upon an indictment charging that he refused to work on a public road after having been duly warned, as the law directs. The evidence shows that the defendant was warned on Saturday to work the road on the following Tuesday, Wednesday and Thursday and that he did not attend on either day. The court instructed the jury in effect that if they believed, from the evidence, that the defendant was warned on Saturday to work the road on the following Tuesday, Wednesday and Thursday, and failed to work on either of those days, that he could not be convicted for failing to work on Tuesday, but could be convicted for such failure on Wednesday and Thursday. This instruction was objected to by the defendant. Section 5907 Mansfield's Digest, provides that any person subject to road duty who "shall have had at least three days' actual notice" according to law, and who refuses or neglects to attend on the day and at the place directed by the overseer, shall be fined for such offense not less than ten nor more than twenty-five dollars.

David A. Gates, for appellant.

1. No proper notice was given. *Mansf. Dig., sec. 5905.* There must be full three days' notice. *42 Ark., 93.* If bad for Tuesday, it was bad for the other days, as a notice cannot be both legal and illegal.

W. E. Atkinson, Attorney General, for appellee.

The warning, while not good for Tuesday, was good for Wednesday and Thursday.

PUBLIC ROADS: NOTICE.

PER CURIAM. Notice on Saturday to one liable to road duty to work a road on the following Tuesday, Wednesday and Thursday, was not sufficient notice to work on Tuesday, because three full days did not intervene (*State v. Jones, 42 Ark., 93*), but was good as to the other days.

Affirm.

WELLINGTON V. STATE.

1. TRESPASS: *Mistake as to boundaries: Instruction.*

A defendant charged with hunting in the inclosed grounds of another without the latter's consent, sought to excuse the act by showing that he had permission to hunt on adjoining land, and got upon that of the prosecuting witness by mistake. The court instructed the jury in effect that it was the duty of the defendant "to ascertain by all means in his power" the boundaries of the inclosure he had permission to hunt within, and that he was not guilty if after thus attempting to ascertain such boundaries, and honestly believing that he was within the same, he trespassed upon the land of the State's witness without intending to do so. HELD: That if the instruction required of the defendant a greater degree of diligence than the law sanctions, it did not prejudice him in the absence of evidence tending to show that he used any diligence at all.

2. SAME: *Hunting in inclosures: Owner of land.*

One who has the control and possession of land to the exclusion of the real owner and all other persons, is the "owner" of such land within the meaning of the statute, making it a misdemeanor to hunt "in the inclosed grounds of another without the consent of the owner." *Mansf. Digest, sec. 1669.*

ERROR to *Washington* Circuit Court.

J. M. PITTMAN, Judge.

The appellants were convicted of hunting in the inclosed grounds of William Braithwait without his consent. The statute (*Mansf. Dig., sec. 1669*) provides that "if any person shall ride, range or hunt in the inclosed grounds of another, without the consent of the owner previously obtained, * * * the party so offending shall be guilty of a misdemeanor, and upon conviction thereof * * * shall be fined," etc. The evidence shows that the appellants were found hunting upon a tract of land which had been inclosed by Braithwait, and was then exclusively under his control. He had taken possession of the land six or seven years previous to the time of the alleged offense under a parol contract for its purchase. At the time of the trial his vendor was disputing his right to the possession of the land, and testified that its sale was conditional and for a consideration, which had failed. On the part of the defendants there was evidence to show that they were hunting by permission on the land of one Craig, which adjoined the land claimed by Braithwait, and got on the latter by mistake as to the boundaries. The court gave to the jury the following instructions which were objected to by the defendants:

"It is the duty of the person who hunts upon the enclosed grounds of another, to first procure permission of the owner of such lands, and to ascertain, by all means in his power, the boundaries of the enclosure that he has permission to hunt upon, and if, after using all these means and ascertaining such boundaries, he, honestly believing that he is in such boundaries, trespass upon the lands of another without intending to do so, he will not be guilty."

"One who has the control, use and possession of land, as against the real owner and all others, is, in law, the owner of such lands within the meaning of the act under which the defendants are charged."

E. P. Watson, for appellant.

1. The use of the words, "*use all means in their power*," in

the first instruction by the State, was too unlimited and misleading. *36 Ark., 451.*

2. Braithwait was not the owner of the land, but a mere possessor.

3. There was no intention to commit a trespass, and to constitute a crime there must be an act and an evil intent. *1 Bish. Crim. Law, secs. 204-5-6-7 and 770; Gould's Dig., ch. 51, secs. 1 and 2.*

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellee.

1. It does not appear that appellants *made any effort whatever* to ascertain the boundaries, and hence the instruction was not prejudicial.

2. *Ignorance of facts* is no valid defense to prosecutions under this section. *50 Ark., 570; ib., 67; 36 id., 58; 38 id., 61; 37 id., 108; ib., 219; ib., 399; 38 id., 656; 43 id., 283; 30 id., 496; 13 id., 696; 10 Ark., 264.*

The statute does not require the act to be done "wilfully" or "knowingly." *Gould's Digest, ch. 51, secs. 1 and 2 of Part 1,* was repealed by *Mansfield's Digest, sec. 1491.*

3. Braithwait was the *owner* of the land within the meaning of the act. *2 Johns. (N. Y.), 105; 8 Gratt, 627; 12 Conn., 488; 44 id., 292; 1 Whart. Cr. Law., sec. 837; 2 Bish. Cr. Law., sec. 12.* The law was intended to protect the visible owner—him who was in possession and reaping the benefits from the protected enclosure.

TRESPASS: Hunting, etc.

PER CURIAM. If the charge of the court demanded of the appellants a greater degree of diligence than the law sanctions in ascertaining the boundaries of the land upon which they had permission to hunt, it did not prejudice them, because there is no evidence in the abstract tending to show that they used any diligence at all. *Clark v. State, 50 Ark., 570.*

Braithwait was the owner of the land within the meaning of the act. Affirm.

MARQUARDT V. STATE.

INDICTMENT: *For keeping dram shop open on Sunday.*

An indictment under section 1887 Mansfield's Digest, which alleges that the defendant, "on the first day of May, 1889, * * * unlawfully did keep open his dram shop on Sunday," is sufficient, although the day of the month is not correctly stated. The gist of the offense being that the shop was kept open on Sunday, the allegation of time is not material.

APPEAL from *Sebastian* Circuit Court.

JOHN S. LITTLE, Judge.

The indictment against the defendant charged that "on the first day of May, 1889," he unlawfully kept open his dram shop "on Sunday." A demurrer to the indictment was overruled, and the defendant having been convicted, appealed. The only question presented by the appeal is as to the sufficiency of the indictment. Section 1887 Mansfield's Digest, provides that "every person who shall, on Sunday, * * * keep open any dram shop or grocery, or sell or retail any spirits or wine, shall, on conviction thereof, be fined in any sum not less than $10, nor more than $20."

Section 2112 Mansfield's Digest is as follows: "The statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of finding the indictment, except when the time is a material ingredient in the offense."

C. A. Lewers, for appellant.

The court judicially knows that the 1st of May, 1889, *was not Sunday*, and it was not unlawful for appellant to sell on that day. *38 Ark., 548.*

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellee.

The indictment charges that the offense was committed on Sunday. It was not material whether it was on the 1st of May, the 1st of September, or any day within twelve months,

provided it occurred on Sunday. *38 Ark., 548.* See, also, *Whart. Cr. Pl. and Pr., sec. 121; 42 Barb., 324; 64 N. C., 591; 1 Swan, 416; 18 Ark., 365; Rex v. Thomas Gill, Russ & Ryan, 431.*

51 Ga., 426 conflicts with these anthorities, perhaps, but if so, is against the clear weight of authority.

INDICTMENT: Time.

PER CURIAM. The allegation of time in the indictment is immaterial; the gist of the offence is that spirituous liquor was sold on Sunday, and whether the day of the month is correctly stated is no more important in this than in other cases. *Whart. Crim. Pl. and Pr., sec. 121; People v. Ball, 42 Barb., 324; State v. Drake, 64 N. C., 591; State v. Eskridge, 1 Swan, 416.*

In *Robinson v. State, 38 Ark., 548,* it was not charged that the offence was committed on Sunday but only on a day of the month which the court judicially knew was not Sunday. That case does not conflict with the view now expressed.

Affirmed.

LOWRY V. STATE.

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60 281

1. PUBLIC ROADS: *Warning to work upon.*

Under Mansfield's Digest, sec. 5905, which provides that a warning to work on a public highway "may be given personally or by leaving a written notice at the usual place of abode of the person warned, in some conspicuous place," a service cannot be had by leaving the notice with the wife of the person to be warned, because that mode of service is not within the provisions of the statute.

2. SAME: *Same.*

Where warning to work on a public highway is served by either of the modes provided for by the statute and its validity is questioned, it must appear that it was given more than three days before the time fixed for the work.

APPEAL from *Garland* Circuit Court.

J. B. WOOD, Judge.

Lowry was indicted for failing to work a public road. On the trial the overseer of the road testified that on the 12th day of March, 1889, he warned the defendant to attend at

a place designated, on the 20th day of March, 1889, to work the road mentioned in the indictment during three days—the 20th, 21st and 22d of March; that such warning was not given personally but by a written notice left with the defendant's wife, who was over the age of fifteen years, at a place where the defendant had said he was living. The witness also stated that a few days later he met the defendant and the latter, after informing him that he did not live in the township where the road was located, and did not intend to work, proposed to send one Cole as a substitute; that the witness declined to accept Cole as a substitute, and that it was then agreed to submit the question of the defendant's liability to work on the road to an attorney; that no further conversation occurred between them, and the defendant failed to attend the working. Among other instructions to the jury was the following, which was given by the court of its own motion, and objected to by the defendant:

"If you find from the evidence that the road overseer left a written notice in proper form at the usual place of abode of defendant and with defendant's wife, a member of his family, at least three days previous to the time appointed to work by said overseer, you will find that the defendant was legally warned."

The defendant was convicted, and appealed. Section 5905 Mansfield's Digest provides that the warning which the overseer of a public road is required to give to persons in his district liable to work, "may be given personally or by leaving a written notice at the usual place of abode of the person named, in some conspicuous place, * * * at least three days previous to the time appointed to work."

C. V. Teague, for appellant.

1. Appellant was not a resident of Hale Township, and was not subject to road duty there. *34 Iowa, 289; 24 id., 204; 63 id., 16 N. W. Rep., p. 71; Mansf. Dig., sec. 5907.*

2. The statute prescribes only two ways by which a person may be warned. Leaving a notice with his wife was not sufficient. *6 Ark., 131; Dwarris Stat., 245; ib., 247.* The statute is mandatory. *21 Cent. Law J., 203; 4 Wall., 435; Dw. Stat., 712; 9 How., 248; 1 Kent., 467, note; Burrill Law Dic., "May;" 38 Ark., 205; 35 id., 501; 20 id., 362.*

W. E. Atkinson, Attorney General, and *T. D. Crawford,* for appellee.

1. The word "residence" is often used as synonymous with "domicil," but the latter involves the idea of a fixed intention to reside for an indefinite period of time. *Anderson Law Dic., in loco.*

But "residence" does not necessarily or properly convey the idea of *permanency.* If appellant was *actually* living and residing in Hale Township, though with the intention of returning to Hot Springs, he was a *resident* within the meaning of the act. "*Qui rentil commodum sentire debet et onus.*" See *8 Savoy, 393; 63 Iowa, 104; 30 Gratt., 718; 3 N. H., 123; Jacobs, Domicil, 373, note 1, et seq; 24 Iowa, 204; 44 Vt., 124; 40 Ill., 198; 19 Wend., 11; 1 Wend., 65; 2 Duer., 110; 51 N. Y., 12.*

2. Appellant cannot complain of any prejudice in the manner of the service of the notice. *He received the notice,* as he hunted up the overseer and told him he was not subject to road duty. Beside this, the conversation with the overseer was a sufficient personal notice to him. *Mansf. Dig., sec. 5905.*

PER CURIAM: The Legislature has prescribed the manner of warning hands to work upon the public highways. The warning may be given personally or by leaving a written notice at the usual place of abode of the person warned, in some conspicuous place.

PUBLIC ROADS: Warning to work.

Service cannot be had by leaving the notice with the wife of the person to be warned, because this manner of giving

notice is not within the provisions of the statute. *Barnett v. State, 35 Ark., 501; Bruce v. Arrington, 22 Ark., 362.*

If the conversation of the overseer with the defendant is relied upon as notice it must appear to have occurred more than three days before the time fixed for the work.

There was evidence upon which a jury might find that the defendant was liable to road duty.

The instruction given by the court of its own motion as to the sufficiency of the notice was error, and for that the judgment is reversed and cause remanded for a new trial.

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CRUMPTON v. STATE.

1. WITNESSES: *Bias of, not a collateral matter.*

The bias of a witness is not a collateral matter; and where on cross-examination he denies making a statement which, if made, tends to show an interest in behalf of the party introducing him, it is competent for the opposing party to prove that he did in fact make such statement.

2. CRIMINAL PROCEDURE: *Trial for murder: Instruction as to lower offense.*

On a trial for murder in the first degree it is not error to instruct the jury as to the law of manslaughter if there is any evidence to justify a conviction of the latter offense.

ERROR to *Craighead* Circuit Court.

J. E. RIDDICK, Judge.

The appellant was convicted of voluntary manslaughter on an indictment for murder in the first degree.

N. W. Norton, for appellant.

1. The evidence is insufficient to support the verdict, especially of manslaughter, and the court erred in instructing the jury as to the law of manslaughter. *37 Ark., 436; 50 id., 506.*

2. It was error to admit the evidence of Clears and Newcomb to contradict the witness King. The State was bound by the answer of King. *Whart. Cr. Ev. (8 ed.), sec. 484; 1*

Greenl. Ev. (*13 ed.*), *sec. 449; 11 S. W. Rep., 106; 34 Ark., 480; Mansf. Dig., sec. 2902.*

W. E. Atkinson, Attorney General, for appellee.

1. It was entirely proper for the court to submit to the jury the entire question, and it was for them to say whether the killing being found, it was murder or manslaughter. *37 Ark., 433; 50 Ark., 506.*

2. Though enmity or bias be the issue, the court may permit particular facts or conditions to be shown, to prove bias or interest of the witness after the predicate has been laid on his cross-examination, and he had denied their existence. *50 Penn. St., 319; 64 Ind., 400; 1 Parker Cr. Rep., 154; Greenl. Ev., sec. 450.* See the rule in *34 Ark., 484,* and *13 id., 800, 801.* It is not a collateral question, but a very important one to prove the motives or temper of the witness, and not the reason for the motive.

WITNESSES: Bias of.

PER CURIAM. During the trial of the appellant, a witness introduced by him was asked if he had not made certain statements, which, if made, tended to show that he felt an interest in the defendant's behalf. He denied that he had made the statements, and the State was permitted, against his objection, to prove that he had made them. The bias of one called to testify in a case is not a collateral matter. The testimony was competent. *Butler v. State, 34 Ark., 480; Whar. Cr. Ev., sec. 485.*

INSTRUCTIONS.

It is urged that the court erred in instructing the jury as to the law of manslaughter, against the appellant's objection. We cannot say there was no testimony to justify a conviction of manslaughter. Affirm.

STATE v. AGNEW.

52 73 275 328

INDICTMENT: *Signature to indorsement.*

The statutory provision that the indorsement, "a true bill," on indictments, shall be signed by the foreman of the grand jury, is directory, and where such signature is omitted, objection to the irregularity is waived unless made before pleading.

APPEAL from *Logan* Circuit Court.

H. F. THOMASON, Judge.

Agnew was indicted and on trial for the sale of intoxicating liquors without a license. After the evidence for the State had been closed, and while a witness for the defense was being examined, the court discovered that the indorsement, "A true bill," on the back of the indictment had not been signed by the foreman of the grand jury. The court thereupon, on its own motion, discharged the jury and dismissed the cause on the ground that there was no indictment upon which the defendant could be convicted. The State excepted and appealed.

Section 210 Mansfield's Digest provides that where an indictment is found "it must be indorsed 'a true bill,' and the indorsement signed by the foreman."

W. E. Atkinson, Attorney General, for appellant.

1. While in England the indorsement "*Billa Vera,*" signed by the foreman of the grand jury, is absolutely essential, with us the matter is a form; the statute is directory merely, and any objection to it may be waived. *14 Mo., 94; Morris (Iowa), 332; 1 Nott & McCord, 256; 6 Iredell, 440.* If the record shows the finding or return into court of the indictment, it will render the indorsement unnecessary, as this sufficiently authenticates the indictment.. *6 Ire., 440; 24 Tex., 135; 33 ib., 444; 23 ib., 599; 21 Cal., 372-3.*

Even where the indorsement and signature are held requisite, the objection must be taken in the preliminary stage of

the proceedings. *47 Mo., 274; 10 Minn., 223*, and cases *supra*. See, also, *28 Ark., 411; 33 id., 174*. Defendant should have been held to answer a new indictment any way. *Mansf. Dig., 2158*.

INDICTMENT.

PER CURIAM: The provision that the foreman of the grand jury shall sign the indorsement, "A true bill," upon indictments, is directory, and the objection to the irregularity is waived, unless made before pleading. *People v. Lawrence, 21 Cal., 372; State v. Mertens, 14 Mo., 94; State v. Creighton, 1 Nott & McCord, 256; Wam-kod-chow-neck-kow v. U. S., Morris, 1 Iowa, 332; State v. Cox, 6 Ire., 440; State v. Fowell, 24 Texas, 135; State v. Murphy, 47 Mo., 274; State v. Shipley, 10 Minn., 223; State v. Brandon, 28 Ark., 411; State v. Johnson, 33 Ark., 174*.

Reverse and remand, with directions to put defendant upon his trial.

RUSSELL V. STATE.

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INDICTMENT: *For assault with intent to kill.*

In an indictment for an assault with intent to kill and murder, it is sufficient to allege that the assault was committed in the manner and with the intent necessary to constitute the offense charged, without expressly averring "the present ability" necessary under the statute to constitute the assault. [*Mansf. Dig., sec. 1562.*] The word "assult," when used in such connection, means all the statute defines an assault to be.

APPEAL from *Washington* Circuit Court.

J. M. PITTMAN, Judge.

Russell was indicted for an assault with intent to kill. The indictment, omitting the usual commencement, is as follows: "The said J. M. Russell, in said county, on the 29th day of September, 1888, upon one James Sharp, with a certain knife, feloniously, wilfully and of his malice aforethought, did make an assault, with intent him, the said James Sharp, then and

there feloniously, wilfully and of his malice aforethought, to kill and murder then and there, no considerable provocation appearing against the peace and dignity of the State of Arkansas."

The defendant demurred on the ground that the indictment does not allege that he had "the present ability" to commit the offense charged, and does not allege facts from which such ability could be inferred. His demurrer having been overruled he was convicted of a simple assault, and appealed. The only question raised by the appeal is as to the sufficiency of the indictment. Section 1562 Mansfield's Digest is as follows: "An assault is an unlawful attempt, coupled with present ability to commit a violent injury on the person of another."

J. M. Russell, pro se.

1. The indictment is bad, because all the allegations contained may be true, and yet the defendant may be innocent; it does not charge a "present ability" to commit the injury. *19 Ark, 143; 37 id., 96; 36 id., 151; 37 id., 96; 48 id., 67; 2 Bish. Cr. Law, Par. 23; Mansf. Dig., sec. 1562; 49 Ark., 179; 8 Ind., 524–5; 16 id., 298; 58 id., 415; 67 id., 401–8; Myers Ky. Code (1867), p. 600.*

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellee.

Indictments merely charging an assault, have been often sustained by this court. See *7 Ark., 374; 49 Ark., 179; 34 id., 480; ib., 275; 24 ib., 348; 5 id., 660; 20 id., 66; 8 id., 451; 4 id., 56.* Present ability must be *proven. 49 Ark., 179.* But it is not necessary to allege it. *Bish. Cr. Pro., sec. 55; 1 Roscoe Cr. Ev., 423; 2 Greenl. Ev., sec. 82; 3 Sm. & M. (Miss.), 553; 1 Russell Crimes, 750; 78 Ala., 463; 43 Mich., 521; 31 Tex., 170; 18 Oh. R., 32; 35 Am. Dec., 735; 8 Ind., 524; 2 Arch. Cr. Pl., 282–7.* But see *contra* cases collected in *49 Ark., 179.* Yet not one of these cases decide that *at common law it was necessary to allege such present means, etc.*

No other court has followed., *58 Ind., 415*. See *18 Ala., 551–552*.

An indictment good at common law is good under the statute. *20 Ark., 183; 33 id., 566; 25 id., 405; 26 id., 323; 1 Bish. Cr. Pro., sec. 322; Bish. St. Cr., secs. 144, 254.*

ASSAULT: Indictment.

PER CURIAM. In an indictment for an assault with intent to kill and murder, it is not necessary to pursue the terms of the statutory definition of an assault. It is sufficient to allege that the assault was committed in the manner and with the intent necessary to constitute the offense, without expressly averring "the present ability" necessary to constitute the assault. The word assault or assaulted used in such connection means all the statute defines an assault to be. *Bishop on Statutory Crimes (2 ed.), sec. 514; Butler v. State, 34 Ark., 480; Lacefield v. State, ib., 275; Robinson v. State, 5 Ark., 660; McCoy v. State, 8 Ark., 451.*

Judgment affirmed.

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LIGHTLE V. CASTLEMAN.

CHATTEL MORTGAGE: *Description of property.*

A mortgage of "one black mare mule six years old in the mortgagor's possession in White County, Arkansas," states facts by which third persons can identify the property, and is a sufficient description.

APPEAL from *Hempstead* Circuit Court.

C. E. MITCHEL, Judge.

This is an action of replevin brought in a justice's court to recover a mule. On appeal to the Circuit Court, the plaintiff offered in evidence a deed of trust executed by one Hill and conveying to the plaintiff an animal which it described as "one black mare mule, six years old." After describing other property the deed concludes as follows: "All of said property is now in my possession in White County, Arkansas." The court excluded the deed on the ground that its description of

the mule was insufficient. The court also excluded evidence offered by the plaintiff to show that the animal described in the deed was the mule in controversy. The judgment was for the defendant, and the plaintiff appealed.

J. W. House, for appellant.

The description in the mortgage was sufficient to identify the property. *Herman Ch. Mortg., sec. 38; Jones Ch. Mortg., sec. 54; 60 Me., 118; 15 N. H., 529; 24 Iowa, 331; 71 id., 693; 11 Neb., 499; 66 Ala., 258; 33 Kans., 649; 26 id., 574; 51 Ark., 410.*

See, also, *13 Gray, 517; 12 Met., 333; 7 Cush., 456; 19 N. Y., 123; 25 Me., 419; 24 Me., 104; 97 Am. Dec., 755; 84 id., 348.*

R. B. Williams, for appellee.

PER CURIAM: A mortgage which describes the property as "one black mare mule six years old in the mortgagor's possession in White County, Arkansas," states facts by the aid of which third persons could identify the mortgaged property and is a good description. *Johnson v. Grisard, 51 Ark., 410; Jones Chat. Mort., secs. 54 and 54a.* CHATTEL MORTGAGES.

Reverse the judgment and remand the cause.

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HELT V. STATE.

INDICTMENT: *Presumption as to returning.*

Where an indictment recites that it was found in the Circuit Court of a county embracing two judicial districts, without specifying in which district it was found, and it appears from the term at which the indictment was found and the date of the Clerk's indorsement upon it when it was received from the grand jury, that it was returned at a time when the court for one of the districts alone could legally be in session, it will be presumed from the indictment itself that it was returned by a grand jury legally empaneled in that district.

APPEAL from *Lincoln* Circuit Court, Star City District
JOHN M. ELLIOTT, Judge.

The following indictment was returned by a grand jury into the Circuit Court of Lincoln County at a term thereof beginning on the 27th day of August, 1888, and held at the court house in Star City:

"IN THE LINCOLN CIRCUIT COURT,

"August Term, 1888.

"STATE OF ARKANSAS,

v

"J. S. HELT.

"The grand jury of Lincoln County, in the name and by the authority of the State of Arkansas, accuses J. S. Helt of the crime of carrying a weapon, committed as follows, to-wit:

"The said J. S. Helt, in the county and State aforesaid, on the 20th day of April, 1888, did carry a pistol as a weapon contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Arkansas."

The defendant filed a special demurrer stating as grounds of objection to the indictment: (1.) That it does not show that it was found by the grand jury of Lincoln County for the Star City District. (2.) That it does not state that the offense was committed within the jurisdiction of the Circuit Court of said county in and for said district. The demurrer was overruled, and the defendant having been convicted appealed. By an act approved April 9, 1885, and amended in 1887, Lincoln County was divided into two judicial districts, to be known as the Star City District and the Varner District. The act provides that the Circuit Court held at the county seat shall be styled "The Circuit Court for the County of Lincoln for the Star City District," and shall have exclusive jurisdiction over that district. It also provides that the Circuit Court held at the Town of Varner shall be called "The Circuit Court of Lincoln County for the Varner District," and that its jurisdiction shall extend over the latter district as if the same were a constitutional county. The act further provides that to ascertain the venue of actions, the two districts shall be for

the purposes of the act considered as separate and distinct counties. And that the Circuit Courts established therein "shall be as distinct from each other as if they were the Circuit Courts of different counties."

The time fixed for holding the Circuit Court for the Star City District is the fourth Mondays in February and August, and for the Varner District on the first Mondays in March and September.

J. M. Cunningham, for appellant.

Lincoln County was divided into two districts by Acts 1887, page 262. Two Circuit Courts were thereby erected, having separate territorial jurisdiction. The indictment is insufficient because it does not charge that the offense was committed within the jurisdiction of the court for the Star City District. *Mansf. Dig., sec. 2106; 1 Bish. Cr. Pro., secs. 375, 98; Mansf. Dig., sec. 2113; Coke, Litt., 381a, 381b.* See, also, *31 Ala., 227; 5 Cal., 169; 13 Ia., 310; 13 Ohio, N. S., 382; 32 Tex., 204; 3 N. E. Rep., 903.*

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellee,

The demurrer was properly overruled. *12 Ark., 799; 1 Bish. Cr. Pro., secs. 661-2-4-7; 50 Ala., 155; Mansf. Dig., secs. 2107, 2113.*

PER CURIAM. The indictment recites simply that it was found in the Lincoln Circuit Court, at the August term, 1888, by the grand jury of Lincoln County, without specifying in which of the two districts of the county it was found. Without referring to the record entries to ascertain where the court sat which empaneled the grand jury, it appears from the term at which the indictment was found, and date of the Clerk's indorsement upon it, when it was received from the grand jury, that it was returned at a time when the Star City District of the court alone could legally be in session. It will therefore be presumed from the indictment itself, that it was re-

INDICTMENT: Presumption.

turned by a grand jury legally empaneled in that district. See *Cornelius v. State, 12 Ark., 799.*

The proof shows that the offense was committed in that district; the defendant was tried and convicted there; there is no other point made in the case, and the judgment will be affirmed.

DOW v. KING.

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1. JUDGMENT: *For conversion of chattel: Pleading.*

In an action of replevin an interplea claiming the chattel sued for on the ground that the plaintiff has recovered judgment against the interpleader for its conversion, is bad if it fails to allege a satisfaction of the judgment.

2. SAME: *For injury to chattel: Title under.*

A judgment for damages recovered for injuring a chattel, can confer upon the defendant no right to the property.

APPEAL from *Lonoke* Circuit Court.

J. W. MARTIN, Judge.

King brought an action of replevin against Sessums for a mule. The defendant answered that at the request of the plaintiff he had taken charge of the mule when it was injured by a train, and had given it necessary care, and held it for a lien of $40. Dow and others filed an interplea setting up that they were the trustees of the Memphis and Little Rock Railroad, and operating it as such, and while so operating it had injured the mule, and that thereupon the plaintiff had brought suit for it as for a total loss, and had recovered, and that the mule had thereby become the property of the interpleaders. A demurrer to the interplea was sustained, and Dow *et al.* appealed.

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

Instead of suing for the damage to the mule, appellee sued for its value and recovered judgment, which has been paid. The appellants, were, therefore, the owners of the mule, for

when a person recovers the value of property taken or destroyed, the judgment passes the title to the defendant. *42 Ark., 211; 2 Addison on Torts, marg. p. 481.*

T. C. Trimble and *John C. & C. W. England*, for appellee.

Judgment against trespassers, without satisfaction, does not transfer the title. *3 Wall, 1; 104 Mass., 108; 1 John., 290; 5 Dana, 299; 11 Bush, 265.*

PER CURIAM. The interplea is bad whether the original action against the railway was for the conversion of the mule, or for damages for injury done it. In the former case it should have alleged a satisfaction of the judgment recovered for the conversion (*Cooley on Torts, 458*), and in the latter event the interpleaders had no claim to the property at all. PLEADING.

Affirm.

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HILLIARD v. HILLIARD.

APPEAL: *From Probate Court: Allotment of dower.*

In a proceeding in the Probate Court for the allotment of dower, an order confirming the report of commissioners appointed to make the allotment, is the final judgment of the court, and an appeal therefrom carries the whole case to the Circuit Court for trial *de novo.*

APPEAL from *Chicot* Circuit Court.

C. D. WOOD, Judge.

This was a proceeding begun in the Probate Court for the allotment of dower to Mrs. Caroline Hilliard in the land of her deceased husband. Commissioners were appointed to make the allotment, and their report was approved and confirmed by the court. From the order approving the report Mrs. Hilliard appealed. In the Circuit Court she filed numerous exceptions to the report, presenting questions which could only be determined by a trial *de novo.* Upon motion of the appellee, all these exceptions except one were stricken out on the ground

that they "did not relate to the order of the Probate Court appealed from." Mrs. Hilliard then filed her motion for a trial of the cause *de novo*, and the same was ordered to be stricken from the files. The court then proceeded to try the cause on the remaining exception which questioned only the manner of making the allotment, and gave judgment confirming the report. Mrs. Hilliard appealed, and contends that the approval of the commissioners' report was the final order of the Probate Court in the cause, and that the appeal therefrom carried up to the Circuit Court for trial the whole case.

Wm. B. Street, for appellant.

The order appointing the commissioners was not a final order, but the order confirming the report of the commissioners was *final*, and an appeal from the latter brings up the whole case for consideration. *Mansf. Dig., secs. 1386, 1389, 1367; 38 Ark., 388; Freeman on Judg., sec. 28, p. 16, and sec. 30; 15 B. Mon., 48; 66 Mo., 465; 84 Penn. St., 238; 41 Ind., 398; 41 Md., 419.*

D. H. Reynolds, for appellees.

Allotment of dower.

PER CURIAM. The order confirming the report of the commissioners appointed to allot dower, was the final judgment of the Probate Court in the case; and the appeal from that judgment carried the whole cause to the Circuit Court for trial *de novo*. It was error, therefore, in the Circuit Court to confine the appellant to her exceptions to the manner of allotting dower. The judgment will be reversed and the cause remanded for a rehearing.

GORE v. STATE.

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CRIMINAL PROCEDURE: *Trial for felony: Presence of defendant.*

Section 2213 Mansfield's Digest which provides that if a defendant on trial for a felony, escapes from custody after his trial has commenced, "or if on bail, shall absent himself during the trial, the trial * * * may progress to a verdict," is not unconstitutional. The guaranty of the Constitution (Art. 2, Sec. 10) that the defendant shall have the right to be confronted with the witnesses against him, does not include the right to abscond and then complain of his own absence.

APPEAL from *Montgomery* Circuit Court.

L. LEATHERMAN, Special Judge.

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellee.

Appellant, having absconded, the court properly proceeded with the trial to verdict. *Sec. 2213 Mansf. Dig.*

SANDELS, J. Appellant, E. N. Gore, was indicted in Montgomery Circuit Court for grand larceny and gave bail for his appearance. He was present at the commencement of the trial, on the 17th day of February, 1880. On the next day, and during the progress of the trial he absented himself. Thereupon, the Prosecuting Attorney having elected to proceed, the court allowed the cause to progress to a verdict. The jury found appellant guilty. Subsequently, on the 21st day of August, 1889, appellant was brought into court in custody of the Sheriff, and judgment was rendered upon the verdict.

The motion for a new trial states three grounds, viz.:

(1.) Defendant was tried for a felony in his absence.

(2.) Defendant was absent when the verdict was rendered, or returned into court.

(3.) The jury was charged by the court that if the value of the goods taken by defendant amounted to $2, they should find him guilty and assess his punishment at not less than one year in the penitentiary.

There is no bill of exceptions, and we do not know what instructions were given by the court.

Trial for felony: Presence of defendant.

The only question arising upon the record is, does section 2213 Mansfield's Digest, violate the Constitution? That section is as follows:

"If the indictment be for a felony the defendant must be present during the trial. If he escapes from custody after the trial has commenced, or if on bail, shall absent himself during the trial, the trial may either be stopped or progress to a verdict, at the discretion of the Prosecuting Attorney; but judgment shall not be rendered until the presence of the defendant is obtained."

It has been uniformly held by this court that a defendant, charged with felony, has a right to be present at every stage of his trial. Sections 8 and 10 of Article 2 of the Constitution have been construed to guarantee him that right. And it has been often held that a defendant cannot waive his constitutional rights by agreement. It is now to be determined whether the constitutional guaranty that the defendant shall be confronted with the witnesses against him remains, where he, pending a trial, absconds and refuses to be confronted. Neither direct authority nor analogy are lacking in the construction of this guaranty.

For two hundred years it has been ruled in England that where a witness is absent by the fraudulent procurement of a defendant, the deposition of the witness taken on a preliminary hearing may be read in evidence. *Lord Morley's case, 6 State Trials, 770; Harrison's case, 12 State Trials, 851; Reg. v. Scaife, 17 Ad. and El. (N. S.), 242,* and the same doctrine prevails in this country. *Drayton v. Wells, 1 Nott & McCord, 409; Williams v. State, 19 Ga., 403; Reynolds v. U. S., 98 U. S., 145-158; 1 Greenleaf on Ev., 163; 1 Taylor on Ev., 446; 1 Wharton on Ev., 178.* In the last mentioned case Chief Justice Waite, delivering the opinion of the court, says:

"The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.

"*The Constitution does not guarantee* an accused *person* against the *legitimate consequences of his own wrongful acts.* It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witness away he cannot insist on his privilege. If, therefore, when absent by his procurement their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

And after reviewing the English and American authorities upon the point, he adds: "We are content with this long usage which so far as we have been able to discover has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and if properly administered can harm no one."

In *United States v. Davis, 6 Blatchford, C. C. Rep., p. 464,* it was ruled that where a defendant was so violent and obstreperous as to prevent the orderly progress of his trial, it was proper to remove him from the court and proceed with the trial. In *Price v. State, 36 Miss., 531,* and in *Fight v. State, 7 Ohio, 327,* it is held that where a defendant, pending his trial, absconds, it is proper to proceed to verdict. The Constitution guarantees him the *right* to be present, but this guaranty was never intended to include the right to abscond and then complain of his own absence.

We hold the statute constitutional and affirm the judgment.

OPP V. WACK.

1. STATUTE OF LIMITATIONS: *New promise to avoid.*

Where a new promise relied upon to avoid the statute of limitations is conditional, it must be proved that the contingency contemplated by the promise has occurred.

2. SAME: *Same.*

Where a new promise or acknowledgment is relied upon to remove the bar of the statute of limitations, and it is otherwise sufficiently specific, parol evidence is admissible to identify the debt to which the promise attaches by showing that there was but one debt due from the defendant to the plaintiff. But where two or more distinct obligations are due, the written acknowledgment or promise must itself identify the debt to which it refers.

3. SAME: *Same.*

The defendant being indebted to the plaintiff on six distinct obligations, wrote to to him, saying * * * "rest assured I will do all I can for you. Don't push me, as yours is the only claim on the shop, and I will work it off as soon as possible." HELD: That the writing is insufficient as a new promise to avoid the bar of the statute of limitations, since it fails to designate which one of the obligations the defendant promises to "work off."

APPEAL from *Phillips* Circuit Court.

M. T. SANDERS, Judge.

J. J. Honor and *J. C. Tappan*, for appellant.

There is no unconditional promise to pay, nor any unqualified acknowledgment that the claims were due; nor any express promise to pay them; nor are the debts identified. If there be a promise at all, it is only a conditional one, and there is no proof that the condition has been performed. In no particular does this letter come up to the rule required by the statute. *26 Ark., 543; 1 Peters, 351; 8 N. Y., 369; 9 N. Y., 85.*

P. O. Thweatt, for appellee.

The proof shows there was no other indebtedness than the one mentioned in the letter, which is the foundation of this suit. This was sufficient identification. *10 Ark., 134; 7 Cal. 22; 22 Ark., 290; Angell on Lim., sec. 208; 66 Md., 558; 91 Mo., 622; 16 Neb., 21; ib., 55.*

A new promise, made before the bar intervenes, operates to continue the obligation from that time. *26 Ark., 543; 86 Mo., 543; Angell on Lim., sec. 237; 122 U. S., 231.*

SANDELS, J. Action brought June 4, 1887, by appellee, upon six bills of exchange—one dated October 8, 1881, due at ninety days, for $212.80; one dated October 25, 1881, due at ninety days, for $311.05, and four dated November 14, 1881, for $82.12 each, and due at fifteen, thirty, forty and sixty days, respectively.

The complaint also alleges that on October 3, 1882, appellant, in writing, acknowledged said several debts, and promised to pay the same. Answer—statute of limitations and denial of promise to pay within five years. The letter written by R. A. Opp, appellant, dated October 3, 1882, upon which appellee relied to take his claims out of the statute of limitations, is in words and figures as follows :

"HELENA, ARK., October 3, 1882.

"*Wack & Miller:*

"GENTS—Yours to hand a few days ago. I have been sick, and am just up. My dear sir, it is impossible for me to give drafts to pay at any particular time at present, as yet business is as dull as it could be. But our prospect is good for a lively trade this fall. The extreme hard times has reduced my stock. But we are at work like Turks to get up work for the fall trade, and rest assured that I will do all I can for you. But it is no use to give drafts and have them go to protest. Don't push us, as yours is the only claim for goods on the shop, and I shall work it off as soon as possible.

"Truly yours,

(Signed) "R. A. OPP."

Wack and Wurth testified that the letter could have referred only to the acceptances in suit; that defendant owed plaintiff these six bills at the time it was written.

Construed most strongly against the writer, the letter of Opp is at most a conditional promise; in which event it is

STATUTE OF LIMITATIONS: New promise to avoid.

always necessary to prove the happening of the contingency or accrual of the subject matter of the condition. But a fatal insufficiency exists in the failure of the letter to designate which one or ones of the drafts he promised to "work off." Where a promise to pay a debt barred by limitation, or an acknowledgment within the period of limitation is relied upon, and is otherwise sufficiently specific, parol proof may be admitted to show that there was but one obligation due from defendant to plaintiff, and thus identify the debt to which the promise refers. But where there are two or more distinct obligations due the plaintiff, the written acknowledgment must itself identify the one or ones to which the promise to pay attaches. *Ringo v. Brooks, 26 Ark., 540; Armistead v. Brooke, 18 Ark., 521.*

Reverse and remand for a new trial.

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BEARD V. WILSON

1. STATUTES: *Extending provisions of, by reference.*

The act of March 4, 1875 [*Mansf. Dig., sec. 3072*] declaring that the sections of Gantt's Digest which provide for the redemption of lands sold under execution [*Mansf. Dig., secs. 3067–3071*] apply to all sales made under decrees in chancery, undertakes to "extend" the provisions of a law "by reference to its title only," in violation of section 23, article 5, of the Constitution, and it is therefore void.

2. REDEMPTION: *From attachment sales.*

A sale under the judgment of a court of law sustaining an attachment, is not a judicial sale, and where real property is thus sold the right to redeem it within one year thereafter is given by section 3067, Mansfield's Digest, as in case of technical execution sales.

3. EJECTMENT: *Pleadings in.*

Where, under Mansfield's Digest, section 2632, a complaint in ejectment states facts sufficient to show a *prima facie* title in the plaintiff, an answer thereto which merely denies the plaintiff's title and states no facts showing a defect therein or a superior title in the defendant or in some third person, is insufficient.

4. SAME: *Same.*

To a complaint in ejectment setting out the evidence of title relied on by the plaintiff, the defendant filed an answer containing a general denial of the plaintiff's title and claiming title in himself derived from the same source as that of the plaintiff. Exceptions were sustained to the evidence of title exhibited with the answer and the defendant declined to amend. HELD: That as the answer contained nothing after the exceptions were sustained except a mere denial of the plaintiff's title, it was not sufficient, and a demurrer thereto was properly sustained.

APPEAL from *Lee* Circuit Court.

M. T. SANDERS, Judge.

U. M. & G. B. Rose, and *McCulloch & McCulloch*, for appellants.

1. There is no redemption from a purchase under a decree in chancery. The act of March 4, 1875, page 212, is void, because it is an attempt to make a new law by reference only. *Const., art. 5, sec. 23; 49 Ark., 131.*

2. But if the right exists, the existence of a mere right of redemption does not prevent the levy of an attachment or execution upon the interest of the purchaser. This precise question has not been decided by this court, but its decisions point favorably to our contention. *42 Ark., 305; 33 id., 222.* See *31 Cal., 293–594; 36 id., 397; 2 Const., 373; 7 Watts, 437; 8 Watts & S., 188; 28 Penn. St., 169; Freeman on Ex., sec. 193; 40 Me., 589.* The purchaser not only has a title which may be seized on execution, but nothing remains in the judgment debtor that is liable to seizure. *13 Ill., 298; 24 id., 281; 29 Mich., 123.*

3. There is no right of redemption in an attachment debtor. The right is only given in case of mortgages, taxes and executions. Attachment sales are judicial sales, and there is no right of redemption. The property is sold by order of the court, and is of no validity until confirmed by the court, etc. *Rorer on Jud. Sales, secs. 1, 5; 34 Ark., 352; 42 Ark., 305.*

4. It was not necessary for the court to approve of the form of the deed; it was only necessary to confirm the attach-

ment sale. *Mansf. Dig., sec. 350.* Only deeds by commissioners in chancery need approval. *Sec. 5256.*

5. An answer which directly denies the title of a plaintiff in ejectment and his right to recover is not demurrable.

The plaintiff must recover on the strength of his own title, not on the weakness of his adversary. *24 Ark., 402; 26 id., 423; 19 id., 201.* See, also, *2 Greenl. Ev., secs., 303–4; Mansf. Dig., sec. 2635.* The court, therefore, erred in sustaining the demurrer and in permitting plaintiff to recover without proof of title in herself.

43 Ark., 296, is erroneous. See *Sedg. & W. Trial of Title to Land, sec. 478; Newman on Pl. and Pr., 532; 2 Yaple's Code Pr., 750; Boone Code Pl., sec. 185; Bliss Code Pl., sec. 328.*

Wm. G. Whipple, for appellee.

The main question is, was the answer demurrable? And this involves several questions.

1. The master's deed is *prima facie* evidence of good title in plaintiff. *2 Jones on Mort., secs. 1653, 1637.*

2. The purchaser at the foreclosure sale may substitute another to receive the deed. *Ib., sec. 1652.*

3. The foreclosure was subject to redemption. *Act March 4, 1875; Mansf. Dig., sec. 3072.* This act is valid. It is clearly within the legislative competency to declare the true intent and meaning of other legislative acts. *Cooley on Const. Lim., star page 93.* It is not obnoxious to constitutional objection. *Art. 5, sec., 23; 49 Ark., 134; 31 id., 239; 29 id., 252.*

4. But if the sewing machine company still had an interest in the land, it was not subject to attachment. The same rule governs, in this particular, attachments and executions. *Drake Att., sec. 232.* The interest of such a purchaser is an equitable estate. *Freeman on Ex., sec. 193.*

But the interest of a purchaser at a foreclosure sale, prior to the master's deed and during redemption, is not an estate, neither a *jus ad rem* nor *a jus in re,* but only a lien. He is not entitled to possession, nor can he maintain ejectment.

See 2 *Jones on Mortg.*, *sec. 1661*, *etc.* The interest of a mortgagee before or after entry is not attachable. *Drake Att.*, *sec. 235*. Nor has a vendor, who has given bond for title and received full payment, an interest subject to execution. *Freeman on Ex.*, *sec. 181; 21 N. H.*, *347*.

5. The deed to Roots by the Sheriff was premature and void. *Freeman on Ex.*, *sec. 316; 27 Cal.*, *238*. If this was an execution sale, it is clear the right of exemption exists. *Mansf. Dig.*, *sec. 3067*. An attachment sale of real estate is in the nature of an execution sale. It is by the Sheriff. *Mansf. Dig.*, *sec. 347*. The court is not the vendor. A Sheriff's sale is not a judicial sale ordinarily. *Rorer on Jud. Sales* (*2d ed.*), *sec. 590; 18 Vt.*, *394*. An attachment is but a preliminary execution. The land was sold on a special *fi. fa.* See *Waples on Att.*, *p. 523; Rorer Jud. Sales.*, *secs. 593, 590–8; 47 Ark.*, *133*.

6. A general denial of ownership is not a good pleading. *43 Ark.*, *299, 305; Mansf. Dig.*, *sec. 5072; Estee Pl.*, *vol. 2, p. 911*.

HUGHES, J. Appeal from Lee Circuit Court. The appellee filed her complaint, claiming title to and right to possession of land described therein, and alleging that appellant, Beard, was in unlawful possession thereof. As evidence of title she exhibited with her complaint a deed for the land, executed to her on the 29th day of April, 1886, by a commissioner in chancery, who had sold the same under a decree in chancery, in the United States Circuit Court for the Eastern District of Arkansas, against said Beard, in favor of the Wilson Sewing Machine Company, of Chicago, Ill., which company had purchased the land at the sale by said commissioner, and received a certificate of purchase from him, which it had transferred to the appellee, Henrietta Wilson, and upon which her deed was made. The deed had been approved by the court, and recorded.

Appellees in their answer denied the ownership and right of possession of the plaintiffs, averred ownership and possession in appellant, Roots, and admitted that Beard was in posses-

sion as his tenant. As evidence of his title, Roots exhibited with the answer a deed executed to him for the land, by the Sheriff of Lee County, on the 24th day of September, 1887, based upon a purchase of said land by Roots, on the 6th day of December, 1886, which had been made by said Sheriff pursuant to the judgment and order of said Circuit Court rendered, and made respectively on the 8th day of May, 1886, and the 26th day of October, 1886, in a cause then pending in said court, wherein G. W. Hull, as receiver of the Wilson Sewing Machine Company, of Wallingford, Conn., was plaintiff, and said Wilson Sewing Machine Company, of Chicago, Ill., was defendant, in which cause a general attachment was issued on the 25th day of March, 1885, and levied upon the land in controversy on the 25th day of the same month.

Exceptions to the documentary evidence exhibited with the answer of defendants were sustained by the court, upon the ground that the Sheriff's deed filed therewith was executed within one year from the Sheriff's sale at which appellant, Roots, became the purchaser of the land. Defendant excepted, and declining to plead further, a demurrer to the answer was interposed, in short, upon the record, upon the ground that (since exceptions were sustained to the documentary evidence exhibited with the said answer), it did not state facts sufficient to constitute a defense to the action. The demurrer was sustained, and defendants excepted and declined to plead further. The court found for the plaintiff, impaneled a jury to assess damages upon the return of their verdict, rendered judgment for the plaintiff for recovery of the land and for damages, to which defendants excepted and appealed.

Did the right of redemption from the chancery sale above referred to exist?

1. STATUTES: Extending provisions of by reference.

The act of the General Assembly of the 4th of March, 1875, in reference to the right of redemption from sales under decrees in equity is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Arkansas*, That it was and is the true intent and meaning of sections 2696, 2698, 2699 and 2700 should and does apply to all sales of real estate made and had under and by virtue of decrees of chancery courts, in the same manner as they did to sales under executions at law."

This act evidently refers to the sections above named of Gantt's Digest, in reference to the right of redemption from execution sales; otherwise it can have no intelligible meaning or application. The language is ungrammatical, but bad grammar does not vitiate.

Is this act constitutional?

Section 23, of article 5, of the Constitution of 1868, which is substantially the same as section 23, of article 5, of the Constitution of 1874, declares: "No act shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length."

The same provision is a part of the Constitution of the State of Pennsylvania. In considering the constitutionality of an act of the Legislature of that State, relating to the lien of mechanics and others upon buildings, passed June 17, 1887, the Supreme Court of Pennsylvania held the act unconstitutional, upon the ground that it undertook to extend and confer the benefits of the acts of 1836 and 1845 to a large class of claimants, which the courts had held not to be within their provisions, by reference to their titles only, without the re-enactment of a single one of the provisions so extended. The court said: "It would be difficult to imagine a plainer violation of the constitutional provision. *Titusville Iron Works v. Keystone Oil Co., 122 Pa., 627.* See *14 Hunn., 438; Watkins v. Eureka Springs, 49 Ark., 131.*" This is exactly the character of our act of March 4, 1875, which comes within the inhibition contained in the above

named section 23, of article 5, of the Constitution, and is void on that account.

2. REDEMPTION: From attachment sales.

Does the right of redemption from a sale under a judgment in an attachment suit exist for one year, after the sale, as in case of a technical execution sale?

Section 3067 of Mansfield's Digest provides, that "when any real estate, or any interest therein, is sold under execution, the same may be redeemed by the debtor from the purchaser, or his vendees, or the personal representatives of either, within twelve months thereafter."

It was doubtless the intention of the General Assembly in passing this act to give the right of redemption from sales of real estate under any final process from courts of law. The justice or sound policy of a distinction between technical execution sales and sales made in execution of judgments, in cases where attachments have issued, is not very apparent. It is true that sales under attachments must be reported to and confirmed by the court ordering the same, and in this particular they partake of one of the characteristics of judicial sales.

While it is generally proper to observe even the technical distinctions of the law, yet when to do so would tend to defeat the beneficent purposes of a remedial statute, they ought not to be entertained. In *Grubbs v. Ellyson, 23 Ark., 287*, Judge FAIRCHILD said: "An attachment is but a preliminary execution, so that a homestead is not subject to an attachment any more than it is to an execution which is final process."

In *ex parte Dingmon, in re Bissel Bros., vol. 9, Law Reports, Equity Cases, 34 Victoria, 618*, it is said, that "an execution is the result of a judgment, which has been recovered in some court of law."

"An execution is the end and fruit of the law." *Co. Litt., 289*. "An execution is the execution of the law according to the judgment." *Coke., 3 Inst., 212.*

"Execution is defined to be the act of carrying into effect the final judgment of a court. The writ, which authorizes the

officer so to carry into effect such judgment is also called an execution." *Lockbridge v. Baldwin, 20 Tex., 306.* "A writ of execution is the embodied power of the court, in the shape of a command to a ministerial officer, respecting the rights of the parties to the judgment; and imposing upon the officer certain duties and liabilities prescribed by law." *Ib., 307. Bouvier's Law Dictionary, in loco.*

We hold that a sale under a judgment and order of a court of law, in a suit in which an attachment issues, is not a judicial sale from which there can be no redemption under our statute, but that the statute gives the right of redemption from such sales, and that, therefore, the exceptions to the deed of appellant Roots, exhibited with his answer, were properly sustained.

Was the demurrer to the answer (interposed after the exceptions to the documentary evidence exhibited therewith had been sustained) well taken?

3. EJECTMENT: Pleadings in.

Our statute governing the pleadings in ejectment is peculiar. It requires that "the plaintiff shall set forth in his complaint all deeds and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same, as far as can be obtained, as exhibits therewith, and shall state such facts as show a *prima facie* title in himself to the land in controversy, and the defendant in his answer shall plead in the same manner as above required from the plaintiff." *Mansf. Dig., sec. 2632.* When exceptions are sustained to any of this documentary evidence, it cannot be used on the trial, unless the defect for which the exceptions are sustained is covered by amendment. *Ib., sec. 2633.*

4. SAME: Same.

Plaintiff and defendant having each derived title from a common source, and having specially pleaded and set out fully the evidences of title relied upon, when exceptions were sustained to the documentary evidence of the defendant exhibited with his answer, it is clear that there was nothing left in the answer, except the general denial of the plaintiff's

ownership and right to possession, which was a statement of a conclusion of law, and not of fact sufficient to constitute a defence to the action. *Keith v. Freeman, 43 Ark., 296.*

The defendant claiming title from the same source as the plaintiff, it is apparent from the pleadings in this case that the demurrer was properly sustained, and to hold this does not necessarily determine that there may not be cases in which an answer to an action to recover possession of real property would be good, only denying that the plaintiff was seized in fee simple of the land, or entitled to possession thereof, as alleged in the complaint.

If it were sufficient in ejectment, under our statute, for the plaintiff to allege in general terms, his ownership or right to possession without stating facts sufficient to show a *prima facie* title in himself, or right to possession, a specific denial of title in the plaintiff, or his right to possession, would be sufficient. In *Newman on Pleadings and Practice, 533*, it is said:

Same.

It would seem that in any case where the plaintiff sets forth in his petition a *prima facie* title, the defendant cannot, perhaps, by a mere denial of title in the plaintiff, be allowed to introduce proof to defeat that title, without having set out the facts in his answer showing the defects in the plaintiff's title, or a superior title in himself or some third person. Certainly it would seem that our statute does not allow him to do so.

Affirmed.

SANDELS, J., dissenting. I concur in holding the statute under consideration null and void, both for the reason stated by the court, and because it is an assumption of power by the Legislature to construe and determine the effect of statutes; a power which belongs alone to the judiciary. But I cannot assent to the two remaining propositions decided by the court. There is no ground upon which to place the claim that a sale under the judgment of the court sustaining an attachment is not a judicial sale.

The sale is of specific property, condemned by order of the court. There is no *writ*, but the judgment of condemnation is the officer's authority to sell. The purchaser acquires no title until the sale is reported to and confirmed by the court. There is not a single element of the definition of a judicial sale, which does not inhere in an attachment sale. The fact that every section of our statute on this subject commits the disposition of attached property to the *court*, from the time it is seized by the Sheriff to the sale of it under the final judgment, and the report to, and confirmation by, the court would seem to be conclusive of the contention that it is a judicial sale. The Supreme Court of Kentucky (whence our statute comes) has decided that an attachment sale is a judicial sale. *Greer v. Powell*, *3 Metc.* (*Ky.*), *125*

Redemption is a statutory privilege. The court decides that there is no redemption from sales under decrees, because no statute gives it. There is not a pretense that any statute, in terms, gives the right of redemption from attachment sales. The logic which extends the benefit of the statute relative to execution sales to the latter, and denies it to the former, is inscrutable. The reason stated is that as to attachments it is but a proper extension of a remedial statute. If so, why not extend it to sales under decrees? Or why extend the statute at all, on account of its beneficial provisions, to subjects which the Legislature, having full power in the premises, did not include in it?

I conceive that the wisdom and expediency of giving the right of redemption are questions for the Legislature alone, and that the courts have no right to extend the privilege to those whom that body has seen fit to ignore.

Upon the last question decided, I am also unable to agree with the court. The record shows that exceptions were filed to the exhibits to defendant's answer, and were sustained, and that upon the exceptions being sustained, a demurrer to the answer was filed and sustained. Sustaining exceptions to ex-

hibits simply precludes the use of such documents as evidence on the trial.

The fact that a party may not be able to prove an allegation in his pleading does not affect the sufficiency of the allegation, when tested by demurrer.

A complaint in ejectment alleges the plaintiff's ownership of the premises, and the defendant's wrongful possession. In addition to this the plaintiff is by statute required to state the evidence of his title, and file copies of deeds under which he claims. This is to prevent surprise on the trial, as objections to the admissibility of documentary evidence must be raised by exceptions in advance.

Now the statement that plaintiff claims title under and by virtue of certain conveyances, is not issuable matter. The defendant need not traverse the evidence by which plaintiff claims that he can establish his ownership. He is not compelled to set up title in himself in order to defend. He may rest upon a denial of plaintiff's title; this he may do at all times, for the plaintiff must recover upon the strength of his own title. But suppose he adds a claim of title in himself, and states such facts as are insufficient to give him title, the invalidity of his own claim does not deprive him of the right to be heard in denial of plaintiff's right. In this cause defendant denied plaintiff's title, and also set up title in himself. The court, upon exceptions, adjudged defendant's evidences of his own title insufficient, and then sustained a demurrer to the whole answer. I think that in any view the demurrer should have been overruled.

CITY OF FAYETTEVILLE v. CARTER.

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1. MUNICIPAL CORPORATIONS: *Power to regulate "drumming" for hotels: Amount of license fee.*

Though the power to regulate "drumming" for hotels and boarding houses, granted by section 751 Mansf. Dig., is conferred solely for police purposes, and municipal corporations cannot use it as a means of increasing their revenue, they may require persons engaging in such occupation to pay for a license to do so, a fee sufficient not only to cover the expense of issuing the license, but sufficient also to meet the expenses of the police supervision made necessary by the business in the city or town where it is licensed.

2. SAME: *Same: Presumption as to fee.*

As the amount of fee which it is necessary for municipal corporations to require for licensing hotel and boarding house "drummers" cannot in all cases be ascertained in advance, the courts will not interfere with the discretion exercised by a city or town council in fixing the fee, unless it is plainly unreasonable. And it will be presumed to be reasonable unless the contrary appears on the face of the ordinance or is established by proper evidence.

APPEAL from *Washington* Circuit Court.

J. M. PITTMAN, Judge.

C. R. Buckner, for appellant.

The ordinance was not void. Since the decision in *34 Ark., 553*, power to regulate and license hotel drummers has been granted cities by *Mansfield's Digest, sec. 751*. There was no proof that the fee was excessive or unreasonable. *43 Ark., 82*. The fee was reasonable compensation for *keeping the record, issuing the license and municipal supervision. Ib.*

T. M. Gunter, for appellee.

Twelve dollars and fifty cents was shown to be excessive and unreasonable. The ordinance was intended as a means of raising revenue and void. The right to regulate does not carry the right to tax.

BATTLE, J. Section 751 of Mansfield's Digest provides that all municipal corporations shall have power "to regulate drumming or soliciting persons who arrive on trains or otherwise, for hotels, boarding houses, bath houses or doctors," and to license

such drummers, and to provide that each drummer shall wear a badge plainly exposed to view, showing for whom and for what he is drumming or soliciting patronage, and to punish by fine any violation of such provision. In pursuance of this section the council of the City of Fayetteville passed an ordinance forbidding all persons to drum or solicit patronage from persons who arrive on trains or otherwise, for any hotel or boarding house, without having first obtained a license to do so, and paid therefor the sum of $12.50, and making a violation thereof an offense punishable by fine. In a prosecution against appellee this ordinance, without any evidence of its invalidity except the ordinance itself, was held void, because the $12.50 was an unreasonable fee for the license.

1. MUNICIPAL CORPORATIONS: Power to regulate drumming: License fee.

The authority of a municipal corporation to pass an ordinance requiring solicitors of patronage for hotels and boarding houses to take out license and pay a reasonable fee therefor is conceded by both parties. The only question presented for our consideration is, is the fee fixed by the ordinance in question reasonable?

The power to license and regulate granted by the statute was conferred solely for police purposes; and municipal corporations have no right to use it as a means of increasing their revenues. They can require a reasonable fee to be paid for a license. The amount they have a right to demand for such fee depends upon the extent and expense of the municipal supervision made necessary by the business in the city or town where it is licensed. A fee sufficient to cover the expense of issuing the license, and to pay the expenses which may be incurred in the enforcement of such police inspections or superintendence as may be lawfully exercised over the business, may be required. It is obvious that the actual amount necessary to meet such expenses cannot, in all cases, be ascertained in advance, and that "it would be futile to require anything of the kind." The result is, if the fee required is not plainly unreasonable, the courts ought not to interfere with the discretion exercised by the

2. Presumption as to fee.

council in fixing it; and unless the contrary appears on the face of the ordinance requiring it, or is established by proper evidence," they should presume it to be reasonable. *The City of Burlington v. the Putnam Ins. Co., 31 Iowa, 105, 106; Van Hook v. Selma, 70 Ala., 361; Van Baalan v. People, 40 Mich., 258; in re, Wan Yin, 22 Fed. Rep., 701; Johnson v. Philadelphia, 60 Pa. St., 445; ex parte Chin Yan, 60 Cal., 78; ex parte Gregory, 20 Texas App., 210; the Town of State Center v. Barenstein, 66 Iowa, 249; Fisher v. Harrisburg, 2 Grant's Cases, 291; St. Louis v. Weber, 41 Mo., 547; Carrigan v. Gage, 68 Mo., 541; the State, ex rel., etc., v. Gas Co., 37 Ohio St., 45; Clason v. Milwaukee, 30 Wis., 316.* According to this rule we cannot say, and it does not appear, that the fee required in this case is unreasonable. The contrary is presumed.

Reversed and remanded for a new trial.

BILLINGS V. STATE.

1. WITNESSES: *Impeachment of: Conflicting statements.*

Uuder Mansf. Dig., sections 2902, 2903, the right to impeach a witness by showing that he has made statements different from his testimony, does not depend upon his denial of such statements on cross-examination. And where the assumed statement is relevant to the issue and the witness, on being asked whether he made it, answers that he does not remember, proof that he made it is admissible.

2. CRIMINAL EVIDENCE: *Trial for homicide: Bruises on body of deceased.*

On a trial for murder where there was evidence to show that during the day of the killing the conduct of the defendant and deceased toward each other was rough and insulting, and that the deceased was the aggressor in such conduct, proof on the part of the State that the body of deceased was exhumed a few days after his death, and that certain bruises were found upon it, which, on being explained to the jury, tended to elucidate the question as to who had been the aggressor in the altercation which preceded the killing, was admissible.

3. SAME: *Same: Threats.*

On such trial the State was permitted to prove that two years before the killing, the defendant, in conversation with the wife of the deceased, wanted to buy

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her interest in certain lands and that on her refusal to sell on credit, he stated that he would have the land "or some man's hide." HELD: That such threat being ambiguous and too remote, both in circumstance and time, to afford any reasonable presumption of connection with the crime charged, was inadmissible.

4. SAME: *Facts proving offense not charged.*

Facts which go to prove the commission of an offense distinct from that charged in an indictment, are not admissible on the trial of the latter unless, in view of all the circumstances of the cause, there appears to be a connection between such facts and the offense charged, or they tend to prove some fact which it includes.

5. SAME: *Same.*

On a trial for murder the State proved that about two and a half years before the killing, the deceased and one W. had a fight; that a few minutes after the fight the deceased said to one B that he had knocked his (B's) brother-in-law down; that defendant, hearing the remark, ran up with a drawn knife and, saying with curses, "if it's brothers-in-law you are after, I am here," struck at the deceased with the knife. There was no proof that any subsequent altercation occurred between the parties, who were neighbors, or that their relations were thereafter and prior to the day of the killing, unfriendly. HELD: That evidence of the previous assault could only have been competent to show malice, and as there was no reasonable inference that it had that tendency, it was error to admit it.

APPEAL from *Perry* Circuit Court.

J. B. WOOD, Judge.

J. F. Sellers, for appellant.

1. It was error to allow the State on cross-examination to ask the witness if he had not made certain damaging statements about the defendant in his absence, and on cross-examination of another of defendant's witnesses, allowed the State to prove such statements. *Whart. Cr. Ev., 225; ib., 483-484; 58 Me., 239; 60 Me., 550; 64 id., 267; 16 Pick., 124; 30 Vt., 100; 10 Gray, 6; 63 Barb., 634; 53 N. Y., 164; 44 Cal., 452; 32 Ind., 145; 4 Iowa, 477; 14 Minn., 105; 23 Grat., 961; 16 Ark., 588-628; 10 id., 638; 45 id., 132, 165; Rapalji Wit., 109; Best's Ev., p. 632; Stephen's Dig. Ev., 179; 2 Phillips Ev., 903; 1 Starkie Ev., 189; 36 Penn. St., 29; 68 N. C., 124.*

2. Evidence of bruises on the body, without proof of defendant's connection with them, was inadmissible. *Whart. Cr. Ev., 48, 92.*

3. The evidence of Mary Billings as to conversation with and prior assault two years before the killing, was too remote.

4. The court's charge on self-defense was argumentative and misleading. Defendant not required to show prejudice by the error. *11 Oh. St., 470; 26 id., 476; 38 id., 383; 1 Humph., 88; 4 Baxter, 19.*

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellee.

1. The burden of showing justification was on defendant. *Mansf. Dig., sec. 1520.*

2. The evidence of Handright as to what William Billings told him, tended to impeach his testimony. *Ib., sec. 2902.*

3. The bruises were part of the *res gestæ.*

4. Mary Wallace's testimony was admissible to show *motive. 2 Bish. Cr. Pro., sec. 629.* It was not too remote.

4. The instruction on self-defense was based on the statute. *Mansf. Dig., sec. 1553; 40 Ark., 454.*

HEMINGWAY, J. The defendant was indicted for murder in the second degree. He testified that he killed the deceased, and sought to excuse it, because it was done as he claimed, in self-defense. He was convicted of manslaughter.

It is assigned for error here, that the court erred; first, in admitting improper evidence; second, in declaring the law applicable to the right of self-defense.

During the morning of the homicide, the deceased, Wallace, the defendant, Dave Billings, William Billings and Ike Brown met at the residence of William Billings, where they all remained until the homicide occurred in the afternoon. The witness, Handright, visited the place during the day, but left before the homicide occurred. It appears that the conduct of the deceased and defendant towards each other during the day

was rough and irritating, attended with violent and abusive language. The evidence of those who were present shows the deceased to have been the aggressor; this the State denied. The appellant was in the house of his friends, and it may be that the witnesses were subject to a bias in his favor. The attitude of the parties toward each other during the day was material in determining the merits of the defense.

William Billings, who is a brother of the appellant, and saw the homicide committed, was produced as a witness in his behalf; he professes to detail the entire transaction from the meeting in the morning until the culmination in the afternoon. If his narrative be true, the conduct of the deceased was violent, abusive and aggressive. To discredit him, the State asked him, upon cross-examination, if he did not tell Handright during his visit that day, while the defendant and the deceased were out of the house, "that Dave Billings and Ike Brown had been running over Wallace (the deceased)", all day, and that he "(the witness), did not intend to stand it." He answered that he might have said something like that, but that he did not remember. The State then proved by Handright that the witness had so told him. This evidence was introduced against the appellant's objection, and its admission is now assigned as reversible error.

The State proved that a very short time after the burial of the deceased, his body was exhumed, and certain bruises found upon it, which were explained to the jury.

It produced, as a witness, the widow of the deceased, and she was permitted to detail the particulars of a difficulty between the parties about two and a half years prior to the killing, and a conversation of the appellant with her about two years before the killing. Her testimony was substantially, that at a picnic her husband and one Wilson had a fight; that a few moments after the fight her husband said to one Bostic that he had knocked his brother-in-law, meaning Bostic, down. That appellant, who heard the remark, ran up with a drawn

knife, and said, "If it's brothers-in-law you are after, I am here," coupled with curses and oaths, at the same time striking at him with the knife. As to the conversation of the appellant with her, she testified, that he wanted to buy her interest in their father's estate. That she offered to sell for cash, which he could not pay; that she refused to sell on credit. That he then said he would have the land or some man's hide.

There is no proof of any other altercation between the parties during the interval of over two years; nor does it appear that their relations were unfriendly. The deceased went to the house where appellant was staying on the morning of the homicide, found him there, and remained until he was killed. The defendant had whisky and the deceased brought more; they drank together during the day, and it is probable that all were somewhat under its influence.

This is a sufficient outline of the evidence to an understanding of the questions we are called to consider.

Was it competent to prove by Handright what William Billings had told him?

1. WITNESS: Impeachment of: Conflicting statements.

The statute provides that a witness may be impeached by the party against whom he is produced, by showing that he has made statements different from his testimony. But in order to so impeach a witness, he must be asked if he has made the statement assumed, and the examination should indicate the time when and the person to whom it was made. *Mansf. Dig.*, *2902–3*.

This is but a re-enactment of the common law. It has been proper at all times to discredit a witness by proof of contradictory statements as to a material matter; but it could not be done until he had been cross-examined as to the supposed contradiction in such a manner as to direct his attention to the matter assumed. The rule which prescribes this condition rests on the principle of justice to the witness.

The tendency of the evidence is to impeach his veracity, and common justice demands that before his credit is attacked

he should have an opportunity to declare whether he made such statements to the person indicated, and to explain what he said, and what he intended and meant in saying it.

When this opportunity has been afforded him, justice can demand in his behalf nothing more, and the reason of the rule is satisfied. If he neither admits nor denies the statement, can it be proven?

The decisions of the English courts upon this question are conflicting. If the matter is irrelevant, the proof of contradictory statements is certainly inadmissible; but if it is relevant, the weight of the English authorities favor their admission. *Phill. on Ev., 2 vol. 960.*

This rule is sustained by American cases. *Payne v. State, 60 Ala., 80; Dufresne and wife v. Weis, 46 Wis., 290.*

The question has never been ruled by this court.

The statute does not place the right to impeach a witness by proof of contradictory statements, upon the condition of his denial. It requires his cross-examination upon the matter; nothing more. This is exacted in order that he may explain apparent contradictions and reconcile seeming conflicts and inconsistencies. If he cannot remember the fact, he is unable to do what the law affords him the opportunity to do. If he cannot remember the statement made, it is quite as probable that his recollection of the occurrence about which he testifies is inaccurate or incorrect. If contradiction properly affects the value of his testimony when he denies, it is difficult to see why it should not when he ignores the contradictory or inconsistent statements. The testimony is discredited because he affirms today what he denied yesterday; the legitimate effect of such contradiction cannot depend upon his power to remember it. If the defect in the memory is real, the proof of the contradiction apprises the jury of this infirmity of the witness; if he has made a false statement under the pretense of not remembering, he should not escape contradiction and exposure. We think the evidence was properly admitted.

Proof of the bruises on the body of the deceased tended to elucidate the disputed question as to who had been the aggressor in the difficulty during the day. It was competent.

2. EVIDENCE: Bruises on body of deceased.

Did the court err in admitting that part of the testimony of Mrs. Wallace, above stated?

3. SAME: Threats.

The conversation of appellant with her is ambiguous. It does not appear to whom he intended his threat to apply. It was too remote from the matter charged, both in circumstance and time, to afford any reasonable presumption or inference of connection between the two affairs.

The general rule is well established, in civil as well as in criminal cases, that evidence shall be confined to the issue. It seems that the necessity for the enforcement of the rule is stronger in criminal cases. The facts laid before the jury should consist exclusively of the transaction that forms the subject of the indictment, and matters relating thereto. To enlarge the scope of the investigation beyond this would subject the defendant to the dangers of surprise against which no foresight might prepare and no innocence defend. Under this rule it is generally improper to introduce evidence of other offenses; but if facts bear upon the offense charged, they may be proven, although they disclose some other offense. The test of admissibility is the connection of the facts offered, with the subject charged. Such connection exists in a variety of cases, and in them it is often proper to prove one offense in a trial for another. The Supreme Court of Alabama has indicated several classes of cases in which this may be done, as follows: First, when necessary to prove the scienter or guilty knowledge which is an element of the offense charged; second, when the offense charged and the offense proved are so connected that they form part of one transaction; third, when the act proved and the offense charged are similar, and the one tends to fix the intent in the other; fourth, when it is necessary to prove a motive for the offense charged, and there is an apparent relation or connection between it and the other acts

4. SAME: Facts proving offense not charged.

proved; and again when it tends to prove the identity of the offender or of an instrument used.

In the case of *Dunn v. The State, 2 Ark., 229*, this court approved the exception to the general rule; but it was there held that proof of a distinct crime could not be introduced until there was evidence showing some connection between the different transactions; or such circumstances as will warrant a presumption that the latter grew out of the former. In that event it was held that the circumstances of the former were admissible as tending to discover the *quo animo* of the latter occurrence.

In a later case it was held, that antecedent facts could be proven when they were capable of forming any reasonable presumption or inference in elucidation of the matters involved in the issue.

There are many cases in the reports of this court in which this question has been considered, and evidence of other crimes admitted; but an examination will disclose that in each case the crime proven and that charged were connected in some way clearly manifest. We think there is no case in which the interval of time was nearly so great as in this. *Dunn v. The State, 2 Ark., 229; Austin v. State, 14 Ark., 555; Edmonds v. State, 34 Ark., 732; George v. State, 13 Ark., 236; Melton v. State, 43 Ark., 367; Ford v. State, 34 Ark., 650.*

On the other hand, cases are to be found in our reports in which evidence of other crimes was held incompetent. *Endailey v. State, 39 Ark., 278; Dove v. State, 37 ib., 261.*

It is impossible to say how far back, as respects time, other crimes may be so connected as to be admissible.

When in view of all the facts in this cause, including lapse of time, and no recurring trouble, it does not appear that there is a connection between the crime charged and the other affairs, or that they tend to prove some fact included in it, they cannot be proved.

5. SAME: Same.

The altercation proven in this case, seems to have arisen suddenly; there is no proof that it did not as quickly pass away. There is nothing in the circumstances attending it to show that it made any lasting impression on the defendant; or that he thereafter cherished any malice or resentment on account of it. If the evidence was competent, it was as tending to prove malice; there is no reasonable presumption or inference, that the two affairs were connected, or that the latter resulted from the former or from the motive prompting the former. As the parties had lived as neighbors for two and a half years, and no recurring evidences of ill feeling were proven, it is more reasonable to say that they had their origin in independent causes.

Regardless of relevancy, this evidence was of a nature damaging to the appellant.

It tended to show that he was a violent, turbulent and lawless man; from which the jury might unconsciously conclude, that the man who committed one would commit another crime. However natural this conclusion, evidence is not proper to establish it. It was competent, if at all, only to show malice; it cannot be said that there was a fair or reasonable inference that it had such tendency.

If it were of a character harmless though irrelevant, we should not reverse for it; but as it is obviously harmful, we cannot so treat it.

The instructions declared the law of self-defense as it has been construed by this court. *Fitzpatrick v. State*, *37 Ark.*, *254–5*.

For the error indicated the judgment will be reversed and the cause remanded.

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CROSS V. WILSON.

1. JUDGMENTS: *Rendered on constructive notice.*

Sections 4339, 4341, Mansf. Dig., provide that in a suit to enforce a vendor's lien on land sold by the State, where the return upon process issued against the defendant shows that he is dead, or upon other proof thereof, the Clerk shall make and enter on the record an order which shall contain the title of the suit, the amount of the note or bond proceeded upon and a description of the land upon which the lien is sought to be enforced, and shall warn, generally, the heirs and personal representatives of the defendant to appear and make defense thereto on the first day of the next term of the court, commencing more than sixty days from the date of such order. Section 4340 *ib*, requires the order to designate the month and day of the month on which such term of the court will commence, and provides that its publication once in each week for four successive weeks, in an authorized newspaper, as provided by law, shall be equivalent to a personal service. In an action of ejectment the plaintiff claimed title under a decree rendered in a proceeding under said statute, and based, as shown by the record, on a warning order which, after giving the style of the court and title of the cause, is in the following form:

"The defendants, the legal representatives of J. E. B. and of J. N. C., are warned to appear in this court within thirty days and answer the complaint of the plaintiff, the State of Arkansas, for use of school fund.

"D. P. U., Clerk."

HELD: That such order does not state material facts required by the statute, and the decree based on it is therefore void.

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

An affidavit stating that a warning order, required to be published once a week for four successive weeks, was published four times in a certain newspaper, naming it, and giving the date of the first and last insertion, but without stating that the newspaper was one authorized by statute to publish legal notices, or that the affiant was its editor, publisher, proprietor or principal accountant, is fatally defective as a proof of publication under Mansf. Dig., section 4599.

APPEAL from *Clark* Circuit Court in Chancery.

R. D. HEARN, Judge.

This was an action of ejectment. The plaintiff claimed title to the land in controversy under a commissioner's deed, executed pursuant to a decree of the Pulaski Chancery Court against Barkman and Candler, foreclosing the State's lien for the purchase money. It appears that the land was sold by

the Common School Commissioner and purchased by Barkman, who gave his note for the purchase money, with Candler as surety. In 1860 a patent was executed to Barkman, reciting the payment of the purchase money. Barkman having died intestate, the land was sold as belonging to his estate under a decree of the Clark Circuit Court, and purchased by the defendant's vendor. The defendant's answer was made a cross-complaint, attacking the decree under which the plaintiff claims for want of jurisdiction, and praying that the commissioner's deed to her be canceled. The cause was transferred to the equity docket, and the judgment was for the defendant. The plaintiff appealed.

The suit against Barkman and Candler, in which the decree relied upon by plaintiff was rendered, was brought under the statute embraced in sections 4332 to 4352 Mansfield's Digest.

Section 4339 provides that in suits brought on notes given for the purchase money of lands sold by the State, "if the return upon the process shows that the defendant is not found in the county in which such land is located, or upon an affidavit of some credible person, that the defendant is a non-resident of the State, the Clerk, * * * upon the application of the Prosecuting Attorney, shall make and enter on the record an order which shall contain the title of the suit, the date and amount of the note or bond proceeded upon, and a description of the land upon which the lien is sought to be enforced, and warn the defendant to appear and make defense thereto on the first day of the next term of such court, that commences more than sixty days from the date of such order."

Sections 4340, 4341 and 4342 are as follows:

Section 4340. The publication of such order once in each week, for four successive weeks, in an authorized newspaper, as provided by law, shall be equivalent to a personal service. *Provided*, That such order shall designate the month and day of the month on which such term of said court will commence.

Section 4341. If the return of the officer upon the process mentioned in the preceding sections shows that the defendant is dead, or upon other proof thereof before such Clerk, said Clerk shall make and enter the order mentioned in the preceding section, except that it shall warn generally "the heirs and personal representatives" of the defendant to appear and make defense thereto, as provided in the preceding sections.

Section 4342. The publication of such order, as provided in the preceding section, shall be equivalent to a personal service. *Provided*, That upon a return of the officer on the process, showing that the defendant is not found in the county in which such land is situated, the Prosecuting Attorney shall file before said Clerk an affidavit to the effect that he has used due diligence, and has not been able to ascertain whether the defendant is dead or alive, the Clerk shall make and enter on the record such order, except that the defendant, if living, or his heirs and legal representatives, if he is dead, are warned to appear, as provided in the preceding section, and, when published as required by said sections, shall be equivalent to a personal service.

Section 4359 of the same Digest provides that "the affidavit of any editor, publisher or proprietor, or the principal accountant of any newspaper authorized by this act to publish legal advertisements, to the effect that a legal advertisement has been published in his paper for the length of time and number of insertions it has been published, with a printed copy of such advertisement appended thereto, subscribed before any officer of this State authorized to administer oaths, shall be the evidence of the publication thereof as therein set forth."

In the suit referred to a summons was issued, to which the Sheriff of Clark County made return, that Barkman was dead, and that Candler did not reside in his county, and from what he could learn was also dead. Thereupon, the following warning order was published:

State of Arkansas, for use of school fund, } *Plaintiff,*
v.
James E. M. Barkman and James R. N. Candler, } *Defendants.*

Pulaski Chancery Court, in Chancery:

The defendants, the legal representatives of James E. M. Barkman and of James R. N. Candler, are warned to appear in this court within thirty days and answer the complaint of the plaintiff, the State of Arkansas, for use of the school fund.

D. P. UPHAM, *Clerk.*

The proof of publication of the order is in the following form:

State of Arkansas,
County of Pulaski.

I hereby certify that the inclosed advertisement was published four times in the Arkansas Republican, the first of which was on the 5th day of March, and the last on the 26th day of March, 1873. JOHN G. PRICE.

Sworn to, etc.

Indorsed, "Filed June 9, 1873."

J. L. Witherspoon, for appellant.

The Pulaski Chancery Court had jurisdiction, and even if the warning order was defective, it was only an irregularity to be corrected by appeal, or by direct proceeding. It cannot be attacked collaterally, being voidable only. *2 S. W. Rep.*, 103; *11 Ark., 519; Boyd v. Roane, 49 Ark., 397; Freeman on Judg., sec. 124; 6 S. W. Rep., Jan. 14, 1888; 40 Ark., 42; 2 Ohio St., 279; 13 id., 432; notes to 6 S. W. Rep., 733.*

Plaintiff was an innocent purchaser, and protected by the commissioner's deed, and confirmation. *40 Ark., 42; 3 S. W. Rep., 550; 19 Am. Rep., 442; 27 id., 746; 12 id., 76.*

Crawford & Crawford, for appellee.

The warning order was fatally defective. *Mansf. Dig., secs. 4332, 4352; 30 Ark., 719.* The whole proceedings were a nullity and can be attacked collaterally. *51 Ark., 34; Freeman on Judgments, sec. 117.*

WARNING ORDER.

PER CURIAM: The record of the cause in which the decree relied upon as the foundation of the appellant's title, was rendered, shows that it was based upon a warning order which does not state material facts required by the statute, and that proof of its publication is fatally defective. The decree was therefore void. Affirm.

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JOHNSON V. CAMPBELL.

1. JUDGMENTS: *Vacating after close of term.*

A judgment of the Circuit Court cannot be vacated therein after the expiration of the term at which it is rendered, except upon complaint filed in accordance with the provisions of section 3909 Mansf. Dig. And where a petition to set aside a decree is presented only by way of exceptions to the report of a sale, it should be rejected.

2. JUDICIAL SALES: *On credit not directed by order.*

Where land was sold on a credit of *three* months under a decree which fixed the term of credit at *four* months, it was not an abuse of the court's discretion, to confirm the sale on being satisfied that no injury had resulted from the irregularity.

APPEAL from *Franklin* Circuit Court.

G. S. CUNNINGHAM, Judge.

Campbell brought this suit against Johnson to recover the amount of certain promissory notes executed by the latter for the purchase money of a tract of land, and to enforce his lien on the land. At the return term a judgment by default was taken against Johnson for the amount of the debt and for the sale of the land. At the next term of the court, the commissioner appointed to execute the order of sale, made his report, and the defendant filed exceptions thereto, alleging that the sale was not made upon a credit of four months, as required by the decree, and that no proof was filed showing that notice of the sale was published as required by the decree. The exceptions also contained allegations to the effect that a defense to the action existed, and that it was not made at the proper itme

because the defendant from sickness was unable to attend the court, and his agent having been informed that the court had adjourned and no proceeding in the cause would then be had, was also absent at the time the judgment was taken. He prayed that the decree and sale be set aside. The court refused to vacate the judgment, overruled the exceptions to the commissioner's report and confirmed it. The defendant appealed.

Mansfield's Digest, section 3909, is as follows:

"The court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order:

"First. By granting a new trial for the cause, and in the manner prescribed in section 5155.

"Second. By a new trial granted in proceedings against defendants constructively summoned.

"Third. For misprisions of the Clerk.

"Fourth. For fraud practiced by the successful party in the obtaining of the judgment or order.

"Fifth. For erroneous proceedings against an infant, married woman or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings.

"Sixth. For the death of one of the parties before the judgment in the action.

"Seventh. For unavoidable casualty or misfortune preventing the party from appearing or defending.

"Eighth. For errors in a judgment, shown by an infant in twelve months after arriving at full age, as prescribed in section 5184."

Section 3911, *ib.*, is as follows:

"The proceedings to vacate or modify the judgment or order on the grounds mentioned in the fourth, fifth, sixth, seventh and eighth subdivisions of section 3909, shall be by complaint, verified by affidavit, setting forth the judgment or order, the

grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On the complaint, a summons shall issue and be served, and other proceedings had as in an action by proceedings at law."

J. V. Bourland, for appellant.

1. The commissioner wholly disregarded the decree, by selling on less time than ordered, thus discouraging bidders; and by selling at an inadequate price, and without any showing that notice was given as required of the sale. *Mansf. Dig., sec. 3909.*

2. Appellant showed a good defense, and a good excuse for not being present. *40 Ark., 420.* A clear case of "abuse of discretion" is shown in the confirmation of the sale.

Vacating judgments.

PER CURIAM. The court, after the lapse of the term, had no power to vacate the judgment except upon complaint filed in accordance with the provisions of section 3909 of Mansfield's Digest.

There was no error in rejecting the petition to vacate the judgment when presented by way of objection to the confirmation of the report of sale.

Judicial sales.

There appears to have been due and legal notice of the time, terms and place of sale. It was made upon a credit of three months, however, instead of four, as the decree directed. The defendant showed no injury resulting from the departure from the direction, and the court being satisfied that none had resulted therefrom, did not abuse its discretion in confirming the sale.

Affirm.

CRENSHAW V. BRADLEY.

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1. APPEAL: *From justice's court: Affidavit: Waiver.*

Where no motion is made in the Circuit Court to dismiss an appeal from a justice's court for want of an affidavit for appeal, the objection cannot be raised in the Supreme Court.

2. EVIDENCE: *Burden of proof.*

In replevin where the defendant, without denying the plaintiff's title to the property sued for, claims the right to its possession under an agreement with the plaintiff that he should sell it and out of the proceeds pay an account which the plaintiff owed him, the burden is on him to establish the defense thus alleged.

APPEAL from *Desha* Circuit Court.

JOHN A. WILLIAMS, Judge.

Bradley brought an action of replevin in a justice's court against Crenshaw, for three bales of cotton. The judgment of the justice was in favor of the defendant and the plaintiff prayed an appeal, which was granted without any affidavit therefor having been filed. In the Circuit Court no motion was made to dismiss the appeal, and in a trial had there the verdict and judgment were for the plaintiff, and the defendant appealed.

W. S. McCain, for appellant.

1 An affidavit is an essential pre-requisite in an appeal from a Justice of the Peace. *Mansf. Dig., sec. 4135; 19 Ark., 647; 44 id., 482; 2 id., 85; 4 id., 65; 5 id., 406; 7 id., 182; 11 id., 302; ib., 664.*

2. The court erred in instructing the jury that the burden was on defendant to prove the delivery of the cotton. There was no dispute about the delivery. The *purpose*, or rather the *authority to detain* it was the real issue.

3. A landlord has a lien for supplies (*Acts 1885*), as well as rent, and if the crops come into his hands, *by whatever means*, the landlord can hold them until his claim is paid. *45 Ark., 447; 37 id., 43; 36 id., 527; 33 id., 707.* Applying the rule in *30 Ark., 745*, there was still a balance due appellant for supplies.

PER CURIAM. The appellant having failed to move the Circuit Court to dismiss the appeal for want of an affidavit for appeal, cannot be heard to raise the objection here. *Wilson v. Dean, 10 Ark., 309; James v. Dyer, 31 Ark., 489.*

APPEALS: Waiver.

There was no proof that the defendant held the cotton as security for payment of a lien upon it, as counsel argues. Without denying the plaintiff's title, he undertook to prove that he held the cotton by virtue of an agreement made with the plaintiff to the effect that he should sell it, and out of the proceeds pay the residue of an account which he claimed the plaintiff owed him. The court properly instructed the jury that the burden was on the defendant to prove the defense thus alleged. Nothing else is complained of.

Burden of proof.

Affirm.

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MAYS v. ROGERS.

ADMINISTRATION: *Sale of lands: Expenses of administration.*

It is error to grant an application for the sale of a decedent's lands for the sole purpose of paying the expenses of administerting on his estate, unless it appears that such expenses were incurred in the course of administering the estate to pay debts due personally by the decedent. [*Mansf. Dig., secs. 170, 171.*]

APPEAL from *White* Circuit Court.

M. T. SANDERS, Judge.

Thomas J. Rogers was the administrator *de bonis non* of the estate of Thomas G. Mays, deceased, and while acting as such presented to the Probate Court a claim against the estate amounting to $220.99 for taxes which he had paid on property of the estate "and for costs and expenses of administration." The claim was allowed, and he subsequently applied to the court for an order to sell certain lands of the estate for its payment. The order of sale was refused and Rogers appealed to the Circuit Court, where his application was granted. This appeal from the judgment of the Circuit Court directing the sale, is prosecuted by the heir-at-law of Mays, who was made a party to the proceedings below.

Sections 170 and 171 of Mansfield's Digest are as follows:

Section 170. Lands and tenements shall be assets in the hands of every executor or administrator for the payment of the debts of the testator or intestate.

Section 171. If any testator be the owner of lands and tenements at the time of his death, of which no provision is made by will, or if any person, being the owner of lands and tenements, die intestate, and such testator or intestate shall not have sufficient personal estate to pay his debts, it shall be the duty of the executor or administrator to apply to the Court of Probate by petition, describing said lands and containing a true and just account of all the debts of the testator or intestate which shall have come to his knowledge, and the amount of the assets in his hands to pay such claims.

The appellant, pro se.

There can be no sale of the real estate of a decedent, except for the payment of debts. *13 Ill., 127; 46 id., 404; 46 Ark., 373; 2 Barb. Chy., 387.* Nor can they be sold exeept to pay debts owing by the decedent at the time of his death; nor for expenses or taxes paid. *Rorer on Jud. Sales, sec. 268, p. 114; 53 Penn., 505, 511, 512; 4 McLean, 486–9; 10 Paige Chy., 366; 24 Mo., 16.* A sale to pay costs or expenses is illegal and void. *8 Mass., 199; 2 Barb. Chy., 387; ib., 161; Rorer Jud. Sales, sec. 268, 114; North Prob. Pr., sec. 487, p. 230; ib., 269, p. 115; 4 Mass., 358–9.*

W. R. Coody, for appellee.

The contention of appellant may be correct at *common law*, (*2 Barb. Chy., 387, and cases cited*), but our statute has changed this rule, making lands assets for the *payment of debts. Mansf. Dig. sec. 68.* Not as in Missouri, "debts of such deceased person." *Wagner's Mo. St., p. 94, sec. 10.* See *40 Ark., 443–4; 25 Ark., 324.*

Taxes are a lien, and it is the duty of the administrator to pay them. *Mansf. Dig., sec. 5808; 30 Ark., 600.* This is a *preferred debt.* See, also, *28 Ark., 19.*

ADMINISTRATION: Sale of lands.

PER CURIAM. Where there are no debts due by a decedent, there can be no sale of lands of his estate to pay the expenses of an administration had thereon. If the admininistration is continued after the debts are paid, as in the case of *Smiley v. Stewart, 46 Ark., 373*, it would be error to order a sale of lands to pay the costs of the subsequent administration. To what extent the right to resort to the lands for the sole purpose of paying the expenses of administering the estate is limited, has not been fully argued by counsel, and is not now determined. In every case, however, where an application is made to sell lands solely for the expense of administering the estate, it must be made to appear that the expenses were incurred in the course of administering the estate to pay debts due personally by the decedent. *Mansf. Dig., secs. 170 and 171.* See cases cited at *sec. 468, 2 Woerner Am. Law of Admrs.; 3 Wms. Ex.,* 2041, N. A.*

The cause was heard by the Circuit Court upon the administrator's petition to sell, an exhibit thereto, and the remonstrance of the heir, without proof; and the essential fact referred to does not appear therefrom. The other questions argued by the appellant are not presented by the facts as set forth in the record.

For the error pointed out the judgment is reversed, and the cause remanded for further proceedings.

COLLIER V. COWGER.

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1. WARRANTY: *Of real estate: Action for breach of: Eviction.*

A judgment against a covenantee in possession of land, upon the foreclosure of a lien created prior to the covenant, rendered after notice to the warrantor to appear and defend, is conclusive of the existence of an outstanding paramount incumbrance, and is a constructive eviction entitling the covenantee to his action on the covenant.

2. SAME: *Same: Damages.*

Where the covenantee buys in the outstanding incumbrance to protect his estate,

he is entitled to recover the sum expended in doing so, provided it does not exceed the amount paid the warrantor for the property, with legal interest on such sum from the date of extinguishing the incumbrance.

3. SAME: *Same.*

In an action for breach of warranty of title to real estate, where paramount title has been asserted and maintained by a judgment in ejectment, there can be no recovery of interest, prior to eviction, upon the sum paid the warrantor, unless the plaintiff in ejectment has recovered *mesne* profits.

APPEAL from *Yell* Circuit Court in Chancery, Dardanelle District.

G. S. CUNNINGHAM, Judge.

This is an action to recover damages for a breach of the covenant contained in a deed executed by the defendant to the plaintiff's wards, who are the minor heirs of J. H. Cowger, deceased. The complaint makes in substance the following averments:

That on the 29th day of November, 1884, in consideration of the sum of $274.69 cash, paid by plaintiff below to appellee for said minors, the appellee executed and delivered to said minors a deed, conveying to them certain described land. That he warranted the title against all lawful claims, and that the premises were free from incumbrances, and that he had a good right to sell and convey the same. That at that time the lands were incumbered by a vendor's lien in favor of I. C. Jones, who brought suit, in which a decree was rendered for such lien in the sum of $307, and the land was sold under this decree, and E. H. Cowger, the plaintiff below, bought it in, and the sale was confirmed and deed made to her. That Collier was notified of the pendency of this suit by her, but failed to defend. That at her own expense she defended the suit. The deed of Collier, which was duly acknowledged and recorded, and the decree in the Jones case, were exhibited with the complaint.

The defendant's answer puts in issue all the material allegations of the complaint, and concludes with a demurrer stating among other grounds of objection to the complaint that it

fails to aver an eviction. The cause was by consent transferred to the equity docket. The decree of the court was in favor of the plaintiff for the sum of $274.69, the amount paid to the defendant for the land, with interest thereon from November 29, 1884, the date of such payment, at 6 per cent. per annum. The defendant appealed.

S. W. Williams and *W. N. May*, for appellant.

1. There was no breach of the warranty. There must be an actual or constructive eviction to constitute a breach of this covenant. *Teideman on Real Prop., sec. 855.* While possession is undisturbed, there is no breach. *Rawle Cov. for Title, pp. 312, 313; 11 Ark., 59; 21 id., 235; 23 id., 203.* See, also, *21 Ark., 585; 22 id., 284.*

2. The mere existence of paramount title is not enough (*ib.*), and where one knows of an incumbrance, as Mrs. Cowger did, she must be held to waive any rights arising in consequence thereof. *22 Ark., 284; 23 id., 147.* See, for a full discussion of the question, *2 Wait's Act. and Def., p. 388;* also, *10 Wheaton, 449.*

3. No interest should have been allowed from the date of the deed. *13 Johns., 50.* Rents are the counterpart of interest. In this case no *mesne* profits were recovered against Mrs. Cowger. *Ib.*

4. A purchaser who has accepted a deed with no covenants but those of warranty, in the absence of fraud, has no remedy until evicted. *40 Ark., 420.*

Davis & Bullock, for appellees.

The covenant of warranty is, in effect, a covenant for quiet enjoyment. *3 Washb. Real Pr., p. 469, par. 18.* An eviction is not necessary when constructive dispossession has taken place. *19 Kans., 539; 6 Cush., 124; 81 Ill., 346; 39 Cal., 360; 2 Am. Rep., 456; 1 Am. Dec., 704; 14 id., 45; 31 Ark., 319; 1 Aiken, 233; 1 Dev., 413; Rawle on Cov. for Title, 4th ed., 143.*

PER CURIAM: A judgment against a covenantee in possession upon foreclosure of a lien created prior to the covenant, rendered after notice to the warrantor to appear and defend, is conclusive of the existence of an outstanding paramout incumbrance. It is a constructive eviction, and he is entitled to his action upon the covenant. Where the covenantee buys in the outstanding incumbrance to protect his estate, he is entitled to recover the sum expended in so doing, provided such sum does not exceed the amount paid to the warrantor for the property, with the legal interest on such sum from the date of the extinguishment of such incumbrance. *Boyd v. Whitfield, 19 Ark., 447; Rawle Cov. Tit., secs. 143–6.*

WARRANTY: Eviction.

Damages.

When paramount title is asserted, and maintained by judgment in ejectment, the recovery of interest prior to eviction, upon the sum paid the warrantor, will depend upon the answer to the question whether there has been a recovery of *mesne* profits by the plaintiff in ejectment. Interest on the money and *mesne* profits are regarded as the equivalent of each other. *Rawle Cov. Tit., sec. 195 et seq.*, and cases cited.

Same.

In this cause, plaintiffs, through their mother, purchased the land at a sale under I. C. Jones' decree on January 14, 1886, and are entitled to recover the $274.69 of purchase-money paid Collier with interest at 6 per cent from January 14, 1886, to this date, amounting to $64.82.

The decree of the Circuit Court in so far as it awarded interest from November 29, 1884, is reversed. Otherwise it is affirmed and judgment will be entered here in accordance with this opinion.

It is so ordered.

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BAIRD V. STATE.

1. LIQUORS: *Unlawful dealing in: Drag-net proviso of license law.*

The liquor provisions of the revenue act of 1883 [*Mansf. Dig., secs. 5592, 5596*] making it a crime to carry on the business of a liquor dealer without a license, created a new offense against the general license law, of which the statute known as the "drag-net proviso" [*Mansf. Dig., sec. 4522*] is a part. And under such proviso, which in effect declares that the license law shall be enforced in every part of the State, irrespective of other acts, a conviction may be had for engaging in the business of a liquor seller, without a license, in a local option district, where no license can issue. [*Mazzia v. State, 51 Ark., 177.*]

2. SAME: *Same: "Drag-net" proviso not unconstitutional.*

The "drag-net proviso" of the license law [*Mansf. Dig., sec. 4522*] does not extend the provisions of that law by reference merely, and it is not, therefore, repugnant to section 23, article 5, of the Constitution, which forbids the extension of the provisions of a prior law by reference to its title only.

3. SAME: *Same: License provisions of revenue act.*

It was not the intention of the act making it a crime to be a common seller of liquors without a license [*Mansf. Dig., sec. 5594*], to limit prosecutions for that offense to territory not covered by other acts. And aside from the effect of the "drag-net proviso," a conviction for such offense may be had in districts where the local option law and other prohibitory statutes are in force.

4. SAME: *Same: Sale by agent.*

Proof that a defendant sold liquors as the agent of an unlicensed dealer, will sustain a conviction for engaging in the business of selling liquors without a license.

APPEAL from *Saline* Circuit Court.

J. B. WOOD, Judge.

The appellant was indicted for unlawfully engaging in the business of selling liquors in Garland County without first paying the proper tax. A demurrer to the indictment was overruled, and the cause was removed to the Saline Circuit Court, where it was submitted for trial to the court, a jury being waived. An agreement signed by the attorneys of the parties was read in evidence, admitting that the appellant, within one year next before the finding of the indictment, had sold liquors in Garland County and within three miles of St. Mary's Academy, as the bar-tender of F. Douglas, who was

engaged in the business of selling liquors. It was proven by the State that the sale of liquors within three miles of that academy was, at the time of such selling by the defendant, prohibited by an order of the County Court. The court found the defendant guilty, and he appealed from the judgment against him.

L. Leatherman and *G. W. Murphy* and *John McClure*, for appellant.

1. The indictment fails to charge that defendant was a *liquor dealer*, and the proof fails to show that he was a *liquor dealer. Mansf. Dig., 3d par., sec. 2164; ib., 2167; 36 Ark., 55; 34 id., 340; 45 id., 93–4.*

2. The license act was displaced and its operation suspended in the local option districts. *34 Ark., 381; 41 id., 305; ib., 308.*

3. The proviso of the act of 1883, p. 192, is limited by its express terms to the act it is a part of, and does not extend to the revenue act. *Acts 1883, p. 212; 43 Ark., 364.* No license can be granted in the prohibited districts. *35 Ark., 414; 36 id., 178.* The object of the revenue act was *revenue. 45 Ark., 93.* See, also, *50 Ark., 140.*

4. The provisions of the license act are not amended by the revenue act, for this is contrary to *art. 5, sec. 23, Const.; 47 Ark., 482; 17 Wisc., 631; 49 Ark., 135.*

Chamberlain v. State, 50 Ark., sustains the position that the operation of the revenue act was suspended by the "three-mile law." *4 Ark., 410; 117 Penn. St., 226; 3 Am. St. Rep., 655.*

Whether the revenue act amended the license act or not, the field of operation of the *proviso* is limited and circumscribed by that act. *12 Mich., 333; 33 Ala., 693.*

The revenue act contains no such proviso, nor refers to it. The function of a proviso is to *limit*, not extend or enlarge the act or section of which it is a part. *Endlich Int. St., secs. 184-5-6; 15 Pet., 423; L. Co. of Ed., U. S. Rep., book 10, p. 791.*

Provisos in criminal statutes are liberally construed in favor of defendant. *Endlich Int. St., sec. 332.*

W. E. Atkinson, Attorney General, for appellee.

1. Agents are equally guilty in sales of liquor unlawfully. *36 Ark., 151; sec. 5594 Mansf. Dig.*

If seller has no license and the owner none, all who participate may be liable. *State v. Keith, 37 Ark., 96.*

The license of the owner is matter of defense for agent. *State v. Devin, 38 Ark., 517.*

Burden is on defendant to show that he sold for a dealer, and that he was licensed. *Rana v. State, 51 Ark., 481.*

If the defendant's theory were true, non-residents could establish saloons in the State and employ men to carry them on in defiancê and violation of law with impunity.

The other points in these cases are settled in *51 Ark., 177.*

COCKRILL, C. J. The latter half of the third section of the act of March 26, 1883, amending the liquor license law, though introduced by the word "Provided," does not limit any provision of the act or except anything from its operation; it contains, besides, a positive enactment to the effect that the provisions of that act shall be enforced in every part of the State, including localities where the local option and special laws prohibiting the sale of liquors are in force. This is apparent from the latter part of the section. The technical canon of construction which applies to provisos proper, has, therefore, no place in the interpretation of the act and its amendments.

1. LIQUORS: Unlawful dealing in.

The license provision of the revenue act of 1883, subsequently passed, made it a crime to carry on the business of a liquor seller without license, and fixed the penalty at a higher fine than was previously imposed for unlicensed sales. The offense thus created was a new one. By the terms of the act creating it, it became an offense against the license law; but there is only one license law (*Bennett v. Drew Co., 43 Ark., 364*), and the "drag-net proviso," as the above-mentioned provision from

the act of March 26, 1883, is called, is a part of it. It follows that there is no suspension of the enforcement of the act on account of the operation of the local option law in the locality where the sale took place; and the decisions of *Dubois v. State, 34 Ark., 381,* and the cases following it, have, for that reason, no application. That is the effect of the decision of *Mazzia v. State, 51 Ark., 177.*

2. Drag-net proviso.

It is argued that the so-called proviso of the act of March 26, 1883, is repugnant to that clause of the Constitution which forbids the extension of the provisions of a prior law by reference to its title. *Sec. 23, art. 5, Const. 1874.* The section does not extend the provisions of the license law by reference merely, but after re-enacting the prohibitory part of the license act of 1879 so as to include alcohol within its prohibition, along with other spirituous liquors, declares that the act shall have operation in every part of the State, irrespective of other prohibitory acts. That is not within the evil inhibited by the Constitution. *Scales v. State, 47 Ark., 476.* The validity of the proviso is asserted by a long line of affirmances of convictions under it by this court without question.

3. Provisions of revenue act.

But aside from the influence of the proviso, the act which makes it a crime to be a common seller of liquor without license, does not indicate the intention to limit prosecutions for its breach to territory not covered by special or other acts. Like the act for the punishment of clandestine sales of liquor passed about the same time (see *Blackwell v. State, 45 Ark., 92*), it is designed to cover all territory. The point as to clandestine sales was so ruled in *Glass v. State, 45 Ark., 173,* The conclusion that such was the intention in this act, is made more manifest by the fact that the proof which would warrant a conviction which is aimed at single instances of selling only, would not answer the demand upon a charge of the new offense. The two offenses have not the same constituent elements. *State v. Coombs, 32 Me., 529;* See *Ruble v. St., 51 Ark., 170.* The reason given for the Duboise decision does not, therefore, ap-

ply, and the conviction is right independent of the drag-net proviso. *Mazzia v. St., 51 Ark., sup.; State v. Smiley, 7 S. E. Rep., 904; Robinson v. State, 9 S. W. Rep., 61.*

4. Sale by agent.

The agreed statement of facts on which the appellant was tried shows that he sold liquor as the agent of one who had no license. That was sufficient to warrant the conviction. *Rand v. State, 51 Ark., 481; Berning v. State, ib., 550; State v. Keith, 37 ib., 96; State v. Devers, 38 ib., 517; Cloud v. State, 36 ib., 151.*

The judgment must be affirmed.

REYNOLDS EX PARTE.

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1. RAILROADS: *Condemning right of way: Securing compensation to landowner.*

Section 9, article 12, of the Constitution provides that "no property or right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money, which compensation * * * shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law." HELD: That the provision as to trial by jury refers only to the final assessment of compensation, and does not prohibit the Legislature from prescribing a different method for ascertaining the amount to be deposited as security for compensation, pending proceedings to condemn a right of way, as provided for in sections 5464, 5466 Mansfield's Digest.

2. SAME: *Same.*

The act of 1873 [Mansfield's Digest, sections 5464, 5466], which provides that where a proceeding to condemn land to the use of a railway company is likely to retard the work, or business of such company, the court, or judge, in vacation, shall, on application, designate an amount of money to be deposited by the company, subject to the order of the court, for the purpose of compensating the landowner, and that on such deposit being made, the company may enter upon the land and proceed with its work, prior to the assessment and payment of damages, is not unconstitutional.

3. SAME: *Same.*

The order of the judge designating the amount of such deposit, is a step taken in the suit to condemn, and the landowner is entitled to notice of the time and

place of that proceeding as of any other had in the cause in vacation. But his right to notice will be waived by appearance.

CERTIORARI to *Chicot* Circuit Court.

CARROLL D. WOOD, Judge.

The Louisiana, Arkansas and Missouri Railroad Company having instituted proceedings under the statute (*Mansf. Digest, secs. 5464, 5466*) for the condemnation of a right of way over the lands of Reynolds, the Circuit Judge, in vacation, on the company's application, made an order designating a sum of money to be deposited, subject to the court's order, for the purpose of making compensation when the amount thereof should be assessed. Reynolds then filed his petition in this court for a writ of *certiorari* to quash the order directing the deposit, on the ground, among others, that the statute authorizing it is unconstitutional; that the judge had no power to make the order, and that the amount to be deposited could only be ascertained by the assessment of a jury. He also objected to the order on the ground that no legal notice of the application upon which it was made was served upon him.

D. H. Reynolds, for petitioner.

1. Argues orally the unconstitutionality of the act, as violating *art. 12, sec. 9, Const. 1874*, citing, among others, *3 Paige, 45; Redfield Am. Ry. Cases, p. 230.*

2. Notice must be given as in other civil cases. *Mansf. Dig., secs. 5458, 5467; Acts 1885, pp. 179, 180; Mansf. Dig., secs. 4967, 4977, 4992, 5201, 5203, 5212; 12 N. Y., 74; 130 U. S., 562; Cooley Const. Lim., p. 703; 54 N. Y., 58; Manier on R. R., etc., secs. 343, 346, 453, etc.; 102 Ill., 459; 121 id., 214; 93 U. S., 277.*

3. Pleadings are necessary in order to make up the issue, where special damages are claimed. *45 Ark., 280; 47 id., 342, 330–1; 45 id., 255; 44 id., 362; 101 Ill., 333; 102 id., 459; 105 id., 519; Lewis Em. Dom., secs, 388–9, 390–7; 111 N. Y., 600; Mills Em. Dom., secs. 84, 107, 100; Manier on R. R., etc., secs.*

401, 390; 113 N. Y., 279; 108 N. Y., 490; Cooley Const. Lim., pp. 657, 672, 674.

John McClure, for respondent.

Argued orally that the act is constitutional, and that the landowner is not entitled to notice, etc., etc.

1. The landowner not entitled to notice of the application to the court or judge, when it determines or fixes the amount to be deposited. *23 N. J., 232-3; 4 Ont. Ch. D., 593; 21 N. Y., 596; 43 Oh. St., 467; 9 How. Pr. N. S., 137; 25 Pa. St., 397; 40 Ark., 508; 43 Ark., 341.*

2. The making of compensation need not precede an entry upon the property, provided some definite provision is made whereby the owner will certainly obtain compensation. *34 Ala., 461; 31 Ark., 494; 19 Conn., 142; 20 Flor., 597; 19 Geo., 427; 7 Ind., 32; 34 Me., 247; Lewes Em. Dom., sec. 456; 43 Ark., 120.*

COCKRILL, C. J. The question which controls this proceeding is the constitutionality of the seventh section of the act of April 28, 1873, which reads as follows:

"Where the determination of questions in controversy in such proceedings is likely to retard the progress of work on or the business of such railroad company, the court or judge in vacation, shall designate an amount of money to be deposited by such company, subject to the order of the court, and for the purpose of making such compensation when the amount thereof shall have been assessed as aforesaid, and said judge shall designate the place of such deposit. Whenever such deposit shall have been made in compliance with the order of the court or judge, it shall be lawful for such company to enter upon such land and proceed with their work through and over the lands in controversy prior to the assessment and payment of damages for the use and right to be determined as aforesaid.

"In all cases where such company shall not pay or deposit the amount of damages assessed as aforesaid within thirty days

after such assessment, they shall forfeit all rights in the premises." *Mansf. Dig., secs. 5464-5-6.*

It is argued that this section attempts to authorize a proceeding which is prohibited by section 9 of article 12 of the Constitution of 1874. That section is as follows: "No property, nor right of way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money; or first secured to him by a deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

Prior to the adoption of the Constitution of 1868, the 48th section of the fifth article of which, was similar to the section above quoted, there was no provision in the organic law of this State requiring compensation to precede the appropriation of private property for public use. In the case of the *C. & F. Ry. v. Turner, 31 Ark., 494,* Chief Justice ENGLISH, in treating of the power of the Legislature under the Constitution of 1836, said there were expressions in the case of *Martin, ex parte, 13 Ark., 198,* which indicated that the learned Judge, who delivered the judgment, was of opinion that it was incompetent even in the absence of such a provision, for the Legislature to stop short of providing for actual payment of compensation to the owner before his property could be appropriated. He states it as his opinion, however, that that view is opposed to the clear weight of authority.

In jurisdictions where it was settled that all that could be demanded by the owner of the property to be condemned was provision for a remedy whereby he could certainly obtain compensation, a difference of opinion existed as to what remedy or provision was adequate to a legal certainty. In the case of *C. & F. Ry. v. Turner, 31 Ark., sup.,* a bond with sureties, which was all that was demanded by the statute in force prior to the Constitution of 1868, was held to be adequate. In Cal-

ifornia, it was at one time held that, as the payment of compensation need not precede the company's entry upon the land to be condemned, an act of the Legislature was valid which gave the right of entry for the purpose of constructing the road upon paying into court a sum of money sufficient to pay the damages when assessed, or upon giving security to be approved by the court or judge (*Fox v. West Pac. Ry. Co., 31 Cal., 538*); but in the subsequent case of *Sawbone v. Belden, 51 Cal., 266*, it was ruled that the bond with sureties which the act provided for, did not afford an adequate means of compensation because the judgment against the sureties might not be efficient. See, too, *Davis v. Ry., 47 Cal., 519–21.*

These are instances of the conflict of opinion on the subject.

In addition to these perplexities, one of the inevitable results of making compensation in advance an unconditional prerequisite to the right of entry, put it in the power of a single individual upon any proposed line of railway to check its construction, if not to thwart the enterprise where time became material in the undertaking, by resorting to continuances, changes of venue, new trials and appeals.

The provision of the Constitution above quoted treats of all these difficulties, and avoids the extremes of each. It affords protection to the landowner while taking from him the power to check unnecessarily the progress of public enterprise, by requiring in advance of any appropriation of his land, actual payment of compensation or what was deemed the most certain security therefor—that is, a deposit of money, instead of a bond with sureties, as the statute formerly required. But when the landowner is secured in the manner required by the Constitution, the conditions of that instrument are fulfilled and the company is authorized to enter upon the land to construct its road without further delay. See *St. Louis & S. F. Ry. v. E. & H. F. B. Co., 85 Mo., 307; Central Branch U. P. Co. v. Atchison, etc. Ry., 28 Kans., 453 S. C.; Wagner v. Ry., 38 Ohio St., 32; Ry. v. Dyer, 35 Ark., 363.*

1. Right of way: Compensation for.

But a question of more difficulty is how shall the amount of the security be fixed? Must it be "ascertained by a jury of twelve men in a court of competent jurisdiction," or does that clause of the Constitution refer only to the final assessment of the compensation, leaving the Legislature free to provide another method for ascertaining the amount of security to be demanded? The probable design in inserting the clause as to jury trial in this connection, and its proper limitation as here used, may in some measure be elucidated by recalling the restrictions the Legislature could impose upon that privilege in a statutory proceeding unknown to the common law; and also by referring to the established practice of the courts in taking security where the law required it as preliminary to the provisional possession of property taken from the owner, or one claiming to be the owner, under process of law in other proceedings, as well as those to enforce the right of eminent domain.

In the absence of an express provision on the subject, trial by jury in a proceeding to assess damages for appropriating a right of way, is not a constitutional right. It was not guaranteed in such cases by the Constitution of 1836. *Railway v. Trout, 32 Ark., 17.* The purpose, we must suppose, of introducing this provision into the Constitutions of 1868 and 1874, was, as is said by the Supreme Court of Ohio, of a like provision in the Constitution of that State, "to enlarge the rights of the citizens by extending the right of trial by jury to a class of cases wherein it did not before exist. But," continues the court, "we can find no evidence on the part of the framers of the Constitution to fortify this extension of the right with immunities and privileges unknown in the history of the law relating to juries and not enjoyable in other cases wherein the right of such trial previously existed." *Reckner v. Warner, 22 Ohio St., 275.*

Now, the right to have a jury fix the amount of security to be taken as indemnity against an act thereafter to be done,

is an anomaly in other proceedings, and while that is not a sufficient reason for holding that the framers of the Constitution may not have desired to confer the right in this class of cases, the known practice of taking security in advance of the assessment of damages in these (see *Gould's Digest, Chapter 140*) as in other somewhat analogous cases, and the absence of any known evil to be corrected growing out of an abuse of the practice, furnish strong reasons for supposing that the word "secured," when used in the Constitution, was intended to be restricted to the sense in which it was commonly understood, unless a different intention is indicated. "Every word employed in the Constitution is to be expounded in its plain, obvious and common-sense meaning, unless the context furnishes some ground to control, qualify or enlarge it." *Story's Const., sec. 451.*

Now, the framers of the Constitution and the people were familiar with the analogies of the law which permit a citizen to be deprived of the possession of his property pending litigation, upon the execution by the adverse claimant of a bond with sureties in a sum sufficient to secure him against loss. The actions of replevin, and unlawful detainer, and suits in which one is ousted by a receiver appointed for the purpose, are familiar instances. In either case the owner is deprived of the use of his property, and may lose the property itself, by conversion, spoliation or destruction, and his protection is the security which the law demands in advance for his benefit. Security in such cases has but its common meaning of something given or deposited to make certain the fulfilment of an obligation, and it necessarily precedes the ripening of the obligation. The practice designed by the Constitution seems to have been framed in analogy to such proceedings, and to depart from the former practice in condemnation proceedings only in requiring a deposit of money in lieu of a bond with sureties. The requirement that a deposit of money shall be made to secure the payment of compensation to the landowner pre-

supposes that the time is not ripe for payment, else no provision for security would be needed.

It has been suggested that the clause means only a deposit of the assessment made by a jury in a condemnation proceeding as a provision for cases where the owner may refuse to accept the amount awarded as payment, or may be unknown, or not *sui juris*. It certainly covers these contingencies, and might easily have been restricted to them, if it had been so intended. But the language employed does not restrict the meaning to such cases; it is general—compensation must be paid or secured in every case; and, pending proceedings to condemn, it is for the Legislature to determine when the deposit by way of security may be made.

It is also suggested that the Judge may fix the amount of the security at a sum not sufficient to make "full compensation." The same objection may be urged to the assessment of a jury—on a second trial the award may be increased and so the deposit made in pursuance of the first verdict be insufficient to meet the final award. The expediency of submitting the question to one or the other is remitted to the Legislature. In either case the landowner has the further protection that his title is not divested, nor does the right to an easement vest in the corporation until the damages awarded by a jury are paid (*C. and F. Ry. v. Turner, 31 Ark., sup.; Mansf. Dig., sec. 5466, sup.*); and the deposit being a security also for compensation for any damages done in the attempted appropriation of the right of way, when the proceeding proves unsuccessful or is abandoned by the corporation, the owner may recover the deposit and retain his land.

The Ohio Constitution contains a provision almost identical with the one in question. The Supreme Court of that State in *Wagner v. Ry., 38 Ohio St., sup.*, construed it as meaning that the right of entry by the company and the right to receive compensation by the landowner, are co-existent; and that when entry is made, the landowner is *eo instanti* entitled to receive

compensation. But that conclusion seems to us to lay stress upon the first part of the provision in relation to payment of the compensation at the expense or in disregard of the subsequent provision as to the security to be given for payment. The latter is of equal dignity with the former, and entitled to the same consideration in construing the provision. The Supreme Court of Missouri, on the other hand, under a more restrictive constitutional provision declaiing that until compensation "shall be paid to the owner, or into court for the owner, the property shall not be disturbed," hold that the company may enter pending an appeal, after paying into court the amount assessed by the jury, without giving the owner the right *eo instanti* to receive the money thus paid, but that it remains on deposit as security for the judgment if it is affirmed, or as security for any judgment that may be subsequently rendered. See, too, *A. T. & S. F. Ry. v. Schneider, 127 Ill., 151.*

2 Same. The act assailed in this case was passed, as was said in *C. & F. Ry. v. Turner, 31 Ark., 494,* to conform to the provisions of the Constitution of 1868, and has been steadily acquiesced in since the adoption of the present instrument. Many miles of railway have been constructed under it and many condemnation proceedings had where the entry was made before the judgment of condemnation—not a few of which have passed through this court without an intimation of the invalidity of any provision of the act; the Circuit Judges from the passage of the act have conformed their practice to the requirements of the provision that is now attacked; and finally, we have an affirmance of its validity by this court in the case of *Niemeyer v. Ry., 43 Ark., 111,* in an opinion by Judge EAKIN, prior to the death of Chief Justice ENGLISH. The state of the case was exactly that now presented, except that the landowner resorted to equity for an injunction instead of seeking his remedy through *certiorari,* as the petitioner here does. The court say that "if the proposed action of the railway be authorized there can be no doubt of

the power to arrest it by injunction;" and, after discussing other questions, and mentioning the fact that the only authority of the company in appropriating the right of way at that time was by virtue of a deposit of money made under the order of the court where the proceedings to condemn were pending, denied relief to the complainants. The question now presented is not argued by the court in that case, and we are asked for that reason to overrule the decision.

It is essential in any case that a prohibition upon the power of the Legislature should be certainly found in the Constitution to warrant the court in declaring a legislative act void; but where the act has been long acquiesced in by the legislative and judicial branches of the government, the courts should be satisfied that it is repugnant not only to the express and unequivocal terms of the instrument, but to its intent and reason, before resorting to their extraordinary power of nullification. "Where a particular construction has been accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention." *Cooley Const. Lim., 67; State v. Sorrells, 15 Ark., 664.* Such matters are not entitled to controlling weight, for acquiescence for no length of time can legalize a clear usurpation of power, but when an examination of the Constitution leaves a doubt, the judges are warranted in looking to these extraneous matters for aid. We cannot draw from the language of the Constitution the plain and unmistakable meaning that the act in question is a usurpation, and therefore declare it to be a legitimate exercise of the legislative prerogative.

3. Same.

The act of the Circuit Judge in fixing the amount of deposit, is a step taken pending the suit to condemn; the landowner is interested in ascertaining the amount to be deposited, and is entitled to notice of the time and place of the proceed-

ing as of any other step taken in the cause in vacation. See *Mansf. Dig., sec. 5212.* But the appearance of the petitioner was a waiver of notice in this case.

Other questions have been argued by counsel, but the power of the Judge to act is the only one presented by this proceeding. So far as the plaintiff can litigate the other questions at all, it must be by independent action in the appropriate tribunal, or by appeal from the judgment of condemnation.

The writ will be quashed.

HEMINGWAY, J., *dissento.*

BLOCK V. INSURANCE CO.

PRACTICE IN SUPREME COURT: *Award of damages on affirmance of judgment.*

Where no judgment for the recovery of money is rendered against an appellant either in the Circuit Court or in the Supreme Court, the sureties on his *supersedeas* bond are not liable to pay the 10 per centum damages which sections 1311, 1312 Mansf. Dig. provide for assessing in certain cases on the affirmance of a judgment.

On motion to assess 10 per cent. damages against the sureties on the supersedeas bond of appellants.

For the facts and original opinion in this case, see *ante* p. 201. *Secs. 1311, 1312 Mansf. Dig.*, are as follows:

"Sec. 1311. Upon the affirmance of a judgment, order or decree for the payment of money, the collection of which, in whole or in part, has been superseded, as provided in this chapter, 10 per centum damages on the amount superseded shall be awarded against the appellant."

"Sec. 1312. Upon the affirmance of any judgment, order or decree by the Supreme Court, which has been wholly or in part superseded, judgment shall be rendered and entered up against the securities on the *supersedeas* bond, and the court shall award execution thereon."

PER CURIAM. No judgment was rendered against the appellants for the recovery of money in the Circuit Court, or

here. The sureties are not liable, therefore, to pay the penalty prescribed by the statute. *Stephens v. Shannon, 44 Ark., 178; Worth v. Smith, 5 B. Mon., 504; Graham v. Sweigert, 12 ib., 527.*

Motion denied.

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APEL V. KELSEY.

1. PROBATE COURT: *Judgment of, cannot be attacked collaterally.*

The doctrine established by previous decisions of this court, that the Probate Court is one of superior jurisdiction, and that its judgment in the exercise of a jurisdiction, rightfully acquired, cannot be attacked collaterally, has become a rule of property and is adhered to.

2. ADMINISTRATION: *Private sale of lands.*

A private sale of the lands of a decedent, made under an order of the Probate Court for the payment of his debts, is not void when confirmed.

APPEAL from *Arkansas* Circuit Court.

JOHN A. WILLIAMS, Judge.

The land in controversy in this suit was sold at private sale by Shall's administrators, for the payment of his debts, under an order of the Probate Court. It was purchased by one Mills, and came by regular conveyances to Kelsey, who brought ejectment against Apel, the latter being in possession and claiming it under a donation deed. On a trial of the cause the defendant excepted to the documentary evidence of the plaintiff's title, directing his exceptions mainly to the administrator's deed, because the record did not show the confirmation and approval of the sale. The exceptions were overruled and judgment went for Kelsey, and Apel appealed. The Supreme Court reversed the judgment because the administrator's deed did not show a confirmation of the sale; and remanded the case for a new trial, with instructions to permit the plaintiff to prove by record evidence the confirmation of the Probate sale. (See *47 Ark., 413.*) Upon the trial anew the confirmation of the sale was shown, and the defendant again

objected to the administrator's deed. His objection was overruled, and by a declaration of law which was refused, he raised, directly, the question of the validity of a private sale under an order of the Probate Court. The second trial also resulted in a judgment for Kelsey, and Apel appealed.

Bell & Bridges, for appellant.

1. The Probate Court has no power to order a sale of lands by an administrator to pay debts, at *private sale*. Nor can such a sale be cured by confirmation. *Mansf. Dig., secs. 170 to 184; 33 Ark., 89; ib., 428; 47 id., 413.* The Probate Court has authority to sell at *public sale* only.

P. C. Dooley, for appellee.

1. As to the power and jurisdiction of Probate Courts, see *art. 7, sec. 34, Const. 1874*, giving them *exclusive original* jurisdiction over estates of deceased persons. See, also, *sec. 170, Mansf. Dig.*, making lands assets in the hands of the administrator to pay debts. The court acquires judisdiction and proceeds *in rem*. It is a superior court, with general jurisdiction, and its judgments, however erroneous, cannot be attacked collaterally. *31 Ark., 82; 33 id., 575; 40 id., 433; 11 id., 519; 47 id., 413.* The confirmation cured all irregularities. *Rorer Jud. Sales, secs. 2, 11, 16, 286–8; 26 Ark., 433*, is conclusive of this case.

1. JUDGMENTS: Of Probate Court.

SANDELS, J. The jurisdiction of Probate Courts in the matter of sales of lands of deceased persons has often been the subject of investigation and decision by this court. It has often been held that the court is one of superior jurisdiction; that as such its judgments are proof against collateral attack; and that all irregularities in the exercise of a jurisdiction once rightfully acquired, are cured by its final judgment. It is held that the court acquires jurisdiction of the *res* by the grant of administration, and that, upon the filing of a proper petition, the power to order a sale is absolute. It is in the exercise of this power that gross and palpable violations of the statute

courteously called "irregularities" most frequently occur. The court being of superior jurisdiction, all presumptions are in favor of the propriety of its action, and ordinarily no relief is attainable against its judgments and orders except by appeal. But no one can appeal except he have himself made a party to the proceeding in the Probate Court. When an administrator desires to sell land, he is required to give notice by publication of his intended application. This is to enable persons interested to make themselves parties, contest the application, if they see proper, and appeal from the order, if adverse to them. Yet, it is held, that failure to give such notice is but an irregular step in the exercise of jurisdiction, and is cured by confirmation. So, it is required that publication be made of the time, place and terms of such sale when ordered; but failure to give such notice is held to be an irregularity which is cured by confirmation. Want of notice being but an irregularity, we are unable to see what additional "sanctity doth hedge about" a sale. The advantage of a *public* sale, when no one save the administrator knows the time when, or place where it will transpire, is not evident.

2. ADMINISTRATION: Private sale of lands.

It is impossible upon principle to distinguish the question here presented from those so often decided heretofore; and in obedience to the settled doctrine of this court, fixing the character of the Probate Court, and the effect of its judgments, we hold that a private sale of land by an administrator, upon order of that court, is not void when confirmed.

In this particular case there were no bad results to the estate of Hall, from this method of sale. The land brought a good price, and the administrators appear, in all things, to have acted capably and in good faith. But upon the occasion of holding this manifest violation of the law lagalized by a subsequent order of confirmation, we think it proper to submit the following suggestions:

The construction put upon the constitutional and statutory powers of the Probate Court, has gone, we think, far beyond

the intention of the framers of either Constitution or statute. The accretions of power, now far outweigh the original nucleus. But little further aggression is necessary to make the action of that court, in legal contemplation, infallible. This should not be. The specific powers granted these courts by law, pursued in the statutory method, are ample to accomplish the object of their being. The Probate Judges are not required to be, and usually are not, lawyers. In many instances they act without knowledge or consideration of the far-reaching effects of what they do. The most important interests, the guardianship of widows, children and estates, are committed to their superintending care. Some possibly are dishonest, many are not wise or discriminating. Taking into account the magnitude of the property interests which they have in charge, these courts should be required to proceed in exact conformity to law, instead of being panoplied by the presumptions which attend the exercise of superior jurisdictions by other courts. When we see, day after day, the inheritance of infants squandered by the dishonesty or frittered away by the incompetency of administrators, and see these actions irrevocably legitimated by the approval of facile courts, we submit that it is time to call a halt.

The courts are now powerless. Former interpretations of the law have become rules of property, and cannot be overturned without uprooting the titles to one-fourth of the property of the State. But as to future transactions it is the power of the Legislature to place its prohibition upon the sins of omission and commission in administration, which now bankrupt the estates of the dead and send dependent widows to the workhouse.

We earnestly commend the subject to the attention of the law-making power.

Affirmed.

JONES v. STATE.

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1. CRIMINAL PROCEDURE: *Instruction as to degrees of homicide.*

On a trial for murder in the first degree where all the evidence is to the effect that the killing was assassination of the deceased, at night, by his fireside, committed by some one who shot him through a crack in his house, the failure of the court to charge the jury as to the lower degrees of homicide is not error. Hemingway and Hughes, J. J., dissenting.

2. EVIDENCE: *Dying declarations.*

A mere expression of opinion is not admissible as a dying declaration; and it is immaterial whether the fact that a declaration *is* mere opinion, appears from the statement itself, or from other undisputed evidence showing that it was a physical impossibility for the declarant to have known the facts stated.

APPEAL from *Benton* Circuit Court.

J. M. PITTMAN, Judge.

Samuel D. Jones was tried on an indictment charging him with the murder of Henry W. Keltner. He was convicted of murder in the first degree and appealed.

Marshall & Coffman, for appellant.

1. Review the evidence and contend that the verdict was not sustained by it, but was contrary to it. No motive whatever was shown for the crime.

2. It was error to exclude the dying statement of deceased. *39 Ark., 225.*

3. It was error to overrule the motion for continuance, and allow the State to admit that the absent witness would, if present, swear to the matters set up. *50 Ark., 161.*

4. The court in its charge virtually told the jury they must convict of murder in the first degree, or acquit. This was error. *43 Ark., 289; Hopt v. People, 4 Sup. Ct. Rep; Thomps. on Trials, sec. 2184; 2 Bish. Cr. Pro., sec. 642; 8 Ohio St., 194. 5; 37 Ark., 435; 50 Ark., 506; 38 id., 310; 30 id., 328; 10 S. W. Rep., 233; 25 Ark., 405.*

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellee.

1. There is evidence to sustain the verdict. *11 Ark., 463; 34 id., 737; 35 id., 652; 16 id., 592; 29 id., 166.*

2. There was no evidence whatever of any crime less than murder in the first degree. He was guilty of murder in the first degree, or innocent. And it was not error to refuse to charge the jury as to the lower grades of homicide. *50 Ark., 508; 37 Ark., 435; 38 id., 310.*

3. The dying statements properly excluded, as they were mere *expressions of opinion. 39 Ark., 227.*

4. The refusal to grant a new trial was in the sound discretion of the court. There was no show of diligence. *2 Thomps. on Trials, sce. 2767; Hill New Tr., p. 393, sec. 35; 5 S. & R., 42; 13 Ga., 358; 7 Clarke, 255; 13 Ark., 105; ib., 362.*

PER CURIAM. The first, second and third grounds of appellant's motion for a new trial are that the verdict is contrary to the law and evidence. The fourth is that the court neglected to properly instruct the jury as to all the different degrees of homicide. The fifth, that the court erred in refusing to give instructions asked by defendant, numbered from one to five, inclusive. The sixth, because of newly-discovered evidence. Many matters, not presented by the record, have been argued by counsel and considered by the court.

As to the first, second and third grounds of the motion, we think the verdict warranted by the evidence and the law as given by the court. Nor was it error to refuse the first, fourth and fifth instructions asked by defendant, in view of the charge actually given. The sixth ground for new trial was matter resting in the sound discretion of the court, and no abuse of such discretion appears. The fourth ground of the motion challenges the correctness of the charge in that it failed to state the law applicable to the lower degrees of homicide. The charge should be based upon the evidence, and it is difficult to imagine how instructions as to murder in the second degree or manslaughter could have been given when all the evidence was to the effect that the killing was

1. INSTRUCTIONS: As to degrees of homicide.

assassination of Keltner, at night, by his fireside, by some one who fired through a crack from without. The trial court should in no case indicate an opinion as to what the facts establish; but in properly giving the *law* the court must of necessity determine whether there *is any evidence at all* justifying a particular instruction. See *Fagg v. State, 50 Ark., 506*, and cases cited.

One of the matters argued, though not raised in proper form, is the alleged error of the court in excluding the testimony offered as to the dying declaration of Keltner. The witness says that some hours after the shooting Keltner said that Samuel Hall shot him.

2. EVIDENCE: Dying declarations.

A mere expression of opinion by the dying man is not admissible as a dying declaration, and it is immaterial whether the fact that the declaration *is* mere opinion appears from the statement itself, or from other undisputed evidence showing that it was impossible for the declarant to have known the fact stated. If, upon any view of the evidence, it is possible for the declarant to know the truth of what he states, his declarations, being otherwise competent, should be received and considered by the jury in the light of all the evidence.

In the case at bar it was a physical impossibility for Keltner to have seen who shot him, and the consciousness of wrong done in the killing of Hall's father made him swift to suspect Hall of the commission of this crime.

The facts in the case of *Nick Walker v. State, 39 Ark., 225*, were very similar to those now before the court, and the declarations in that case were held to be properly admitted.

The court divided, however, upon the question as to whether it was possible for the declarant to have *seen* Walker, and a majority sustained the trial court in the view that it was possible.

Affirmed.

HEMINGWAY, J. (Dissenting.) I am unable to concur in the opinion of the court in this case; but think that the judgment should be reversed and a new trial awarded.

The charge of the court was entire; not as is usual, divided into a number of instructions. It contained reference alone to the law applicable to murder in the first degree. It announced that the defendant was charged with murder in the first degree; and instructed the jury that if they found him guilty, as charged, they would return a verdict of guilty of murder in the first degree.

No jury of good intelligence could have understood the charge in any other way than as directing a conviction for murder in the first degree or an acquittal. True, there was no language expressly prohibiting a conviction for a lower grade of homicide; but substantially, the direction to convict of murder in the first degree or acquit, implied a prohibition against a conviction of a lower grade of offense. In my opinion this court should treat the charge as saying what it fairly imports, and would naturally be received by an honest and intelligent jury as meaning. We should not endeaver to find a meaning different from that, and impress this meaning upon the charge, although, if so interpreted, it might properly declare the law. The force of the charge rests in its interpretation by the jury; it should not only properly declare the law, but also declare it in a manner to be properly understood.

I am unable to reconcile this charge with the law as declared in the case of *Flynn v. The State, 43 Ark., 289.* In that case the Circuit Judge in concluding his charge, "instructed the jury that if they found the defendant guilty they should assess his punishment at not less than three nor more than twenty-one years in the penitentiary, and that in this case the defendant was guilty of an assault with intent to kill, or that he was guiity of nothing." This court say, "the charge in the case at bar left the jury no room to infer anything in regard to the degree of the offense, or of the nature of the penalty, but

cut them off from finding the prisoner guilty of any of the lower grades of assault, as they might have otherwise done. Under an indictment, such as we have here, a prisoner may be convicted of any one of several very grave offenses, an assault with intent to murder being the highest in degree, and he has the right to have judgment of the jury uninfluenced by any direction from the court as to the weight of evidence." The judgment was reversed.

Now, under the indictment in the case at bar, the jury might have convicted the appellant "of any one of several very grave offenses," murder in the first degree being the highest, and he had a right to have the judgment of the jury "uninfluenced by any direction from the court as to the weight of evidence." Was the right accorded him? Was the jury permitted to act uninfluenced by any direction of the court? The court said, the defendant is charged with murder in the first degree; then follows a lengthy instruction as to the law applicable to murder in the first degree; there is nowhere an intimation that the indictment contained a charge of the lower grades of homicide, or that the jury could convict therefor. It concludes by saying: "If you find the defendant guilty as charged, you will say, we, the jury, find the defendant guilty of murder in the first degree." If the jury was uninfluenced by this charge, and was not restrained from convicting for a lower grade of offense, I am of opinion that the charge had an effect different from that intended by the learned Judge. In a proper case, I think such an instruction ought to be given; but I am satisfied that this court has not so ruled, and I am not willing to change the rule by refinement of language and confusing distinctions.

In a later case this court discussing the same question says: "But the court cannot direct a verdict for the higher offense, nor restrain the jury from returning it for the lower grade." *Fagg v. State, 50 Ark., 506–8.*

It may be said that no exception was properly saved to the charge. The exception was to the charge *in solido;* as the charge was not divided, but given as an entirety, it may well be contended that the exception was sufficient. Be that as it may, the law denounces the penalty, of death against the murderer, and not against the unskilful or unwary. I cannot concur in a judgment, which, because a defendant has not conformed to a technical rule in preparing a bill of exceptions, dooms him to the gallows. I esteem fixed rules, intended to secure orderly procedure in the courts; but think all such technical rules should yield, when necessary, to protect the life of a human being.

HUGHES, J. I concur in this opinion, except that I think, upon the whole case, the judgment should be affirmed.

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STATE v. DRAKE.

ADMINISTRATION: *Settlement of administrator's accounts.*

The settlement of a deceased administrator's accounts, made by the Probate Court before the appointment of an administrator on his estate, is not binding upon the sureties on his bond, and cannot be made the basis of an action against them.

APPEAL from *Randolph* Circuit Court.

J. W. BUTLER, Judge.

The complainant in this action alleges that on the 31st day of November, 1870, Clayburn Spears and Phœbe Dodd were, by the Randolph Probate Court, appointed administrators of the estate of John S. Dodd, deceased, and as such entered into bond, as required by law, in the penal sum of $3000 with the defendants, Oscar Drake and A. W. James, as sureties, which bond is made part of the complaint, and was conditioned among other things that the said Spears and Dodd would well and truly administer according to law, and

pay the debts of the deceased as far as the assets would extend or the law direct, and would make or cause to be made just and true accounts of their administration, and make due and proper settlements thereof from time to time, according to law, or the lawful order of any court having jurisdiction. That by reason of said Spears having been appointed and confirmed as administrator of the said John S. Dodd, deceased, a large amount of assets came to his hands to be administered, and afterwards, on the 24th day of July, 1872, he filed his second annual settlement, from which it appears that he had in his hands the sum of $603. Prior to filing the second settlement, Phœbe A. Dodd relinquished her interest in the assets of her intestate to her co-administrator, and resigned or was removed as such administratrix. On the 31st day of May, 1871, the party for whose benefit the suit was commenced, recovered a judgment in the Probate Court of Randolph County against the administrators of Dodd, for $969, and that $369 of the same remained unpaid. On the 30th day of October, 1872, Spears died intestate, and at the January term, 1886, of the Randolph Probate Court, A. J. Witt was appointed administrator of his estate, and at the same term of court, he was, as such administrator, ordered to pay off and discharge the claim of said Hecht, which order was filed and made a part of the complaint. 'That said Spears, as administrator of John S. Dodd, deceased, wasted the sum of $369 of the assets of his intestate, and that his legal representatives failed to keep and perform the covenants and conditions in the said bond, and assigned as a breach thereof, that by the terms and conditions of the same it was the duty of Spears and his legal representatives to pay off and discharge the indebtedness of the estate when so ordered to do by the Randolph Probate Court; and that the said Spears did not, as administrator of the estate of John S. Dodd, deceased, leave unadministered any sum with which to pay off and dis-

charge the debts. The complaint was dismissed on demurrer, and the plaintiff appealed.

J. C. Hawthorne, for appellant.

The court erred in sustaining the demurrer. See *50 Ark., 102; Mansf. Dig., secs. 42, 1200; 40 Ark., 433; 34 id., 63; 14 id., 179; 65 Ala., 241.*

ADMINISTRATION: Settlement of accounts.

PER CURIAM. The Probate Court's settlement of the deceased administrator's accounts, which is relied upon as the basis of the breach of the bond sued on, was made before the appointment of an administrator of the deceased administrator.

As neither the principal nor his administrator was legally before the Probate Court at the time of the settlement, the judgment of the court was not binding upon the sureties in the bond. No breach is, therefore, alleged in the complaint, and the judgment sustaining the demurrer is right. *Wycough v. State, 50 Ark., 102*, and cases cited.

Affirmed.

PORTER V. NAVIN.

EXEMPTION: *Of wages.*

The right to claim the exemption provided for in section 3244 Mansf. Dig., of laborers' wages from seizure by garnishment, is limited to persons entitled to exemption under the Constitution, and does not extend to non-residents. The sworn statement by which the statute requires a defendant to claim such exemption of wages, is therefore defective if it fails to show that he is a resident of this State.

APPEAL from *Desha* Circuit Court.

JOHN A. WILLIAMS, Judge.

Porter sued Navin before a justice of the peace for a sum due on an account, and obtained an order of attachment embracing a garnishment clause. Reed and Winchester, as trustees of the Little Rock, Mississippi and Texas Railway, were summoned as garnishees, and answered, admitting that they

were indebted to the defendant in the sum of $37.25. The defendant claimed the amount of their indebtedness as exempt. The justice gave judgment against him in the action and refused to sustain his claim for exemption. He appealed to the Circuit Court and filed there a sworn statement to the effect that the sum due from the garnishees was for time wages and did not exceed sixty days' wages; that the sum claimed was less than the amount exempt to him under the Constitution of this State, and that he did not own sufficient other personal property which, together with said sixty days' wages, would exceed in amount the limits of said constitutional exemption. Judgment was again rendered in favor of the plaintiff for his debt, but the court sustained the exemption claimed by the defendant, and the plaintiff appealed.

David A. Gates, for appellant.

Non-residents are not entitled to the benefit of our exemption laws, and the schedule must show the party claiming the exemption to be a resident. *Mansf. Dig., sec. 3422; 41 Ark., 249; 34 id., 111; Mansf. Dig., secs. 2992 to 3000; 58 Ala., 451; 66 id., 199; 71 id., 450; 44 Ind., 266; 60 Iowa, 312; ib., 346; 11 Humph. (Tenn.), 42; Smyth on H. & Ex., sec. 530; 4 Ala., 554.*

PER CURIAM. Section 3244 of Mansf. Dig., in relation to the exemption of laborers's wages from seizure by garnishment, requires of the defendant a sworn statement to the effect that the wages claimed as exempt are less than the value of the personal property exempt to him under the Constitution. The statute thus manifests the intent to limit the right of exemption to those entitled to exemption under the Constitution. But only residents are entitled to the privilege under the Constitution. The sworn statement of the defendant was, therefore, defective in failing to state that the defendant was a resident of this State. *Guise v. State, 41 Ark., 249; Donnelly v. Wheeler, 34 Ark., 111.*

WAGES: Exemption.

Reverse and remand for further proceedings.

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STANLEY V. BONHAM.

1. CURTESY: *Right of subject to execution.*

A husband's right of curtesy in the statutory separate estate of his deceased wife is subject to execution for the payment of his debts.

2. INJUNCTION: *Damages on dissolution of.*

Sections 3763, 3765, Mansf. Dig., providing for the assessment of damages on "the dissolution of an injunction * * * to stay proceedings upon a judgment," apply only to cases where the enforcement of the judgment is enjoined. An injunction to prevent the sale of particular property is not within the meaning of the statute, and it is error to award damages on dissolving it.

APPEAL from *Drew* Circuit Court.

CARROLL D. WOOD, Judge.

This is a suit to enjoin the sale under execution of the plaintiff's curtesy in the separare estate of his deceased wife.

At the hearing below a temporary injunction, which had been granted in the cause, was dissolved, and the complaint was dismissed. The court refused to award the defendant more than $10 damages upon the dissolution of the injunction, and both parties have appealed.

Section 7, Article 9, of the Constitution of 1874, is as follows:

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

Section 4624, Mansf. Dig., provides that the property of a married woman, whether acquired before or after marriage, together with the rents and profits thereof, "shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own

name, and shall not be subject to the interference or control of her husband or liable for his debts."

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

1. Wherever the common law still prevails the husband's estate by curtesy is subject to execution, but wherever (as in this State) the common law has been superseded by Married Women's Acts, the right to seize the estate is abrogated whether the wife be dead or alive. *47 Ark., 175; Mansf. Dig., sec. 4624; 77 Va., 639; 111 U. S., 731; 36 Ark., 588; 13 Allen, 64; 10 id., 94; 9 Fed. Rep., 31; 94 U. S., 770; 52 Ala., 456; Bishop on Mar. W., sec. 824; 34 Fed. Rep., 14; 86 Tenn., 333; 119 U. S., 642; Freeman on Ex., sec. 176; 29 Ark., 209.*

2. This was not a suit to enjoin the collection of a debt, but only the sale of certain lands, and it was error to award damages on the dissolution of the injunction. *24 Ark., 430; 48 Ark., 24.*

Wells & Williamson and *W. S. McCain*, for appellees.

1. Under the decision in *Neely v. Lancaster, 47 Ark., 175*, the husband was seized of an estate by curtesy consummate. *Sec. 7, Art. 9, Const.*, and *sec. 4624, Mansf. Dig.*, only protect a married woman's estate during her life, and does not at her death effect the law of succession. *44 Ark., 153; ib., 112; 47 Ark., 175; 77 Va., 639.* There is no statutory curtesy in this State. It is a freehold estate (*Tiedeman on Real Prop., sec. 101; 38 Ark., 91*), subject to execution for the husband's debts. *Mansf. Dig., sec. 3001; Tiedeman R. P., sec. 109; Washburn R. P., vol. 1., p. 181, sec. 51; Freeman on Ex., sec. 186; 38 Ark., 91.* Ncr can the husband defeat the right by disclaimer. *1 Washb., R. P., sec. 51; 13 Conn., 85.*

2. Stanley is wholly insolvent, and the injunction was in effect an injunction against the collection of a debt generally, and works the same injury. The court should have assessed damages to the full amount of the judgment and costs.

CURTESY: Subject to execution.

PER CURIAM. The husband's right of curtesy in the deceased wife's statutory separate estate is subject to execution for the payment of his debts, just as the estate was at common law in lands held by the wife to her separate use and free from the husband's debts. That is the logical deduction from the decision of *Neely v. Lancaster, 47 Ark., 175.* Whether the husband takes an estate freed from the right of the wife's creditors to subject the property to the payment of her debts is not determined.

DAMAGES: On dissolution of injunction.

As to the assessment of damages on dissolution of an injunction, the statute does not authorize an assessment except in cases where the proceedings upon a judgment have been stayed—that is, when the enforcement of the judgment has been enjoined. *Sec. 3763.* An injunction preventing the sale of particular property does not prevent the execution of the judgment within the meaning of the statute. *Marshal v. Greene, 24 Ark., 410.*

Sections 3763–4 and 5 of Mansf. Dig. were enacted as one section. The first clause (section 3763) authorizes the assessment of damages, and the other two fix the measure of the assessment in the only cases in which the statute contemplates that damages shall be assessed upon the dissolution of an injunction. *Greer v. Stewart, 48 Ark., 21.* In other cases the remedy is by suit on the injunction bond.

The judgment assessing damages upon the dissolution of the injunction is vacated, otherwise it is affirmed.

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MURPHY V. SHEPARD.

TAXES: *Assessor's failure to take official oath.*

Although an Assessor fails to take the general oath of office required by law, he is an officer *de facto* and his acts are valid when questioned collaterally.

APPEAL from *Desha* Circuit Court.

JOHN A. WILLIAMS, Judge.

This was a proceeding in chancery to enforce the collection of a levee tax assessed upon the defendant's lands, in accordance with the provisions of an act entitled, "An act to provide for building and repairing the public levees of this State," approved March 20th, 1879. The statute provides for the election of certain directors of levees, and assessors, and that they shall, before entering upon the discharge of their duties, take and subscribe to the oath required by section 20, article 19 of the Constitution of this State, which is the general oath of office prescribed for all State and County officers. The defendant demurred to the complaint, stating as one of his grounds of objection thereto, that it contains no averment that the directors and assessors "took and subscribed the oath of office prior to entering upon the discharge of their duties." * * * The demurrer was overruled and on the trial the court excluded evidence offered by the defendant to show that the directors and assessors did not qualify, as required by law. The decree was for the plaintiffs, and the defendant appealed.

James Murphy, for appellant.

1. The assessors did not take the oath prescribed by section 17 of the *act March 20, 1879, Acts, p. 117*. They never qualified *at all* as required by law, and the assessment was invalid. See *2 Greenl., 218; 9 N. H., 491; 1 Foster, 400; 13 S. & R., 208; 1 Bush., 259; 21 Ark., 581; 25 N. W. Rep., 13; 49 Wisc., 291; 71 N. Y., 309; 27 Am. Rep., 47; 10 Atl. Rep., 451; 3 N. W. Rep., 382; 18 How., 137; 30 Me., 319; 2 Vt., 218; 12 id., 674; 15 Me., 29; 3 Greenl., 227; 4 id., 72; 20 Me., 199; 2 Mich. (Gebbs), 498.*

X. J. Pindall, for appellee.

1. The assessors were officers *de facto*, and their acts cannot be attacked collaterally. *22 Ark., 559; 43 id., 243; Mansf. Dig., sec. 4389; 25 Ark., 336; 32 id., 666.*

2. This is not a proceeding against a *de facto* officer, but a proceeding concerning a third person. *38 Ark., 336.*

PER CURIAM. An assessor who fails to take the general oath of office required by the law, is an officer *de facto*, and his acts are valid when questioned collaterally. *Moore v. Turner, 43 Ark., 243; Twombly v. Kimbrough, 24 ib., 474; Equalization Board v. Landowners, etc., 51 ib., 516; Cooley Taxation (2 ed.), pp. 253–6.*

Official oath.

Affirm.

WEBB v. ARNOLD.

LANDLORD'S LIEN: *Attachment to enforce.*

Where a tenant, by the consent of his landlord, removes part of the crop from the premises where it was grown, to sell it for the purpose of paying a debt to a third person, the failure to apply to the payment of the rent the excess of the proceeds after the satisfaction of the debt, is no ground for attachment.

APPEAL from *Sebastian* Circuit Court.

JOHN S. LITTLE, Judge.

This was a proceeding under sec. 4459 Mansf. Dig., to enforce by attachment the lien of a landlord on the crop of his tenant, consisting of corn and cotton. The statute provides that "any landlord who has a lien on the crop for rent shall be entitled to bring suit before a justice of the peace, or in the Circuit Court, as the case may be, and have a writ of attachment for the recovery of the same, whether the rent be due or not, in the following cases:

"First. When the tenant is about to remove the crop from the premises without paying the rent.

"Second. When he has removed it, or any portion thereof, without the consent of the landlord."

The attachment was obtained in this case on the alleged ground that the tenant had removed the crop, or a portion of it, without the landlord's consent. On the trial there was evidence to show that the plaintiff had authorized the defendant to sell two or three bales of the cotton for the purpose of pay-

ing a debt due to one Howard, and for which the plaintiff was surety. The judgment was for the defendant, and the plaintiff appealed.

Charles M. Cook and *Joseph M. Hill*, for appellants.

The evidence in the cause shows that the tenant *did remove* a portion of the crop without the consent of the landlord. This was sufficient to sustain the attachment. *Mansf. Dig., sec. 4459 and Ark. Rep. passim.* See, also, *Jones on Liens, secs. 579, 1015.*

The intention of the landlord must be inferred from all the "attendant circumstances." *32 Me., 211; 27 Mich., 6; Jones Liens, sec. 579.*

PER CURIAM. There was evidence to justify the jury in finding that the landlord consented to the removal of the cotton from the premises where it was grown, and it was in proof that the tenant was authorized by the landlord to sell two or three bales of cotton to pay the Harwood debt, for which the landlord was surety. He sold two bales for $81, and out of the proceeds paid the Harwood debt of something over $50, and devoted the residue to the payment of his creditors.

LANDLORD'S LIEN.

The consent of the landlord to the removal and sale of the cotton was the gist of the defense to the attachment, and when that was proved, the ground of the attachment failed. The failure to devote the excess of the proceeds of sale, made by consent of the landlord, to the payment of rent, was not a ground for attachment. The appellant has pointed out no error for which the judgment should be reversed.

Affirm.

WILSON v. WILLIAMS.

REPLEVIN: *Bond required of plaintiff.*

The solvency of a plaintiff in replevin will not dispense with the surety required of him by section 5575 Mansf. Dig., which provides that an order of delivery "shall not be complied with by the Sheriff until there has been executed in his presence by one or more sufficient sureties of the plaintiff, a bond to the defendant" to the effect prescribed by the statute. And where the officer executes the order without taking such bond he becomes a trespasser, aud is liable as such to the party injured.

APPEAL from *Sebastian* Circuit Court.

JOHN S. LITTLE, Judge.

Catherine A. Wilson brought this action against John F. Williams, Sheriff of Sebastian County, to recover the value of certain property which was taken from her and her husband by the defendant's deputy, under an order of delivery issued by a justice of the peace in an action of replevin, brought against them by Whitson and Anderson. The complaint alleges that the property belonged to the plaintiff, and that it was taken by the Deputy Sheriff and delivered to Whitson and Anderson, without first taking from them the bond required by law; that the plaintiff was not summoned in said action, and that the property was sold or otherwise disposed of by the plaintiffs therein. The answer of the defendant avers that he did take from the plaintiffs in the replevin suit a bond as required by law, which he exhibits. It appears, both from the copy exhibited and from the evidence, that the bond was signed by the plaintiffs in that suit alone, and that it was not executed by any person as surety. The court below instructed the jury that the bond thus taken was sufficient to justify the Sheriff in executing the order of delivery. The judgment was for the defendant, and Mrs. Wilson appealed.

Charles M. Cook and *Joseph M. Hill*, for appellant.

1. A Sheriff, taking property under an order of delivery, loses the bond of plaintiff, is responsible to the same extent the

sureties would be. *Binmore on Sheriffs, sec. 80, p. 46; Wells on Replevin, sec. 595; 11 Eng. C. L. Rep., 464 (5 Barn. & Cr., *p. 285.*

2. If a Sheriff, in executing an order of delivery, takes a bond signed only by the plaintiff in replevin, he is a trespasser, and liable for the property, if lost to the defendant. *Mansf. Dig., sec. 5575; Wells on Replevin, sec. 390; 20 Me., 93; 55 id., 362; 5 Ark., 110; 5 id., 81; 10 id., 89; 14 id., 266; 3 Wisc., 407; 5 id., 219; 42 Miss., 732; 6 Wend., N.Y., 547; 18 id., 521; Benmore on Sheriffs, sec. 80; Wells on Replevin, sec. 391, 388, 410 and notes.*

REPLEVIN: Plaintiff's bond.

PER CURIAM. The only bond taken by the Sheriff before executing the order of delivery in the replevin suit was signed by the plaintiffs in replevin alone. But the statute prescribes that the order shall not be executed by the officer until a bond to the defendant, with one or more sureties for the plaintiff, has been executed in his presence. *Mansf. Dig., sec. 5575.* If the officer executes the order without such bond, he becomes a trespasser, and is liable to the party injured, as such. *Pirani v. Borden, 5 Ark., 89; State v. Stephens, 14 ib., 264.*

The solvency of the plaintiff in replevin does not dispense with the necessity for one or more sureties, for that is a statutory requirement. See cases cited in *Wells on Replevin, sec. 390.*

The charge of the court was erroneous. Reverse the judgment and remand the cause for a new trial.

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CLARK COUNTY V. CALLOWAY.

CORONER'S INQUEST: *When to be held.*

The statute [*Mansf. Dig., sec. 692*] requires no inquisition on the body of a person dying from apoplexy or other disease. And it is not the duty of the Coroner to inquire of sudden deaths unless he has reasonable ground for believing that they have resulted from violent or unnatural causes.

2. SAME: *Claim for expenses of.*

It is the province of the County Court to determine whether a Coroner's inquest was one for the expenses of which the county is liable. And a claim for such expenses should be rejected where it does not appear that any ground existed for suspecting that the death inquired of was not a natural one.

APPEAL from *Clark* Circuit Court.

R. D. HEARN, Judge.

Calloway presented to the County Court of Clark County for allowance, a fee bill for services rendered by him as Coroner in holding an inquest on the body of William Rooks. The County Court disallowed the claim, and the plaintiff appealed to the Circuit Court, where the cause was tried by the court sitting as a jury. The plaintiff testified that he was notified of the death of Rooks by Dan Hardy, and that the latter's statement to him in giving such notice was substantially the same as his testimony in this case; that the verdict of the jury on the inquisition was that the deceased came to his death by apoplexy, and that he died within twenty or thirty steps of his house. Hardy's testimony at the inquest was read by consent, and is as follows: "Myself and Wm. Rooks were sawing wood this morning, and he, Rooks, was complaining, and we stopped sawing, and Rooks straitened by the fence and took a fit, and fell down and died in about three minutes. He did not complain before we began to saw."

The wife of the deceased testified that he had been in bad health for two or three years, and had "complained of a pain in his heart, and had smothering spells."

Other witnesses testified that they saw the deceased lying on the ground where he fell, as if he had fainted, and that he died there in a very short time. They also stated that his health had not been good. Upon this testimony in substance the claim was allowed, and the county appealed.

Section 692 Mansf. Dig. is as follows:

"If any person die in prison, or if any person be slain, or die an unnatural death, except by the sentence of the law, or

if the dead body of any person be found, and the circumstances of the death be unknown, information shall be immediately given to the Coroner of the county."

Section 693 provides that the Coroner on receiving such information shall, without delay, summon a jury and hold an inquest. Section 3253 fixes the Coroner's fees, and provides that they "shall be paid out of the county treasury as other demands." Section 1413 provides that the County Court shall in all cases require an itemized account sworn to of any claim presented to it, and may in all cases require satisfactory evidence in addition thereto of the correctness of the accounts.

Crawford & Crawford, for appellant.

This was not a case for a Coroner's inquest. *Mansf Dig., secs. 692, 693.* Nor a proper claim against the county. *Ib., secs. 3253, 1413.*

See *Hale's P. C., vol. 2, p. 57; 11 Am. L. Rev., p. 480, et seq.; 11 East., 229; 7 Ell. & Bl., 805; 100 Penn. St., 672; 32 Mo., 373; 82 Mo., 486.*

It was the province of the County Court to allow or disallow the claim, upon the facts, and protect the county from needless expense.

Murry & Kinsworthy, for appellant.

The Coroner must necessarily exercise, and the statute clearly vests in him, certain discretion, and so long as that discretion be not abused, and the Coroner has reasonable grounds for believing an inquest necessary, it is his duty to hold an inquest, and the county is bound to pay his fees. *Mansf. Dig., secs. 692–3.*

The Coroner, in this cause, exercised a reasonable discretion, and the court so found.

PER CURIAM. It is not necessary that an inquest should be held in the case of one dying with fever, apoplexy or other disease. It was not required by the common law (*2 Hale's Cr. Law, 57*), and is not demanded by the statute. *Mansf. Dig.,*

CORONER'S INQUEST. When to be held

sec. 692. It is not the duty of the Coroner to inquire of sudden deaths, unless there is reasonable ground to believe that they are the result of violence or unnatural means. The authority is to be exercised within the limits of a sound discretion, and when exercised, the presumption is that the Coroner has acted in good faith on sufficient cause. *Lancaster Co. v. Mishler, 100 Penn. St., 624.* As was said in the case cited: "The duty of a Coroner to hold an inquest rests on some reason, on that reason which is the life of the law. It is not a power to be exercised capriciously and arbitrarily against all reason. The object of an inquest is to seek information, and to obtain and secure evidence in case of death by violence or other undue means. If there is reasonable ground to suspect it was so caused, it becomes the duty of the Coroner to act. If he has no grounds for suspecting that the death was not a natural one, it is a perversion of the whole spirit of the law to compel the county to pay him for such services."

Claim for expenses.

It is the province of the County Court to determine whether the case is one for the expense of which the county is liable. *Lancaster Co. v. Mishler, supra; State v. Marshall, 82 Mo., 486.*

In this case there were no circumstanses tending to induce the belief that there was any unnatural cause conducing to the death.

Reverse and remand.

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WEAR V. GLEASON.

1. INN-KEEPER: *Liability for baggage.*

A guest severs his personal connection with a hotel by surrendering his room and paying his bill. And as to baggage which he subsequently delivers to the proprietor, to be held either as a pledge for money borrowed or for accommodation, the extraordinary liability incident to the relation of inn-keeper and guest does not arise.

2. BAILMENT: *Negligence: Delivery of goods to third person.*

Where the gratuitous bailee of a chattel delivers it to a stranger, without effort to

verify the latter's claim thereto, and without inquiring as to its ownership, he is guilty of such negligence as will make him liable for the value of the property, if the delivery is to the wrong party.

APPEAL from *Pulaski* Circuit Court.

J. W. MARTIN, Judge.

Wear, Boogher & Co. brought this action against L. D. Gleason, to recover the value of a trunk and its contents, left at the defendant's hotel by John R. Boddy, the traveling salesman of the plaintiffs. The complaint alleges that the trunk was left with the defendant as inn-keeper, and that as such he agreed to hold it and deliver it to Boddy on demand; but that he negligently and wrongfully delivered it to a third person, by whom it was carried away, and that it was thus wholly lost to the plaintiffs. The answer denies that the trunk was left with the defendant as inn-keeper, or that he negligently delivered it to any one not entitled to it. The evidence shows that Boddy was a guest at the defendant's hotel on the 19th day of August, 1887. After paying his bill, he asked the defendant to loan him $25.00 on the security of the trunk referred to, which he stated to the defendant that he was going to leave at the hotel. The defendant replied that he would lend the sum requested, but that he wanted no security for it. Boddy then gave the defendant his due bill for $25.00, and received from him that sum. The defendant offered to give a check for the trunk, which Boddy declined. Before leaving he gave his railroad check to the defendant, and the latter sent a porter to the railroad depot and got the trunk. Some time afterwards a man called at the hotel, and pointing out Boddy's trunk, which was in the hall, said it was his, and that he wanted it sent to the railroad baggage room to be checked. The defendant sent the trunk to the baggage room of the depot, as requested, and it has not been heard of since. The court refused to instruct the jury that the defendant held the trunk as an inn-keeper. The verdict was for the defendant, and a new trial having been refused the plaintiffs, they appealed.

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

1. When one becomes a guest at an inn, and upon leaving allows his baggage to remain with the consent of the host, the latter continues to hold the baggage as an inn-keeper until it is called for, or until a reasonable time for its removal has elapsed. *41 Ga., 65; S. C. 5 Am. Rep., 524; 9 Pick., 280; 2 Daly 102; 2 Sd. Ray, 866.* When property is entrusted to a bailee of any description, and is not produced upon demand, the burden is upon him to account for the loss. *11 Cush., 70; 14 Allen, 448; 7 Cow., 497; 10 Watts, 335; 22 La. Ann., 415.*

2. Every bailee, whether gratuitous or for hire, is bound to deliver the bailment to the bailor, or rightful owner, and it is no excuse for him to say that he has delivered it by mistake to another. *Edwards on Bailments, 2d ed., secs., 99, 162; Story Bailments, sec. 450; 4 Barb., 361; 9 id., 176; 4 Wend., 613; 6 Bush., 251; 20 La. Ann., 297; 31 Mo., 577; 35 Ala., 209; 1 Caldwell, 372; 25 Texas, 655; 55 Barb., 188.* Even if Gleason was a mere gratuitous bailee, he was liable for *gross negligence, supra.*

Sanders & Watkins, for appellee.

1. The court correctly charged the law as to inn-keeper and guest, and where the relation ceases, in the first instruction asked by defendant. *Edwards on Bailment, p. 393; Schouler on Bailments, sec. 298; 60 Miss., 822; 22 Fla., p. 627; 26 Vt., 330; 2 Lea, 312.*

2. The evidence does not make out a case of *gross negligence*, sufficient to render a gratuitous bailee liable. *Edwards Bailm., pp. 44, 105.*

3. Appellant was guilty of contributory negligence in not taking a check.

INN-KEEPER: Liability for baggage.

PER CURIAM. There is no evidence to show that Gleason received the trunk in the capacity of inn-keeper. Boddy had severed his personal connection with the hotel by surrendering his room and paying his bill before the trunk was delivered

to Gleason. It was subsequently delivered to him either under an understanding that it should be held as a pledge for money loaned by him to Boddy or only for the accommodation of Boddy. In neither case would the extraordinary liability incident to the relation of inn keeper and guest arise. *Bishop Non Contract Law, secs. 1172, 1180.*

Bailment: Negligence.

If the defendant became a gratuitous bailee, or depositary without reward, for the accommodation of Boddy, as the jury might well have found from the evidence, he was not answerable except for gross neglect. His only excuse for his failure to deliver on demand the trunk deposited with him was that he had delivered it to a third person who claimed it as his own. But by delivery to a third person, the bailee deals with the subject of the bailment in a manner not warranted by the understanding between the parties, and thereby commits a wrongful act for which he becomes liable. As to whether an honest mistake by a gratuitous bailee in the identity of the owner, or of the property, made after the exercise of care on his part, would excuse him, is not presented by the facts in this case. The delivery by Gleason was made to an apparent stranger without an effort to verify his claim to the property and without inquiry as to its ownership. He thus manifested a culpable indifference to the safety of the property committed to his care, which, according to all the authorities which have come to our notice, makes him answerable for the value of the goods. *Schouler Bailment, secs. 117, 118; Edward's Bailment, sec. 99; ib., sec. 162; Nelson v. King, 25 Tex., 625; Dufour v. Mepham, 31 Mo., 577; Coy Kendal v. Eaton, 55 Barb., 193; Willard v. Bridge, 4 ib., 361.*

In view of this fact the evidence does not warrant the verdict, and the judgment will be reversed and the cause remanded for a new trial.

It is so ordered.

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St. L., I. M. & S. Ry. v. Box.

1. Railroads: *Defective crossings: Contributory negligence.*

In an action against a railway company for personal injuries sustained by the plaintiff while attempting to drive a loaded wagon over the defendant's track at the crossing of a highway, the fact that when such attempt was made the plaintiff knew that the crossing was defective is not of itself conclusive proof of contributory negligence where it appears that the defect in the roadway was not necessarily dangerous.

2. Same: *Same.*

In such case it is a question for the jury to determine whether, under the circumstances, the plaintiff was justified in attempting to cross the track, and whether he used due care in doing so.

APPEAL from *Craighead* Circuit Court.

J. E. Riddick, Judge.

This is an action to recover damages for personal injuries sustained by the plaintiff in being thrown from his wagon while passing over the defendant's track at a defective road-crossing. The answer denies any negligence on defendant's part and charges contributory negligence on the part of the plaintiff. The evidence shows that the plaintiff drove a wagon over defendant's tracks in Corning, at the crossing near the depot, for the purpose of getting a load of lumber. After the wagon was loaded with lumber he started back to cross the track at the same crossing. The lumber projected considerably in front. Plaintiff drove the team up an incline, which was 5 feet to 110 feet to the crossing. There were three tracks, the main track and one side track on each side. Plaintiff crossed the side track without difficulty, but when he arrived at the main track the wheels struck the plank outside of the rail and the team stopped and quit pulling, and the wagon rolled back some two or three feet. Plaintiff then took the whip and struck one of the mules, which started up again and pulled the wagon over the rail. The fore wheels went into a hole some eight or ten inches deep between the rails. The jar threw plaintiff forward on the double-tree; he caught

on the double-tree and the tongue and was about recovering himself when something struck him on the back or side and knocked him back. He could not recover himself, but fell to the ground, and was run over by the wagon and badly hurt. He had driven over the same crossing that day and many times before. He knew its condition, as did everybody in Corning. It was in bad condition, and the citizens had been complaining of it for some time. The next nearest crossing was about half a mile north.

The court charged the jury as to the measure of damages and also gave them the following instructions, which were objected to by the defendant:

1. It does not follow as a rule of law because a person undertakes to pass a defective or dangerous crossing over a railroad track, which he can see, and is thereby injured, that he is guilty of contributory negligence and cannot recover for his injury; but he should be careful in proportion to the danger, and may proceed to cross if it be consistent with reasonable prudence to do so, and, in this case, it is a question for the jury to say whether the plaintiff was in the exercise of reasonable prudence and ordinary care in attempting to cross at the time of the injury complained of, and in arriving at their conclusion on this subject, they should take into consideration the condition of the crossing, and plaintiff's knowledge of the same, and also the condition in which the wagon with which he was attempting to cross was loaded, and other circumstances in proof.

2. If the jury find from the evidence that the plaintiff was injured while attempting to pass with his wagon a public crossing, placed by defendants over their railway, that the crossing was in a defective condition at the time, by reason of the negligence of the defendant, and that the injury to the plaintiff was caused by said defective crossing while he, on his part, was in the exercise of ordinary care and prudence, they will find for the plaintiff.

The jury returned a verdict for the plaintiff, assessing his damages at $1000, and the defendant appealed.

Dodge & Johnson, for appellant.

1. Plaintiff was guilty of contributory negligence. Had he taken the most ordinary precautions, he would not have been injured. *25 Mich., 294.*

2. If the crossing was notoriously defective and plaintiff knew it, and yet could have avoided it by using another crossing, or could have passed in safety by proper loading or driving, or the exercise of prudence, then a failure in either particular is negligence, in law, contributory to the injury. *90 Mass., 138; 12 Cush., 488; 3 Allen, 21; 5 Allen, 1; 33 Ohio St., 24; 6 id., 109; 3 id., 172; 61 Iowa, 101; 15 N. W. Rep., 855; Beach Cont. Neg., p. 257; 46 Penn. St., 316.* In this case there was another crossing near by, known to him, which was safe, and he should have crossed there. His failure was negligence. *64 Ill., 19; 71 id., 238; 61 Barb., 437; 11 Hun., 543; 84 Penn. St., 230.* See, also, *101 Penn. St., 622; 11 East, 60; 119 Mass., 564; 23 Wisc., 635; 63 Mo., 420; 45 Mo., 452; 61 id., 591–2.*

F. G. Taylor, for appellee.

1. Because a crossing is defective, and not *per se* dangerous, persons who know of its defects are not obliged to abandon travel, if in the exercise of ordinary care and prudence they might reasonably expect to avoid the obstruction, or if the defects were of such a character as that a reasonable person might not anticipate injury from crossing, and this is a question for the jury. *14 N. E. Rep., 738; 13 id., 256; ib., 677; 44 Am. Rep., 274, note; 46 id., 230; 2 N. E. Rep., 1; 7 S. W. Rep., 857; Thomps. on Neg., p. 1203, secs. 52, 53; 18 Am. & E. R. Cases, 87; 3 N. W. Rep., 389.*

PER CURIAM. It is admitted that there was proof showing negligence on the part of the company in its failure to keep the road-crossing in repair; but it is argued that the plaintiff's attempt to cross the track with a loaded wagon when he

CONTRIBUTORY NEGLIGENCE.

knew of the defective condition of the crossing, is of itself conclusive proof of contributory negligence, and bars a recovery.

It is certainly true that one cannot recover for an injury caused by his own wanton or unreasonable conduct in this, more than in any other, class of cases (See *Rosenberry v. Ry., 45 Ark., 256*), but a traveler is not compelled to abandon the use of the only highway conveniently accessible to him, merely because he is apprised that it is out of repair. "A person who, in the lawful use of a highway, meets with an obstacle, may yet proceed if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction and all the circumstances surrounding the party." This language, announcing the general rule which governs such cases, was used by the Supreme Court of Massachussets in a case very similar to this one. *Mahoney v. Ry., 104 Mass., 73;* see, too, *Thomp. Neg., p. 1205, sec. 53.*

Same.

The defect in the road-crossing was not necessarily dangerous, and it was a question for the jury to determine whether, under the circumstances, the plaintiff was justified in attempting to cross the roadway notwithstanding the defect, and whether in doing so, he used due care. The court submitted the question under proper instructions to them, and their verdict is conclusive here.

Affirm.

HENDERSON V. GATES.

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CHATTEL MORTGAGE: *Description of property, etc.*

The mortgage of a crop which designates it as "my entire crops of cotton and corn, to be raised by me the present year, or contracted by me," and which recites the names of the grantees as "Henderson, Echols & Co.," sufficiently describes both the property conveyed and the mortgagees, and is not invalid as to third parties for uncertainty.

APPEAL from *Prairie* Circuit Court.

M. T. SANDERS, Judge.

The appellees, F. Gates & Co., were sued by appellants, Henderson, Echols & Co., for the value of two bales of cotton, which had been purchased by them from one Maddox, and upon which appellants claimed to have had a mortgage. On the trial appellants offered their mortgage in evidence, and appellees objecting to its introduction as evidence, the court sustained their objection and excluded it. Two defects in the mortgage were insisted on. First—That the description of the crops of corn and cotton was too imperfect to render the instrument valid as against third parties who had acquired an adverse claim to the same innocently and in good faith. Second —The description of the mortgagees was too uncertain, their names being recited as "Henderson, Echols & Co."

The mortgage relied on describes the crop in these words: "My entire crops, of cotton and corn to be raised by me the present year, or contracted by me." It was duly recorded in the Recorder's office for Monroe County.

J. E. Gatewood and *T. J. Oliphint*, for appellants.

1. The description in the mortgage, and its record in Monroe County, was sufficient to enable third parties, aided by inquiry, to identify the property. *Jones Ch. Mortg., secs. 54, 53, and note; 51 Ark., 410; 65 Ga., 644; 60 Ala., 394; 78 id., 28; 79 id., 335; Jones Ch. Mortg., sec. 64; 18 Pac. Rep., 491; 39 N. W. Rep., 582; 35 ib., 598; 10 Daly, 202; 28 N Y., 362; 37 id., 593; Smith Ch. Mortg., 10.*

2. Oral evidence is competent to identify the articles. *18 Barb., 201; 28 Hun., 25; 9 Barb., 630.*

Sandels & Warner, for appellee.

1. The description is not only insufficient, but unintelligible. *74 Ind., 495; 36 N. W. Rep., 719; 57 Iowa, 662; 41 Ark., 70; 43 id., 350; 26 Kan., 589.*

2. The description of the mortgagees was not sufficient. *36 Ark., 464.* The mortgage fails to name any *person* as grantee.

MORTGAGES.

PER CURIAM. The mortgage offered in evidence sufficiently described the subject mortgaged (*Johnson v. Grisard, 51 Ark., 410*) and the parties named as mortgagees. *Perciful v. Platt, 36 Ark., 456; Kellogg v. Olsen, 34 Minn., 103; Morse v. Carpenter, 19 Vt., 613; Sherry v. Gilmore, 58 Wisc., 332-3; Chicago Lumber Co. v. Ashworth, 26 Kan., 212; Newton v. McKay, 29 Mich., 1; Beaman v. Whitney, 20 Me., 413; Hoffman v. Porter, 2 Brock, 156; Murray v. Blackledge, 71 N. C., 492.*

The court erred in refusing to admit the mortgage in evidence.

Reverse and remand for a new trial.

SMITH V. FINLEY.

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1. JUDGMENT: *By confession in justice's court.*

Where the entry of a judgment by confession in the docket of a justice of the peace does not show, except by inference, that the defendant personally appeared in the justice's court as provided by the statute [*Mansf. Dig., sec. 5185,*] governing confessions of judgment, and it is shown by parol testimony that he did not in fact appear, the judgment will be held void.

2. USURY: *Trustee's sale.*

The sale of property under a power contained in a deed of trust will pass no title where the deed is executed to secure the payment of a note void for usury.

APPEAL from *Garland* Circuit Court.

J. B. WOOD, Judge.

O. F. Smith sued Addie Finley for the possession of lot 6, of block 74, of the Hot Springs Reservation, in Garland County, and claimed title under a deed of trust made by defendant to D. Beitler, trustee, for the benefit of E. Smith, under which there was a sale of the property by R. L. Williams, Sheriff of Garland County, the trustee having refused to act,

purchase by O. F. Smith, and a subsequent conveyance made by the Sheriff to him, the appellant.

The deed of trust was filed as an exhibit to the complaint. It bears date September 5, 1885; indebtedness, $60; authorizes the Sheriff of Garland County to act in case of the trustee's refusal. The deed of the Sheriff, bearing date July 19, 1887, was filed as an exhibit to the complaint; recites a sale on the 21st day of February, 1887, after publication of notice according to the terms of the deed of trust, the refusal of the trustee to act, bid of appellant of $66.50, etc. This deed was duly acknowledged and both were recorded. The deed of trust bore the following indorsement: "I hereby refuse to act as trustee for the sale of the within described property. D. Beitler, trustee." The deeds were introduced in evidence on the part of the plaintiff, also the advertisement of sale. The defendant pleaded usury. The original transaction was shown by the evidence to be usurious. Plaintiff introduced in evidence a judgment of Henry James, a justice of the peace, as follows:

"IN JUSTICE COURT, GARLAND COUNTY, ARKANSAS.

"Before H. James, Justice of the Peace.

"E. Smith, plaintiff,
v.
"Addie Finley, defendant. } Judgment by confession.

"On this, the third day of November, 1886, comes said plaintiff by agent, O. F. Smith, and files before me one promissory note against the defendant for the sum of $60, dated September 5, 1885, and made payable to E. Smith, or order, two months after date, with 10 per cent. interest per annum from maturity until paid, and secured by deed of trust of even date herewith, and the said defendant says that she is indebted to the said plaintiff in the sum of $60, and confesses that judgment may be rendered against her for said amount. It is therefore considered by me that said plaintiff have judgment and recover from said defendant the sum of $60 with all

the interest and all the costs in and about this suit expended.

"H. JAMES, J. P."

The justice of the peace, James, who entered the judgment, testified that he went with the plaintiff, and at the latter's request to the defendant's house, and she there, at the date of said entry, and with the plaintiff's consent, confessed judgment on the note secured by the mortgage. On cross-examination he stated that he went with the plaintiff to defendant's home and she stated that she owed the note; but that she did not come to his office to confess judgment, and he did not see her in his office. The defendant testified that the justice merely asked her if she owed the note, and she answered "yes;" that she did not understand that she was confessing judgment and did not do so.

The plaintiff moved the court to instruct the jury that after the defendant confessed a judgment on the note that it was too late for her to make the defense of usury, but the court refused to do so, and the plaintiff excepted.

The verdict was for the defendant and the plaintiff appealed.

Section 5185 Mansf. Dig. is as follows:

"Any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and, with the assent of the creditor or person having such cause of action, confess judgment therefor, whereupon judgment shall be entered accordingly."

R. G. Davies and *Charles D. Greaves*, for appellant.

1. Judgments by confession are no more open to collateral attack than other judgments. They may be set aside for fraud, but are not vitiated by mere irregularities. *4 Watts, 474; 61 Pa. St., 96; 6 Or., 344; 1 Bibb., 164; 17 Fed. Rep., 98; 9 Atl. Rep., 670; 5 Oh., 523; 13 Oh. St., 446; 30 id., 69; 9 Tex., 495.*

2. The judgment of the justice substantially complied with the statute, and operated as a release of errors. *Mansf.*

Dig., sec. 5187; 1 Ark., 169; 11 id., 313; ib., 572; Freeman on Judg., secs. 334–7.

3. The confession of judgment precluded the defense of usury. See *4 Cow., 457; 3 Humph., 63; ib., 559; 3 Cald., 477; 5 Rand., 543; 16 Am. Dec., 759; Freeman on Judg., sec. 502; 2 Burr, 1009; 4 East, 313; 3 Minor Inst., p. 132.*

PER CURIAM. The justice's record does not show jurisdiction of the person of the defendant Finley unless by inference. The parol testimony which was heard at the trial, and was admissible to show want of jurisdiction (*Jones v. Terry, 43 Ark., 230; Visart v. Bush, 46 ib., 153*), is conclusive of that fact. The judgment was, therefore, void.

The proof was clear that the contract was usurious. The plaintiff, therefore, took nothing by his purchase at the trustee's sale.

Affirm.

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SANDERS v. MOORE.

1. APPEALS: *Dismissal for want of prosecution.*

The dismissal of an appeal to the Supreme Court for want of prosecution, does not bar a second appeal.

2. PARTIES: *Action by heir to recover debt.*

The sole heir of one who died in 1867, may maintain an action commenced in 1885, to enforce the payment of a debt due the decedent's estate, where it appears that administration on the estate ceased in 1882 by the administrator's death, and that the creditors (if there are any) have made no effort to renew it.

APPEAL from *Phillips* Circuit Court in Chancery.

M. T. SANDERS, Judge.

Cliff, the father of the plaintiff, Mrs. Sanders, died in 1867, leaving her his only heir. The administrator sold the land of the estate under an order of the Probate Court, and it was purchased by J. W. Humphries, who executed his note for part of the purchase money. Mrs. Sanders brought this suit in 1885 against Humphries' heir, to enforce the payment of his note, alleging that by imposition upon an administrator *de*

bonis non Humphries procured a deed without paying his note. That there was no administration pending on the estate of Cliff, and that it owed nothing. The court below held that the suit could only be maintained by an administrator on Cliff's estate, and dismissed the bill. The plaintiff appealed, and her appeal was dismissed for want of prosecution. A second appeal having been granted, the defendant moved to dismiss it.

U. M. & G. B. Rose and *John C. Palmer*, for appellant.

There being no administration, and no necessity for an administrator, the bill charging that there are no debts, the suit was properly brought in the name of the only heir. *6 Ark., 156; 47 id., 470; 37 ib., 155; 46 ib., 373.*

George Sibley, for appellee.

The administrator was an indispensable party to the suit. *Bliss Code Pl., 108.*

PER CURIAM. The dismissal of an appeal for want of prosecution does not bar a second appeal. *Ashley v. Brazil, 1 Ark., 144; Turner v. Tappscott, 29 ib., 318.* APPEALS.

The only question decided by the Circuit Court or pressed for determination here, is the right of the plaintiff to maintain the action. She is the sole heir of her deceased father, who died in 1867; there was administration on his estate soon after; the administration ceased by the death of the administrator in 1882, and no effort has been made by the creditors, if there are any, to renew it. The principle governing the cases of *Graves v. Pinchback, 47 Ark., 470; Crane v. Crane, 51 ib., 287; Winningham v. Halloway, ib., 385; State Bank v. Williams, 6 ib., 156,* permits the maintenance of the action by this plaintiff. PARTIES.

The plaintiff's position is strengthened by the allegation that there are no subsisting debts against the estate.

The court erred in sustaining the demurrer.

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

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BUSH V. CELLA.

1. PLEADING: *Ambiguity in, corrected by motion.*

Although the material allegations of a pleading are ambiguous and uncertain, if the inference may be drawn therefrom by a fair intendment, that facts exist sufficient to constitute a cause of action or ground of defense, the defect must be corrected by a motion to make more definite and certain, and not by demurrer.

2. SPECIFIC PERFORMANCE: *Of ageeement to convey lands.*

Where a purchaser of lands causes them to be conveyed to a married woman under an agreement with her husband, who pays the purchase money, that upon the repayment of the amount with interest, he will cause the lands to be conveyed to the purchaser, and the latter enters into possession and makes valuable improvements under the contract, he may enforce it against the wife, who in such case will hold the title as a naked trustee.

APPEAL from *Miller* Circuit Court.

C. E. MITCHEL, Judge.

This is an action of ejectment, to recover possession of a lot in the Town of Texarkana. The complaint is in the usual form, and alleges title in the plaintiff under conveyances from the United States government to one Thomas T. Murray, and from him to the plaintiff.

The defendant answered, denying plaintiff's ownership of the lot, and alleging that said Thomas T. Murray, on or about November 1, 1885, being the owner of said lot, entered into negotiations with defendant to sell it for him; that Murray proposed to take $300 for it, and give defendant for his commissions all over that sum which he might be able to get; that defendant then proposed to purchase it himself for that sum, to which Murray agreed. This was consummated on or about November 13, 1885. Defendant then borrowed from J. L. Cella, the husband of plaintiff, $300, with which to make the purchase, agreeing to repay said amount with 20 per cent. interest thereon, after the expiration of one year, and further agreeing that the deed might be made by Murray to said Cella, or to his wife, the plaintiff, to be held as security for such repayment, and a reconveyance to be made to defendant upon

such repayment. Defendant afterwards, upon maturity of the loan, presented a deed to plaintiff for her examination and signature, stating that he was prepared to pay the loan and interest as agreed upon. Plaintiff disclaimed any knowledge of the transaction, and desired to consult her husband about it. Defendant then left her house, thinking that at a convenient time the deed to him would be properly executed and presented and the money demanded, and he alleges a willingness and readiness at all times since the maturity of the loan to pay it and the 20 per cent. interest thereon according to agreement. The answer further states that ever since his said purchase from Murray, defendant has lived on said lot with his family, has made valuable improvements thereon, paying about $200 therefor, and has paid all taxes assessed against it, and that plaintiff was never consulted nor asked to pay for any of these things; and denies that defendant wrongfully holds possession of the lot, or has damaged plaintiff, and prays that the cause be transferred to the equity docket; that plaintiff's deed be held and treated as a mortgage to secure the money loaned; that plaintiff be required to convey the lot to defendant upon payment by him of the $300 and interest as agreed on, which sum he then brought into court and tendered, and for other relief. To this answer plaintiff demurred. The demurrer was sustained, and defendant declining to answer further, judgment was rendered against him, and he appealed.

Dan W. Jones and *Thomas B. Martin*, for appellant.

1. Parol evidence is admissible to show that a deed, absolute on its face, was intended as a mortgage. *5 Ark., 321; 18 id., 34; 7 ib., 505; 13 ib., 112; 15 ib., 280; 23 ib., 479; 40 ib., 146.*

2. If the cross-complaint set up a defective or uncertain defense, a motion to make more certain and definite, was the proper mode to correct, and not a demurrer. *31 Ark., 383; 32 ib., 131-5-6.*

Scott & Jones, for appellee.

1. It requires clear and decisive testimony to show that a conveyance, absolute on its face, was intended as a mortgage. *31 Ark., 163; 19 id., 278; 1 Story Eq. Jur., sec. 152; 7 Otto, 624.*

2. The answer is wholly without averments as to material facts; it is not alleged that the conveyance was made for the consideration of securing to appellee the loan of $300. Nor does it appear that in any transaction had by appellant with J. L. Cella, the husband, the latter was agent of his wife, or that the conveyance was the result of appellant's negotiations with her husband and Murray; nor that the $300 alleged to have been borrowed, was the $300 used in making the purchase, etc. See *45 Ark., 302.*

Francis Johnson, also for appellee.

To establish a resulting trust all the facts must be clearly set out. *Perry Trusts, sec. 137.* The very first element is lacking, viz.: That the consideration moved the party seeking to enforce the trust.

2. Specific performance of an executory contract will not be enforced against a married woman. *38 Ark., 31; 44 id., 113.*

3. The alleged contract is void for usury.

PER CURIAM. The allegations of the cross-complaint are slovenly, ambiguous and uncertain as to some of the material facts necessary to sustain it; but the inference may be drawn, by a fair intendment from the allegations, that the defendant either caused the deed upon which the plaintiff relies to be executed to her as security for money loaned him by her husband; or that it was executed to the plaintiff under an agreement with the husband, who paid the purchase money, that upon repayment by the defendant of the amount, with interest, he should cause the land to be conveyed to the defendant, and that the latter had entered into possession under the agreement, paid the taxes and made valuable improvements in part performance of the contract. In either

PLEADING.

event a defense or cause of action was defectively stated, and the plaintiff's remedy was by motion to make more certain, and not by demurrer.

SPECIFIC PERFORMANCE.

In the second contingency, the allegations, the truth of which is confessed by the demurrer, show the wife to be a naked trustee, or only a conduit for the passage of the title, and her coverture would present no argument against the enforcement of the contract.

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

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ROBERTSON V. READ.

1. VENDOR AND VENDEE: *Bond for title: Rights of parties.*

Where land is sold by a bond for title, the return of the bond to the vendor through the action of a third person, without the knowledge or consent of the vendee, and the destruction of the latter's note for the unpaid purchase money, will not extinguish the equitable title acquired by his purchase. And a subsequent sale of the land by the vendor to such third person, merely subrogates the latter to the vendor's rights, and he will hold not as owner, but as mortgagee.

2. MORTGAGEES: *Compensation for improvements: Liability for rent.*

A mortgagee who himself occupies the mortgaged premises, consisting of a farm, is not entitled to pay for permanent improvements made without the owner's consent, and is chargeable with such rent only as the land would have yielded without the improvements.

APPEAL from *Drew* Circuit Court in Chancery.

C. D. WOOD, Judge.

W. S. McCain and *Wells & Williamson*, for appellant.

1. Equity will not decree specific performance when the contract has been voluntarily surrendered and abandoned, especially when there are matters of estoppel, and the rights of third persons have intervened. *33 Ark., 63; 34 Ark., 34; 8 Paige, 473.*

2. Where a husband has abandoned his wife and children, the wife becomes the agent of the husband so far as concerns the property left in her possession. *Mansf. Dig., sec. 4953.*

3. Absence from the *county*, as alleged in the complaint, does not raise the presumption of death. *Ib., 4597.*

4. It was error to hold appellant liable for rent of land which he cleared after his purchase. *50 Ark., 447; 33 id., 490.*

5. Appellant bore no fudiciary relation to appellees. He was at best no more than a mortgagee in possession, who is not liable for rent of improvements made by him. *42 Ark., 456; Jones on Mortg., 1127; 4 Kent, 166; 32 Minn., 189; 7 Iowa, 134; 14 Vt., 513; 1 Hill, S. C., 501; 1 Johns. Chy., 385; 4 Cowen (N. Y.), 168; 19 Wisc., 235; 56 Miss., 352; 131 U. S., 107–9; 8 Wheat, 1; 10 Paige, 49; 21 Hun., 36; 65 Ala., 511; 38 Miss., 401; Malone on Realty, 132; Boone on R. Prop., 169; Sedg. & W. on Tr. of Title to Land, sec. 578.*

W. F. Slemons, for appellees.

The attempted cancellation of the bond for title did not affect appellee's rights. *49 Ark., 469.* Bob Robertson not having been heard of for twelve years, was dead, in law. *Mansf. Dig., sec. 2850.* Brass was the brother-in-law of the widow, and uncle of the children, and standing in this close relation, committed a fraud on them.

The evidence shows that the amount paid by Bob Robertson, the amount of assets converted by Brass, and the rents reimbursed Brass for any amount he may have paid on the land, and the decree is right, and should be affirmed.

HEMINGWAY, J. This is a suit by the widow and heirs at law of one Bob Robertson, against Brass Robertson, his brother, to establish a trust in a tract of land.

The material facts of the case are as follows: In 1871 or 1872 one Thomas Trotter sold the land to Bob Robertson, on a credit, for $660, giving his title bond and taking notes for the purchase money, bearing interest until paid at 10 per cent. per annum. Bob Robertson entered into possession and occupied the land as a homestead, Brass, who was younger, living with him. Bob paid $160 on the notes. In 1874 he fled

the country, leaving his wife, children and brother in possession of the land. In 1875, after the last of the purchase money notes had matured, Trotter notified Brass that unless they were paid, he would proceed against the land. Brass procured the title bond from Bob's wife, and returned it to Trotter, who, intending to cancel the sale, destroyed it and the notes. The payment made by Bob liquidated the interest, but did not reduce the principal of his debt. Brass and Bob's family remained upon the land during 1875 as tenants of Trotter. About the close of that year Trotter sold the land to Brass. He paid part of the price in cash, and gave his notes for the balance; he received a bond for title. He subsequently paid the notes. It does not appear from the evidence that Brass acted otherwise than in good faith, either in attempting to cancel the bond to Bob, or to acquire title to himself. When he purchased there was due on Bob's notes $660; and there were twenty acres of the land in cultivation of the rental value of three dollars per acre per annum. The land is not shown to have had any other rental value. Brass subsequently cleared more of the land and made other improvements; he asks that he be paid therefor in case his title fails.

The court below found that Brass had received assets from Bob to apply on his notes, which, with the rents received by him, was sufficient to extinguish them. As to such assets the testimony is very indefinite and unsatisfactory, and we cannot find that any were received by Brass for that purpose.

1. VENDOR AND VENDEE: Bond for title.

The effect of the title bond to Bob, was to vest in him an equitable title to the land, and to retain in Trotter the legal title as security for the purchase money. The return of the bond to Trotter was made without Bob's knowledge or consent; such being the case, Trotter did not acquire Bob's title by its delivery to him and the destruction of the notes.

When Brass took possession under his purchase, he held not as owner but as mortgagee, being subrogated to Trotter's right as such. *Teaver et al. v. Eakin*, 47 *Ark.*, 528.

2 MORTGAGES: Improvements: Rents.

A mortgagee is not entitled to be paid for improvements made upon the mortgaged premises, further than is necessary to keep them in repair. The improvements may be of permanent benefit to the estate, but unless made with the consent and approbation of the owner no allowance can be made for them. The mortgagee has no right to increase the burden of redeeming. If he chooses to make improvements, he may enjoy their use during his possession, but upon redemption they inure to the benefit of the estate. *Jones on Mort., sec. 1127.*

A mortgagee who himself occupies the premises, especially if they consist of a farm, upon which money and labor must be bestowed to produce annual crops, is chargeable with such sums as are a fair rent of the premises (*Jones on Mort., sec. 1122*); but he should not be charged an increased rent, caused by improvements upon the land for which he is denied compensation. Justice is done by charging him with the rent which the land would have yielded as it was without his improvements. To the extent that the rental value is increased by them, he should not be held to account. *Jones, McDowrell & Co. v. Fletcher, 42 Ark., 456; Tatum v. McClellan, 56 Miss., 352; Jones on Mort., sec. 1127, and cases cited.*

The question of limitation was not raised by the pleadings of appellant nor considered by us.

The appellees are entitled to redeem the lands upon paying to appellant the amount due on Bob's notes. He should be credited by the sum of $660, the amount due on the notes when he purchased, less $60, the rent for 1875, with interest from January 1, 1876, at 10 per cent. per annum; but he should be charged with the sum of $60 for the rent of the land for each year beginning with 1876, which should be credited at the end of each year on the amount due him. If the appellees pay the sum so due him, they are entitled to have the title vested in them; if they fail to pay it within a reasonable time, the land should be sold to satisfy it.

The judgment is reversed, and the cause remanded for a decree and proceedings thereunder, in accordance with the law as herein declared.

GARNER V. WRIGHT.

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1. COMMON LAW: *Presumption as to.*

The courts of this State will not presume that the common law is in force in the Indian Territory, where no system of laws has been adopted.

2. INDIAN TERRITORY: *Adjudication as to right accruing in.*

When the aid of our courts is invoked as to a right accruing in the Indian Territory, in the absence of evidence showing the laws in force there, the laws of this State will be applied and justice administered according thereto.

3. CHATTEL MORTGAGE: *Possession under: Mortgagee's title.*

Where a mortgaged chattel is delivered to the mortgagee before the right or lien of any third party attaches, his title is good against all persons, if the mortgage was previously valid between the parties, although it is not acknowledged and recorded.

4. SAME: *Same.*

While the mortgaged chattel is in the custody of the mortgagee, he may lend it to the mortgagor for occasional, temporary use, without prejudice to his security.

APPEAL from *Sebastian* Circuit Court.

JOHN S. LITTLE, Judge.

C. M. Cooke and *Joseph M. Hill*, for appellant.

1. As there is no *lex loci contractus* to govern this case, the parties having invoked the aid of our courts, the *lex fori*, the common law, should govern. See *18 How., 100; 4 id., 567; 14 Otto, 621; 116 U. S., 28; 12 Otto, 145; Vattel (Chitty's 4th Am. ed.), sec. 107; Story Conf. Laws (5th ed.), pp. 421–2; 1 Kent Com., *pp. 243, 473, note a; 1 Sharsw. Blackst. *p. 108, note 11; 6 N. J. L., 1; 1 Dall., 374; 1 Dall., (Pa.) 64; 5 Peters, 233; 3 Oh. St., 172; 2 Oh. St., 387; 45 Miss., 397; 2 Ark., 198; Mansf. Dig., sec. 566; 53 Miss., 222.* The parties, Brown and Garner, being citizens of the United States, and white men, in the absence of proof, the law will presume they had as their heritage

the common law of England. *14 Ark., 603; 30 id., 469; 31 id., 32; 105 U. S., 24.*

2. Under the common law delivery of mortgaged property was essential. Registration or filing, under our laws, has taken the place of delivery, but either is sufficient. *Jones. Chat. Mortg., sec. 176; 30 Wisc., 81; 10 Sm. & Mar. (Miss.), 282.* Possession by the vendor or mortgagor, for temporary purposes, does not invalidate the transfer. *41 Ark., 186; 33 Am. Dec., 164; 32 id., 341.* A subsequent delivery to the mortgagee cures all defects. *Jones Ch. Mortg., sec., 178 and note 4; 49 Ark., 279.*

3. The action is transitory and may be maintained in any forum in which plaintiff may find the defendant or property. The *res* is a chattel. *Bouvier Law Dic., "Transitory Actions;" Bacon Ab. Tit. Actions, Local and Transitory; 1 Ark., 63; 31 Am. Dec., 264; 32 Am. Dec., 341; 1 Ves., 444; 6 Cranch, 148; 31 N. J. Law, 309.*

4. *Carter v. Goode, 50 Ark., 155,* applies only to torts. The following cases would seem to announce a different ruling: *Cowper, 167–8; ib., 180.* Certainly in cases *ex contractu, cases supra.*

E. E. Bryant, for appellee.

1. Whether the doctrine in *50 Ark., 155,* applies to contracts or not, is not necessary to inquire. At common law, possession by the mortgagee was essential, as against third parties. *Jones Ch. Mortg., sec. 176; Brown on Mortg, sec. 245; 49 Ark., Watson v. Lumber Co; 9 id., 19; 41 id., 186–191; 75 Am., Dec., 143,* and many others. The change of possession must continue, during the life of the mortgage. The mortgagee must "take and *retain*" possession. *Jones Ch. Mort., secs. 176, 180–1, 185, 186–7; Boone Mortg., sec. 245; 15 Wend., 244; 9 Johns., 337; 16 Pick., 34; 19 Vt., 609; 17 Pac. Rep., 594; 30 Am. Dec., 475; 16 id., 686.*

2. The common law does not exist in the Indian Territory between whites. *30 Ark., 230; 50 Ark., 155; Story Conf.*

Laws, secs, 278–9, 273–4; 15 Cal., 253; 20 Fed. Rep., 300. There being no *lex loci contractus*, the *lex fori* governs. *18 Ark., 395; Story Conf. Law, supra.*

3. While courts may enforce the laws of another country *by comity* (*1 Gr. Ev., sec. 43; Story Conf. Laws, secs. 244, 36*), yet they refuse so to do when against the policy of their laws, or against the interests of her own citizens. *Story Conf. Laws, sec. 244; 70 Am. Dec., 65, 66; 31 Ark., 32; 14 Martin, 93, 102; 142 Mass., 102; 81 N. Y., 199; 9 Phila., 615; 8 Mich., 143; 12 N. W. Rep., 913; 9 Vt., 358; 23 id., 279; 18 Ark., 395.*

HEMINGWAY, J. The appellant, Garner, and one Brown, white men, and citizens of the United States, resided in the Indian Territory. On the 19th of January, 1886, Brown there executed a mortgage to Garner, whereby he conveyed to him certain chattels, including the horse and wagon in controversy, as security for a debt.

The mortgage provided that Garner should have possession and control of the mortgaged chattels. They were accordingly delivered to him and remained in his sole possession for more than a month, when Brown borrowed them to use in hauling wood. He used them during ten days, but at night returned them to Garner's barn. On the 9th of April following, Brown borrowed them to make a trip to Fort Smith, and after his arrival there they were seized under an attachment against his property. Garner appeared in the attachment suit, and filed an interplea, claiming them under his mortgage. There was judgment against him on the interplea and he appealed.

In determining the merits of his claim it is essential to know by what law the validity of the mortgage is to be determined.

As a rule, when rights arise in a particular country, they are to be determined by the laws of that country, and the party who would avail himself of them should prove them.

1. COMMON LAW: Presumption as to.

The mortgage in controversy was executed in the Indian Territory. No proof was offered of the laws in force there applicable to the matter, and it was agreed between the parties that there was no local Indian law that was pertinent. This absence of proof cannot be supplied by presumption. In similar cases the courts of this State will generally presume the common law to be in force in another State. *Cox v. Morrow, 14 Ark., 603; Thorn v. Weatherly, 50 Ark., 243.* But this presumption is indulged as to those States only that have taken the common law as a basis of their jurisprudence. Such a presumption would not be indulged as to the laws of the States of Louisiana and Texas, because we know that their jurisprudence is founded upon a different system; the same reason forbids such a presumption as to the laws of the Indian Territory, for we know that no system of law has been adopted there. But property rights are asserted there, and their existence universally recognized. They do not depend upon the uncertain tenure of possession, but rest upon a more substantial basis. As such rights are respected there, they should be enforced when they become involved in the courts of this State.

2. INDIAN TERRITORY: Rights accruing in.

There is no Federal law on the subject. We have no proof of, and can indulge no presumption as to, the local laws in force there. As the parties have invoked the aid of our courts, we must therefore apply our own law and administer justice according to its principles. Such we understand to be the practice of the Supreme Court of the United States. *The Scotland, 15 Otto, 24.*

3. CHATTEL MORTGAGE: Possession under: Title.

Under our law if a mortgagee take possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not acknowledged and recorded. The delivery cures all such defects. *Jones Chat. Mort., sec. 178,* and cases cited; *Applewhite v.*

Harrell Mill Co., 49 Ark., 279; Cameron v. Marvin, 26 Kan., 625; Hutton v. Arnett, 51 Ill., 198.

4. SAME: Same.

While the mortgaged chattels are in the custody of the mortgagee, he may lend or hire them and they continue in his possession constructively; and there is nothing in the relation which he sustains to the mortgagor that forbids to him the offices of ordinary kindness or good neighborhood. Therefore, the mortgagee may lend the mortgaged chattels to the mortgagor for occasional, temporary use, without prejudice to his security. In a case very similar to this the Supreme Court of Vermont so ruled. *Farnsworth v. Sheppard, 6 Vt., 521.*

The learned Judge of the Circuit Court held that appellant's mortgage was void for want of filing and record. But it follows from the principles herein announced, that he was mistaken in this. If the transactions of delivery and loan were had *bona fide*, the mortgage should be sustained.

The judgment is reversed and the cause remanded.

MARTIN V. TAYLOR.

1. CONVEYANCE: *For benefit of creditors: Parol evidence to prove condition.*

An insolvent debtor and his creditors, including several persons who had sued out attachments against him, signed an instrument unconditional in its terms, whereby his property was conveyed to a trustee and by which it was stipulated that the attachments should be discharged, and that the trustee should dispose of the property for the benefit of the creditors. After the execution of the instrument, the attaching creditors released the property, which, together with the instrument, was delivered to the trustee, who accepted the trust. HELD: That parol evidence is not admissible to show that one of the creditors signed the instrument under an oral agreement that he was not to be bound by it, except upon the condition that another should be substituted for the person named in the conveyance as trustee.

2. SAME: *Same: Title of trustee.*

Such instrument having been signed and delivered to the trustee, together with the property it conveyed, the title to the property vested in him and his right thereto could not be impaired by the act of one of the creditors in causing his

name to be erased from the instrument, although such erasure was made without objection by the trustee, with the assent of some of the other creditors, and pursuant to a parol agreement made with some of the creditors, that the party whose name was erased should not be bound by the instrument except upon a condition not expressed therein.

3. SAME: *Same: Parol agreement as to: Fraud.*

An oral agreement between some of the creditors made before the execution of such instrument, to the effect that one of the trustees named therein should be removed and another person put in his place, was no part of the contract, and the failure to perform it does not constitute a fraud, and furnishes no ground on which a person thereby induced to sign the instrument may avoid it.

4. SAME: *Same: Estoppel.*

The parties to such instrument are concluded from attacking it on the ground that it was executed to defraud creditors.

APPEAL from *Woodruff* Circuit Court.

M. T. SANDERS, Judge.

J. W. House, for appellants.

1. Considered as an assignment it may be conceded that the instrument, under our statutes, would be void as to all creditors who did not join in the same. But as a mortgage it would not be fraudulent. *26 Iowa, 381; 8 N. H., 536; 13 id., 298; 99 Ind., 548; 21 N. Y., 131; 4 Comst., 211; 2 Keys, 125; 14 Fed. Rep., 160; 67 Tex., 315; ib., 100; 67 Iowa, 605; 34 N. W. Rep., 763; 66 Iowa, 237; 19 id., 479; 26 id., 381; 58 id., 589; 31 N. Y., 542; 47 Ind., 372; 49 Wisc., 486.*

2. But conceding it to be an assignment and, therefore, void as to those creditors who did not participate in it, the plaintiffs cannot recover. It was not fraudulent as to those who signed it or participated. A written contract cannot be contradicted by parol evidence. These plaintiffs signed the contract; they cannot be heard to say they signed it upon certain conditions, that is, that Martin's name was to be stricken out and Estes' inserted. *29 Ark., 544; 30 id., 417; ib., 186; 4 id., 179; 5 id., 651, 672; 9 id., 501; 13 id., 125; ib., 593; 15 id., 543; 16 id., 519; 20 id., 293.* When the plaintiffs signed the contract they accepted as a whole. They cannot now be heard to dispute or impeach it for fraud or otherwise. *71*

Ala., 240; 41 id., 510; 30 id., 101; 7 Heisk., 612; ib., 617; 101 Mass., 193; 2 Am. St. Rep., 295; 5 id., 23; 67 Tex., 217; 7 Conn., 214.

They are estopped from asserting that the assignment was fraudulent. *2 Herm. on Estop., sec. 1023; 27 N. Y., 310; 13 Wend., 243; 8 Ohio, 533; 31 La. Ann., 84; 7 Minn., 345; 2 Minn., 291; 18 B. Mon., 195; 46 Me., 490; 33 Ark., 465; 37 id., 47.*

Having made their election they must stand by it. *46 Conn., 394; 7 Greenl. (Me.), 70; 135 Mass., 172; 87 N. Y., 166; 46 N. Y., 354; 5 Met. (Mass.), 49; 5 Ala., 322; 17 Conn., 345.*

Plaintiffs will not be allowed to assume inconsistent positions, when in doing so they injure others. They signed the agreement; they induced the release of the property from attachments, and the property therefore went into the hands of the trustees; they cannot now attack the assignment. *48 Cal., 131; 100 Ill., 43; 33 Mich., 344; 51 Mo., 33; 105 Pa. St., 103; 114 Mass., 175; 116 id., 386; 128 id., 152; 53 Am. Dec., 194; 80 id., 163.*

J. M. Moore, for appellees.

1. The instrument was a general assignment for the benefit of creditors, and void on its face. *Richmond v. Mississippi Mills, 52 Ark.; 37 id., 150; 36 id., 406.*

2. Under the circumstances of this case no estoppel arises. See *30 Ark., 453.* An election under a mistaken impression will not be binding. *1 Lead. Cas. in Eq., 537; 2 Johns. Chy., 450; 33 Ark., 468.*

If one is imposed upon, or acted under the influence of misrepresentation or fraud, or through mistake, no estoppel can arise. *Bigelow on Estop., 450, 462; 44 N. Y., 402; 46 id., 6; 30 Con., 210; 38 Iowa, 25; 57 Mo., 478.*

It is always admissible to show by parol that a document was conditioned on an event that never occurred. *14 Fed.*

Rep., 222; 30 Minn., 313; 11 Vt., 449; 119 Mass., 386; 52 N. Y., 575; 4 Cranch., 219.

Parol evidence is admissible to show that the instrument is void, or never had any legal existence or binding force, either by reason of fraud or want of due execution. *1 Greenl. Ev., sec. 284; 2 Phil. Ev., 688; 26 Ark., 451.*

To constitute an election, it is held that any decisive act done by a person with knowledge of his rights and of all the facts material to him, is binding. *Bigelow Estop. (4th ed.), 648; 13 Wend., 443.* There must be assent deliberately made with full knowledge of its effect.

Only those whom the representation or conduct is made to, or intended to influence, and who are prejudiced by it, may take advantage of the estoppel. *Bigelow Est. (4th ed.), 576.* The appellants, as assignees of the general creditors, cannot set up the estoppel. *30 Con., 224.*

W. G. Weatherford, also for appellees.

BATTLE, J. In April, 1886, J. J. Cook & Bro., grocers and merchants in the Town of Augusta, became insolvent. Several of their creditors brought suits and sued out orders of attachment against them. The claims sued on amounted to about $22,000. The property of Cook & Bro. was seized under these orders of attachment. This brought about a general conference and concert of action upon the part of their creditors. Many of them had an informal meeting in Augusta, and afterwards, on April 30, 1886, held a meeting in the City of Memphis, when a contract or agreement was entered into by Cook & Bro., and their creditors, including all the creditors who had sued out orders of attachment and all others, except one or two to whom only small amounts were due. This contract was reduced to writing and signed by the parties. By it Cook & Bro. transferred, assigned and conveyed all their property of every kind and description to Branch Martin and Thomas E. Erwin, in trust for the benefit of all their creditors.

It was thereby agreed that Martin and Erwin, upon giving bond, were to take charge of all their property, including real estate, merchandise, notes, mortgages, book accounts, etc., that the attachments should be dismissed, and that payments should be made as follows, to wit: First, the expenses of the trust. Second, to Friedman Bros. Third, to Dillard & Coffin, $7000. Fourth, to Eckerly, Stone & Co., $1305. Fifth, the balance to all other creditors, including balance due to Dillard & Coffin, and Eckerly, Stone & Co., *pro rata*, and the balance, if any, to Cook & Bro. Friedman Bros. were preferred creditors to the full extent of their claim. Dillard & Coffin, and Eckerly, Stone & Co. were preferred only as to a part of their debts. These creditors were preferred because they were the first attaching creditors, and because, if they had enforced their attachments, all the assets of Cook & Bro. would have been exhausted, and nothing would have been left to pay other creditors. By this agreement a committee, consisting of John W. Dillard, L. C. Tyler and F. T. Ryan, creditors of Cook & Bro., were appointed. It was empowered to superintend and direct the execution of the trust, to regulate and direct the purchases and expenditures in connection with the same, and to fill vacancies in the trusteeship, if any occurred. Its action was to be subject to the approval or rejection of the creditors as a body, and consistent with the object and purposes of the trust. The trustees were empowered to continue the business of Cook & Bro.; and the subscribing creditors agreed to furnish them, through the committee, supplies to the amount of $2500, or such other sums as they might find necessary to advance to the customers of Cook & Bro., to enable them to make their crops, and thereby to pay what they owed, as well as for the supplies furnished. If the trust was not closed by the first of March, 1887, the trustees were directed to sell the assets remaining on hand, or enough thereof to satisfy the trust, at private or public sale, as they should think best. This contract was signed by W. F. Taylor & Co., the attaching credi-

tors, and by other creditors to the number of about thirty, and was delivered to the trustees. The attaching creditors then discharged the property from the attachments, and delivered it to Martin and Erwin. Afterwards W. F. Taylor & Co., the appellees, caused their signatures to be erased from the agreement, brought suit on their demand, and on the 19th day of August, 1886, obtained a judgment against Cook & Bro. for $645.12. They caused an execution to be issued on this judgment, and levied on one and a half lots and some corn, a part of the property of Cook & Bro., transferred and conveyed to Martin and Erwin, and caused the Sheriff to advertise the same to be sold to satisfy their judgment. Before the day of sale Martin and Erwin, claiming the property, in order to suspend the sale, executed with J. H. Campbell, as surety, a bond to the plaintiffs in the execution, to the effect that, if it should be adjudged that the property levied on, or any part of it, was subject to the execution, they would pay to the plaintiffs the value of the property so subject, and 10 per cent. thereon, not exceeding the amount due on the execution, and 10 per cent. thereon, and it was approved. Thereupon Taylor & Co. brought this action. They alleged in their complaint that the conveyance to Martin and Erwin and contract signed by Cook & Bro. and their creditors was and is illegal, fraudulent and void as to them; first, because it does not specify any time within which creditors are to accept its provisions; second, because the same provides that property therein conveyed is to be administered and closed up under the supervision of the creditors through a committee; third, because it provides that the business is to be carried on beyond the time allowed by the statute; fourth, because the same provides for the disposition of the assets at private sale; and fifth, because it provides that the surplus, if any, shall be paid to Cook & Bro.; and asked that the transfer and conveyance made by Cook & Bro. in the agreement with their creditors be set aside, and for judgment against Martin, Erwin, and Campbell on their bond,

for the full amount due on their jndgment. And defendants answered, and alleged substantially, the facts stated: that the erasure of plaintiffs' names was made without authority; that the contract between Cook & Bro. and their creditors was made in good faith; and that plaintiffs are estopped from disputing its validity. On a hearing, the court, sitting as a jury, found the facts as follows: "The plaintiffs declined to participate in the meeting of the creditors and debtors at which the agreement was entered into, and refused to sign it. Subsequently, however, they were induced by the so-called managing or supervising committee, upon certain conditions, to sign, and did sign the paper. They consented to do so upon the direct condition and representation that one Estes, at a salary of $75 a month, should be substituted in place of Martin, who was objectionable to plaintiffs, and was to get a salary of $200 a month. This condition was not complied with, and the chairman of said managers, on the part of the assenting creditors, on demand of plaintiffs, and without objection, immediately caused plaintiffs' signature to the agreement to be erased therefrom. Plaintiffs had no other connection with the parties to this agreement, were never called on to contribute any part of the money the creditors were to advance to carry out its provisions, and their withdrawal from it seems to have been acquiesced in, particularly by the defendants. The erasure was made when the instrument was in the hands of the defendants, Martin and Erwin, and they in possession of the property, but before they had proceeded to dispose of it, and before the instrument had been filed for record. Neither Martin nor Erwin offered any objection to erasing the signature when it was done, or at any time thereafter; neither did Cook & Bro., who were on the ground; nor the creditors, who had knowledge of it. With a knowledge of these facts, the defendants, Martin and Erwin, proceeded to dispose of the assets of Cook & Bro., according to the terms of the instrument;" and among other things declared the law to

be as follows: "The instrument of writing by which defendants set up a claim to the property on which the plaintiffs' execution was levied is absolutely void as a deed of assignment for the benefit of creditors, nor is it valid as a deed of trust or mortgage security. If the instrument has any validity in law it is merely as an agreement in writing between debtor and creditors, by which the assets of the debtor were placed in the hands of a third party, to be disposed of under the supervision and direction of the creditors for their benefit. It did not affect the rights of any creditor who was not a party to the agreement," and "conferred upon the assignees, in this case, no right or title to the possession of the property;" and that "plaintiffs were not estopped from prosecuting their claim against Cook & Bro. to judgment, and levying executions on property in the possession of Martin and Erwin;" and that "parol evidence was admissible to explain the erasure;" and rendered judgment in favor of the plaintiffs against the defendants for the full amount of the execution, and the defendants appealed to this court.

The instrument in question is a conveyance by Cook & Bro. of their property to trustees for the benefit of creditors, and is also a contract between the subscribing parties thereto. Martin and Erwin were the trustees. It provides that the committee selected to supervise shall have the authority to fill any vacancy which might occur in the places of the trustees. When it was first presented to the appellees they refused to sign it. Finally, at the instance of one or two members of the committee, they signed it, with the understanding that T. H. Estes should be made trustee in the place of Martin. No change, however, was made in the instrument on account of their signature. Martin and Erwin still remained, as before, the trustees in the deed. The said members of the committee immediately ascertained that one of the creditors would not consent to the removal of Martin, and so informed appellees. They at once demanded the erasure of their names, and the

members of the committee, at whose instance they signed, without delay caused it to be done. They now insist that they are in no manner affected by the instrument, and that the property in controversy was liable to be seized to satisfy their execution.

1. CONVEYANCE: For benefit of creditors: Parol evidence.

The first inquiry which presents itself for our consideration is, did the instrument in question go into operation as to all who signed it? Appellees say that they signed it on condition that Estes should be made a trustee in the place of Martin; but there is no evidence to show that it was not to be delivered until the condition was performed. On the contrary, they wrote to a member of the firm of Cook & Bro. that they had signed it "upon condition that Mr. Martin goes over and receives the property under the instrument of writing, and turns it over to Mr. Estes." After it was signed the creditors discharged the property thereby conveyed from the attachments, and both the instrument and the property were delivered to Martin and Erwin. They accepted the trust, and proceeded to comply with its terms. All the parties to the instrument, it appears, understood that it was to take effect and become operative as a conveyance in trust when it was signed by them and delivered to Martin and Erwin. Nothing is said in it as to its taking effect upon the happening of a future contingency. It purports to be a full and complete conveyance and contract. Upon delivery to the trustees it became obligatory, and went into immediate operation as to all who had signed it. To permit any of the parties to show by parol evidence that it was conditional, would be to allow them to thereby vary or add to the terms of a written contract, and to violate a fundamental rule of evidence. The evidence relied on by appellees to show that it was conditional as to them was a parol agreement between them and two of the supervisory committee, that Estes should made a trustee in place of Martin, and was clearly inadmissible. *Scott v. State Bank, 9 Ark., 36; Chandler v. Chandler, 21 Ark., 98; Ward v. Leidis, 4 Pick., 520; Cocks*

v. Barker, 49 N. Y., 110; Lawton v. Sager, 11 Barb., 349; Mossman v. Holcher, 49 Mo., 87; Jones v. Shaw, 67 Mo., 667; Cincinnati, etc., R. Co. v. Stiff, 13 Ohio St., 235; Dawson v. Hull, 2 Mich., 390.

2. SAME: Same. Title of trustee.

The next inquiry is, did the erasure of the names of the appellees affect the rights of the other subscribing creditors and the trustees to the property in controversy? It has been held by this court that the destruction of a title deed by a grantee does not divest him of the title to the land thereby conveyed; and it is well settled that the alteration of such a deed does not affect the title. Mr. Greenleaf, in his work on evidence, says: "If the grantee of land alters or destroys his title deed, yet his title to the land is not gone. It passed to him by the deed; the deed has performed its office as an instrument of conveyance, and its continued existence is not necessary to the continuance of title in the grantee; but the estate remains in him until it has passed to another by some mode of conveyance recognzied by the law. The same principle applies to contracts executed in regard to the acts done under them." What is said of land is equally true of personal property. When the title to it passes it cannot be divested, except in some mode of transfer recognized by the law. *1 Greenleaf on Evidence (14th ed.), sec. 568; Strawn v. Norris, 21 Ark., 80; Talliferro v. Patton, 34 Ark., 503; Cunningham v. Williams, 42 Ark., 170; Davidson v. Cooper, 11 M. and W., 798; Chessman v. Whitesmore, 23 Pick., 231; Withers v. Atkinson, 1 Watts, 248; 2 Parsons on Contracts (5th ed.), 724; 2 Wharton on Contracts, sec. 704.*

In this case debtors and creditors were, doubtless, of the opinion that the instrument in question would be invalid as to non-assenting creditors. Not until all the creditors, except one or two to whom the debts owing were very small, had signed, were the instrument and the property delivered. After the execution of the instrument the attaching creditors, believing that they were as well secured thereby as by their attachments,

discharged the property from seizure and caused it to be delivered to the trustees. Nothing remained for Cook & Bro. and their subscribing creditors to do to complete the transfer and conveyance of the property when the erasure was made. The result was the property vested in Martin and Erwin in trust according to the terms of the instrument. Did the erasure impair their title? It is said that the court found that it "was made when the instrument was in the hands of Martin and Erwin, and they in possession of the property, but before they had proceeded to dispose of it, and before the instrument had been filed for record;" and that neither Martin, Erwin, Cook & Bro., nor any of the creditors, who had knowledge of it, made any objection to the erasure when it was made, or at any time thereafter. This may be true, but it is also true that Cook & Bro., the trustees, and the subscribing creditors, except appellees, never consented to surrender the property conveyed by the instrument, or any part of it, or to release any hold upon it, on account of the erasure. On the contrary Martin and Erwin still claimed and held it in trust and proceeded to dispose of it according to the terms of the instrument. The consequence is, the title to it was not divested by the erasure as to any of the parties who had signed. Surely appellees could not, so far as they were concerned, divest the trustees of title, or impair the same, by a stroke of the pen, against the will of the other parties. That is not a mode of transfer recognized by the law.

3. SAME: Same: Parol agreement as to: Fraud.

It is contended by appellees, that they were induced by the agreement, that Martin should be removed and Estes put in his place, to sign the instrument. Did the failure to carry this agreement into effect render the instrument fraudulent and void as to them? It was entered into before the execution of the instrument, rested wholly in parol, and formed no part of the written contract; was of no effect; and was binding on no one. It vested no right; its violation was no legal wrong. No one had a right to rely on it. Consequently there was no fraud in

the failure to carry it into execution. On the contrary the evidence shows that it was entered into in good faith by two members of the committee selected to supervise the execution of the trust; and that immediately after appellees signed the instrument they ascertained that one of the subscribers would not consent to the removal of Martin, and reported that fact to the appellees; and that upon the demand of appellees, one or both of them, without authority, caused the erasure of their signatures to be made. The failure to perform a promise made in good faith is no indication of fraud. *Long v. Woodman, 58 Me., 49; Bigelow on Fraud, p. 483, sec. 4,* and the cases cited.

4. SAME: Same: Estoppel.

There is another reason why appellees cannot attack the instrument in question for fraud. The parties to it had the right to make the agreement contained therein and bind themselves thereby. Appellees were contracting parties. One of the moving causes and considerations of the transfer and conveyances evidenced thereby was their written assent thereto. They have consequently concluded themselves from attacking it on the ground that it was executed to defraud creditors. *Rapeller v. Stewart, 27 N. Y., 310; Horn v. Henriquez, 13 Wend., 243.*

For the errors indicated the judgment of the Circuit Court is reversed, and this cause is remanded for a new trial.

BOEHM V. BOTSFORD.

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TAX SALE: *Decree confirming.*

All inquiry as to the validity of a tax title is cut off by a decree confirming the sale under which the title was acquired.

APPEAL from *Arkansas* Circuit Court in Chancery.

JOHN A. WILLIAMS, Judge.

Botsford and Edgarton brought this suit against Boehm to remove a cloud from the title to certain lands. By their com-

plaint they claim title to the lands by virtue of deeds from the Auditor of State, conveying them as lands held by the State under forfeitures for the non-payment of taxes for the year 1868, and also by a decree confirming the tax sale through which the State acquired title. The decree confirming the tax sale was rendered in 1876 and is exhibited with the complaint. Boehm answered, setting up title to the lands under a conveyance executed to his vendor by the State Land Commissioner, pursuant to a sale thereof by the State as swamp lands, made in 1850. He also claimed title through one Price, under a purchase made by the latter at a sale for the non-payment of taxes for the year 1876. On the trial the defendant offered to prove that "the pretended assessment, levy of taxes, return of the delinquent list, advertisement and sale of the lands in controversy for the year 1868, were absolutely void, and that at the time of the pretended decree of confirmation of the plaintiff's tax title, defendant and his vendor were non-residents of the State and out of the jurisdiction of the courts thereof;" and insisted that as such he had the right to show that the tax proceedings and sale referred to were illegal. But the court refused to permit such showing, holding that such defenses were cut off by the decree of confirmation. The court gave judgment for the plaintiff, granting the relief sought by his complaint, and the defendant appealed.

The statute [Mansf. Dig., secs. 576–583] under which the decree of confirmation relied upon by the plaintiff was obtained, provides that notice of the application for such decree shall be published "six weeks in succession in some newspaper published in this State," and that such notice shall call "on all persons who can set up any right to the lands so purchased in consequence of any informality or any irregularity or illegality connected with such sale, to show cause at, etc., * * * why the sale * * * should not be confirmed." (Sec. 577.) Section 581 provides "that the judgment or decree * * * confirming said sale shall operate as a com-

plete bar against any and all persons who may hereafter claim said land in consequence of informality or illegality in the proceedings; and the title to said land shall be considered as confirmed and complete in the purchaser thereof, his heirs and assigns forever, saving, however, to infants, persons of unsound mind, imprisoned beyond seas, or out of the jurisdiction of the United States, the right to appear and contest the title to said land within one year after their disabilities may be removed."

W. H. Halliburton, for appellant.

Gibson & Holt, for appellees.

TAX SALES.

PER CURIAM. All inquiry as to the validity of the plaintiff's tax title was cut off by the decree of confirmation of the tax sale under which their title was acquired. *Wallace v. Brown, 22 Ark., 118; Buckingham v. Hallett, 24 Ark., 519; McCarter v. Neil, 50 ib., 188.*

The court adjudged the defendant's subsequent tax title invalid upon proof which has not been brought upon the record, and we cannot inquire into the correctness of the finding.

Affirm.

RAILWAY V. DICK.

RAILWAY COMPANIES: *Negligence: Killing stock.*

Where a railway company permits cotton-seed to accumulate on or about its track, it is under obligations to maintain reasonable care to prevent injury to stock attracted thereby. And where an animal while feeding on such seed, is killed by a train, the burden is upon the company to show that its servants used proper care to avoid the injury.

APPEAL from *Crawford* Circuit Court.

JOHN S. LITTLE, Judge.

This is an action to recover the value of a bull killed by the defendant's train. At the place where the animal was killed

and within two or three feet of the track, there was a house used for storing cotton-seed for an oil-mill. The seed were loaded into the cars from the house by a chute, and in loading them, a considerable quantity would fall on the ground from the seed-house to the car. Cattle were attracted by the seed thus wasted, and the plaintiff's bull was feeding upon them and jumped on the track from behind the seed-house as the train approached. The judgment below was for the plaintiff, and the defendant appealed.

Sec. 5537 Mansf. Dig. is as follows:

"All railroads which are now or may be hereafter built or operated in whole or in part in this State, shall be responsible for all damages to persons and property done or caused by the running of trains in this State."

G. W. Shinn, for appellant.

This case falls within the ruling of *Ry. v. Kern, 52 Ark.*

PER CURIAM. The company having permitted cotton-seed to accumulate on or about its track, was under obligation to maintain reasonable care to prevent injury to stock attracted thereby. *Jones v. Nichols, 46 Ark., 207; Ry. v. Kirksey, 48 Ark., 366; Crafton v. Ry., 55 Mo., 580; Page v. Ry., 71 N. C., 222.* NEGLIGENCE.

The burden was upon the company to overcome the *prima facie* case of negligence made by the killing, by showing that its servants had used the degree of care indicated by the charge, to avert the injury. The proof does not show that state of case, and the judgment will be affirmed.

DUNCAN V. TUFTS.

CHANGE OF VENUE: *Payment of Clerk's fee: Presumption on appeal.*

On appeal where the record shows only that an order for a change of venue was made, and that thereafter the parties voluntarily submitted to trial in the court in which the action was brought, it will be presumed that the order became inoperative under sec. 6483 Mansf. Dig., which provides that it shall be void if the Clerk's fee for transmitting the papers is not paid within fifteen days from the granting of the order.

APPEAL from *Jefferson* Circuit Court.

JOHN A. WILLIAMS, Judge.

James Tufts brought this action against T. B. Duncan & Co. to recover the price of a soda-water apparatus which the complaint states was made for the defendants and shipped to them according to their order. The answer of defendants alleges that they were damaged to the amount of $60 by the act of the plaintiff in substituting "copper fountains" for "cast-iron fountains" which they ordered, and that they were damaged in the further sum of $25 by the failure of the plaintiff to ship the goods as early as he had agreed to. Upon petition of defendants an order was made changing the venue to Desha County. But there is nothing in the record to show that the Clerk's fees were paid, or that any other step was taken under the order, and the action was tried without objection in the court in which it was brought. The verdict and judgment were for the plaintiff, and the defendant appealed.

Section 6482 Mansf. Dig. provides that "where an order for a change of venue is granted, the Clerk shall make and file with the papers a certified copy of all the orders in the case, and, upon the payment of the transmission fees hereinafter provided, shall transmit the papers in the case to the Clerk of the court to which the venue is changed, by any safe and convenient mode which he may select, * * * for which he shall receive ten cents per mile to and from said Clerk's office,

to be paid by the party obtaining the order, and to be taxed in the costs."

Section 6483 is as follows: "If the above mentioned fee is not paid or arranged with the Clerk within fifteen days from the granting of said order, the order shall be null and void. *Provided*, That the Judge granting the order may extend the time of making such payment, which shall be stated in the order. *Provided, further*, That the adverse party, if he chooses, may make such payment." * * *

N. T. White, for appellant.

1. After the order for change of venue, the Jefferson Circuit Court had no jurisdiction. *Mansf. Dig., secs 6479 to 6484; 4 Ark., 163; 9 id., 479.* See, also, *37 Ark., 491.*

2. The court erred in its declarations of law.

W. S. McCain and *John W. Crawford*, for appellee.

1. The jurisdiction remained in the Jefferson Circuit Court until the conditions of the statute were complied with. By proceeding to trial without objection, the appellants waived the right to object now. See *37 Ark., 104; 48 id., 104; 31 id., 25; ib., 190; 44 id., 174.*

2. The cause was submitted to the jury upon proper instructions.

PER CURIAM. An order for a change of venue in a civil case is made upon the condition that the Clerk's fees shall be paid by the party in whose favor it is granted within fifteen days from granting the order. If a satisfactory arrangement is not made to pay the Clerk's fees within that time the order becomes void, and the court making it retains jurisdiction of the cause. *Haglin v. Rogers, 37 Ark., 491.* It is incumbent upon the appellant, who relies upon the failure of the jurisdiction of the court in which the order is made, to show affirmatively the facts which deprive it of jurisdiction, and where the record shows only that an order for a change of venue was made, and thereafter a voluntary submission to trial by the parties, it will be presumed that the

CHANGE OF VENUE.

conditions upon which the order was made have not been complied with.

Under the issues made by the pleadings in this case, the only question for the jury's consideration was whether the defendant was entitled to a deduction from the amount sued for. The question was submitted to them under fair instructions from the court, upon conflicting evidence, and the jury found for the plaintiff.

Affirm.

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RAILWAY V. ADCOCK.

1. RAILROADS: *Regulation as to flag stations.*

The refusal of a railway company to designate as a flag station for its through trains, an unincorporated town, containing only a few houses, and situated within three miles of a regular station, is not an unreasonable regulation.

2. SAME: *Same.*

The facts as to such regulation not being controverted, it is the province of the court to declare it reasonable, and it is error, under such circumstances, to submit the question of its reasonableness to a jury.

3. SAME: *Failure to stop for passenger.*

Where the custom of trains to stop at a place misleads a person, without fault on his part, into the belief that it is a flag station, and relying upon that custom, he buys a ticket to and from such place from an agent of the railway company, who knows that it is his intention to use it in returning on a train which does not stop at the point of his destination, and yet fails to inform him of that fact, the company will be liable for the failure of the train to stop when properly flagged.

APPEAL from *White* Circuit Court.

M. T. SANDERS, Judge.

Adcox brought this action against the St. Louis, Iron Mountain and Southern Railway Company, to recover damages sustained by reason of the defendant's passenger train No. 1 refusing to stop at Higginson Station in the night time, for the purpose of taking the plaintiff on after it had been properly flagged. The evidence shows that Higginson was a small

way station, comprising three or four houses, and that day passenger trains stopped there only when flagged. It was without telegraphic communication, and situated only three miles south of Kensett, and six miles north of Garner, both of which were telegraphic stations and regular stopping points for all trains. Higginson was a flag station for one regular passenger train and one local freight, which carried passengers daily each way. But by the rules of the company, duly promulgated, passenger trains Nos. 1 and 4, which were night trains, were forbidden to stop there at all. It was, however, shown by the testimony of the plaintiff's witnesses, that on a number of occasions said train No. 1 had stopped for passengers at Higginson on being flagged. On the part of the defendant, the station agent and several engineers testified that on other occasions the company's employes had refused to stop said trains at Higginson, even when flagged, because of the rule forbidding it. In the afternoon of December 30, 1886, the plaintiff purchased at Beebe, a station on the defendant's road, a round-trip ticket to Higginson. He testifies that he went to the depot and asked the telegraph operator whether train No. 1 was on time? On being informed that it was, he stated if that was the case he would get a round-trip ticket to Higginson, and return on that train, and that he then asked the station agent, Welty, for such ticket, telling him that he wished to return on train No. 1. He also testified that the agent did not inform him that that train was forbidden to stop at Higginson, and that he had no knowledge of that fact. He also stated that in September, 1886, he was a passenger on train No. 1, and that on that occasion it stopped at Higginson, but he did not know whether it was flagged. Welty, the station agent, testified that he was busy, and paid no attention to the plaintiff's conversation with the operator, but remembered hearing him ask whether No. 1 was on time. He stated that he did not know that the plaintiff was buying the ticket with the expectation of returning on that train, and that the plaintiff

did not ask him whether it stopped at Higginson. Among other instructions given to the jury were the following, to which the defendant objected:

3. The jury are instructed that the conductor of a passenger train, while in charge of and running the same, represents the company; and if the conductor of the train No. 1, or conductor who had hitherto been in charge of and running said train, had been in the habit of stopping at Higginson in the night time and taking on passengers, upon being signaled with a light to do so, that by so habitually stopping the said train at said station, operated as a waiver of any rule or regulation of the said company, whereby said conductors were directed not to stop at said station.

5. If you find that the train No. 1 was in the habit of stopping at Higginson in the night time to take on passengers when signalled to do so with a light reflected from a lantern swung at or near the track, and the plaintiff was at said station on the night mentioned in the complaint, with a ticket entitling him to a ride on the said train, and that the usual signal was given, and the defendant company failed or refused to stop the said train and take plaintiff on, you will find for the plaintiff.

6. The court instructs the jury that the defendant company has the right to make reasonable rules and regulations for the running of its trains; the reasonableness of such rules are questions for you to determine, and if you find, from the evidence, that the defendant had a regulation whereby train No. 1 was forbiden to stop at the station of Higginson, and you find that the said regulation was unreasonable, and you find that the plaintiff was at the said station of Higginson on the night complained of, offering himself to be carried, with a ticket entitling him to ride on the said train, you will find for the plaintiff.

The verdict was for the plaintiff, and the defendant having been refused a new trial, appealed.

Francis Johnson and *Dodge & Johnson*, for appellant.

1. Where the facts are not disputed, it is error for the court to submit to the jury the question whether a rule adopted by a railroad for the government of its trains is a reasonable one or not. Such a question is one purely of law, and must be determined by the court. *43 Ill., 420; 20 N. Y., 126; 49 Ark., 357.* Railroads may make reasonable regulations as to the mode of their performance of their duties as carriers. *46 N. H., 213; 11 Metc., 121; 11 Ohio St., 457; 50 Ind., 141; 12 A. & E. R. Cases, 142.*

See, also, *103 N. Y., 82; 33 Oh. St., 234; 46 N. H., 220; 45 Ark., 263; 47 id., 79.*

It was plaintiff's duty to inform himself whether the train stopped at his destination. *45 Ark., 256; 49 id., 357; 40 id., 298; 47 id., 79.*

The fact that the regulation had been violated by the company's servants did not deprive the company of the right to begin its enforcement when it deemed fit. *49 Ark., 360; 9 A. & E. R. Cases, 314.*

2. There was no obligation on the company to stop its trains at Higginson at night. It was only a small way station, between two regular stations. Two daily trains stop there, going each way. That was sufficient. *Thompson on Carriers, pp. 65, 66; 23 N. W. Rep., 414.*

T. J. Oliphint, for appellee.

1. The evidence shows that train No. 1 *habitually* stopped at Higginson upon being *flagged*, so that the public had a right to presume that the train would stop as *usual*, and its failure to do so made the company liable. *4 West. Rep., 797; Thomps. on Car. Pass., pp. 345–6; Patterson on Railway Ac.. 325; 2 So. Rep., 831; 9 West. Rep., 117; 24 Am. Law Reg., 573; 2 Cent. Rep., 726; 1 West. Rep., 812; Pierce on R. R., 498; 110 U. S., 667–86.*

Rules and regulations for the running of trains are questions of law and fact, while the reasonableness of a by-law is

a pure question of law. *Rorer on R. R., p. 226.* Rules and regulations as to stopping at stations are questions of mixed law and fact, and, therefore, for the jury. *Thompson on Carriers of Pass., p. 335; 84 Ill., 109, 116; 23 Vt., 387; Thomson on Trials, sec. 1567; 24 N. J. L., 435; 15 Minn., 49; Thomp. Car. Pass., 306, 311; Redfield on Ry., 95.*

When appellee purchased a round-trip ticket, it was the duty of the agent to inform him that No. 1 did not stop at Higginson at night. By his silence he misled the appellee to his damage. *45 Ark., 263; Patt. Ry. Ac., secs. 37, 97; 4 West. Rep., 797; 54 Wisc., 234; 5 Daly (N. Y.), 50; 50 Tex., 443; 47 Mich., 277; 50 Ind., 141.*

1. RAILROADS: Regulation as to flag stations.

PER CURIAM. The refusal of a railway company to designate as a flag station for its through trains a place which is not an incorporated town, which contains only a few houses and is situated within three miles of a regular station, is not an unreasonable regulation. The facts being uncontroverted, it was the province of the court to declare the regulations reasonable. To submit the question to the jury for determination, under such circumstances, was simply to leave the matter to their discretion, which was error.

2. Same.

3 Failure to stop for passenger.

II. If the plaintiff, without fault of his, was mislead by the company's custom into believing that the place was a flag station for night passenger trains, then his right to recover was the same as though he had been misdirected by its authorized agent. *Atkinson v. Ry., 47 Ark., 74; Hobbs v. Ry., 49 ib., 357; 2 Woods Ry., p. 1174.* It would be otherwise if he was not informed of, or had not relied upon the custom; or if the stoppage of trains was only casual and not habitual. The charge upon that phase of the case was too restricted.

If the company's agent, from whom the plaintiff purchased his return ticket, was informed and understood that the plaintiff purchased the ticket with the intention of using it to return from his destination on the night train, it was the agent's duty to notify him that the train would not stop at his

destination, and the court so instructed the jury. If it were certain the agent had knowledge of the plaintiff's intent, and permitted him to act when it was his duty to speak, we would affirm the judgment, notwithstanding the errors pointed out; but the evidence is conflicting upon that point and we cannot say how far the jury were mislead by the false charge.

The judgment must be reversed and the cause remanded for a new trial.

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HARRIS V. TOWNSEND.

1. PARTNERS: *Suits between: Jurisdiction.*

An action at law may be maintained by a partner against his co-partner, for injury done to the partnership property. A court of equity may also take cognizance of such an injury, in a suit for the final settlement of the partnership accounts.

2. PLEADING AND PRACTICE: *Form of proceeding: Mode of trial.*

The substantial difference between law and equity under the code, is that where the case, stated in the complaint, would, under the former practice, have been an action at law, either party is entitled to a trial by jury; but if the cause would, under the old system, have been distinctly equitable, then it is triable according to the method formerly observed in chancery.

3. SAME: *Same.*

The Circuit Court having power to try causes both at law and in equity, it is not under the code error to try a common law case according to equity practice or a case in equity according to the common law practice, where no objection is made to the form of the trial; and where such objection is made, the application of the wrong form of trial is only an error, and does not affect the validity of a judgment pronounced in the cause in which it is committed.

4. SAME: *Res adjudicata.*

In an action brought by a partner against his co-partner for an injury done to the partnership property, the defendant relied upon the plea of *res adjudicata* and the court below sitting as a jury, found that in a former suit brought by the plaintiff against the defendant, for an injunction to prevent unlawful interference with the partnership property, the defendant filed a cross-complaint praying for a dissolution and settlement of the partnership, and the plaintiff in answer thereto, among other defenses, set up by way of counter-claim the same cause of action which is stated in his complaint in this suit: that no motion

having been made to transfer said counter-claim to the common law docket, the court, by a final decree rendered in said cause, settled all the matters properly at issue therein. HELD: That, on such finding, the judgment should have been for the defendant, sustaining his plea.

APPEAL from *Clark* Circuit Court.

R. D. HEARN, Judge.

The complaint in this action alleges that about the 6th day of March, 1887, the plaintiff, Townsend, and the defendant, Harris, entered into a partnership for the purpose of editing and publishing the "Arkadelphia News," a weekly newspaper—Harris being publisher and Townsend editor. That about the 20th day of July, 1887, that being the day of publication, "the defendant having possession of the only key to the office of publication, wickedly, maliciously and with the intent to stop the publication of said paper without consulting plaintiff, and against his will, locked the door of said printing office, carried therefrom the joint lever of the press, without which it could not be run, and also took the half-printed paper for that week and secreted them so that plaintiff was unable to get possession of the same, or to have them in the office until the order of the Chancery Court commanded him to replace them; that by reason of said unbusinesslike conduct, the newspaper was suspended for about two months, and many of its subscribers and advertising patrons were driven away, to the great damage of the plaintiff, in the sum of $200." The defendant's answer contains:

First—The plea of *res adjudicata.* Second—A denial of the damage alleged, and an allegation that the property was taken by defendant, in order to prevent the continuance of the partnership against his will. The plea of *res adjudicata* was heard by the court sitting as a jury, and its findings of fact and law are as follows:

"That, previous to July 20, 1887, plaintiff and defendant were engaged as partners in running a newspaper in Arkadelphia, called the Arkadelphia News; that on the 25th day of

July, 1887, plaintiff herein brought a chancery suit on the equity side of this court, numbered 859; that defendant herein was defendant in that suit; that plaintiff's complaint asked for a permanent injunction, restraining the defendant from unlawfully interfering with the partnership property, alleging certain reckless and unbusinesslike conduct upon defendant's part; that on the 1st of August, 1887, this defendant in that suit filed an answer and cross-complaint, asking that said partnership be dissolved, and for a settlement of the same. On August 6th, 1887, plaintiff in that suit filed his answer to the cross-complaint, of this defendant and in that answer one of the paragraphs set up a counter-claim for damages sustained by plaintiff herein, alleging the same cause of action set up in the complaint herein, and claiming the same amount of damages asked in the complaint by the plaintiff; that no objection appears to have been raised on the part of defendant to the counter-claim, and that it nowhere appears from the record in that cause that the said counter-claim was ever withdrawn by plaintiff; that defendant did not demur to said counter-claim, nor move to transfer it to the common law docket; that plaintiff did not ask said court to order the issue on this counter-claim, to be tried by the jury; that the court, on the —— day of December, 1887, made a final decree in said cause, settling all the matters put in issue in said cause. The court finds that the acts complained of in the complaint herein were committed by one partner to the partnership property while the partnership existed. The court finds as a matter of law that a court of equity had no jurisdiction, in suits by one partner to obtain damages for the tortious acts of another partner to the partnership property while the partnership lasted, to award damages, and that the answer to the cross-complaint in the chancery suit herein, raised no issue triable in a court of equity, even though defendant did not object to the trial of that issue in that case; that a court of equity cannot award damages for a tort by a partner to partnership property. The court there-

fore finds as matter of law, that the decree of the Clark Chancery Court, in the case of Townsend v. Harris, No. 859, on chancery docket, rendered on the —— day of December, 1887, does not bar this suit between the same parties, and consequently the cause of action set forth in plaintiff's complaint herein is not *res adjudicata.*" Thereupon the case was tried upon the complaint and the second paragraph of the answer before a jury and a verdict rendered for plaintiff in the sum of $25. The defendant appealed.

Crawford & Crawford, for appellant.

The court erred in declaring the law on its findings of facts as to the plea of *res adjudicata.* All questions at issue in this cause were finally adjudicated in the chancery suit. The court had jurisdiction to settle the partnership accounts, and could adjudge damages for compensation, thus settling the whole controversy. *37 Ark., 292; 24 id., 203; 35 id., 343; 7 Wall., 107–113; 125 U. St., 698–702; 1 Gray, 301; 71 Ala., 186; 1 Storey Eq. Jur., sec. 692.*

Murry & Kinsworthy, for appellee.

An action by a partner against his co-partner for injury done to the partnership is cognizable in a court of law. *Collier on Part., p. 210; 4 Am. St. Rep., 174; 6 id., 503, and notes; 9 Atl. Rep., 32; 13 Pac. Rep., 569; Storey on Cont., 232; 24 Ark., 193.*

The issues in this case were not, and could not, properly have been considered in the chancery suit. It was not *res adjudicata.* There is no bar without judgment upon the merits. *36 Ark., 196.*

1. PARTNERS: Suits between.

PER CURIAM. The authorities cited by the appellee are to the effect that an action by a partner against his co-partner for injury done to the partnership property is cognizable in a court of law. None goes to the extent of holding that the matter is not cognizable in a court of equity, in an action of account for final settlement.

But even if the issue were not properly cognizable in equity, can it be held that the judgment is void? Under the code a plaintiff is only required to make a plain statement of his case in his complaint. If the case stated would formerly have been an action at law, either party is entitled to a trial by jury after the manner of the common law; but if the cause as stated would have been distinctly equitable under the old system, then it is triable according to the former chancery method. That is the substantial difference between law and equity under the new procedure. It does not recognize one judge as presiding over separate tribunals, the clash of whose jurisdictions confounds the practitioner and ruins the suitor. One court, endowed with the powers to try all causes, administers the whole law. For its convenience separate dockets are kept for the two classes of cases. If no objection is made to the form of trial—that is, whether it shall be according to the common law or chancery practice—it is adjudged not to be error to try a common law case according to equity practice, or an equitable case according to the practice of the common law. *Organ v. Ry., 51 Ark., 235.* It follows that if objection is made, and the court applies the wrong form of trial to the case in hand, it commits only an error in the exercise of rigntful jurisdiction, because the power to determine the cause and the method by which it shall be tried, is devolved upon it. An erroneous judgment pronounced in such a case is not a nullity.

2. PLEADING AND PRACTICE.

3. SAME.

On the finding of the court, its judgment should have been for the appellant upon his plea of *res adjudicata*, and such judgment will be rendered here.

4. Res adjudicata.

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GARABALDI v. WRIGHT.

1. CONVERSION: *Action for: Conflict of jurisdiction.*

An action at law will lie for the conversion of property, although it is in the custody of a Chancery Court, in a suit between the same parties, as such action does not interfere with the possession of the property.

2. PLEADING AND PRACTICE: *Two actions between the same parties.*

Where two suits are for different objects, they may progress at the same time, although they are between the same parties, and the thing with reference to which they are prosecuted is the same in each case

APPEAL from *Pulaski* Circuit Court.

J. W. MARTIN, Judge.

Garabaldi and Wright were partners in a stock farm, and becoming dissatisfied undertook on the 24th day of December, 1886, to settle the affairs of the partnership. Wright contends that such settlement was consummated. This is denied by Garabaldi, who, on the 3d day of February, 1887, filed his bill in chancery against Wright for a dissolution of the partnership and a settlement between the parties.

A receiver was appointed who sold the personal property of the partnership under an order of the court. On the 21st day of September, 1887, while the suit in chancery was still pending, Wright brought this action at law against Garabaldi for the conversion of part of the personal property, which he claims was turned over to him in the settlement of December 24, 1886. Garabaldi answered denying the conversion of the property, and setting up that it was partnership property and the pendency of the suit in chancery.

A trial by jury resulted in a verdict for Wright, and Garabaldi appealed.

S. R. Allen and *Eben W. Kimball*, for appellant.

A suit being then pending in the Pulaski Chancery Court, between the same parties, and concerning the same subject matter, this suit could not be maintained. *37 Ark., 164; Mansf. Dig., sec. 1503; Boone Code Pl., sec. 267; 32 Ark., 332; 29*

Conn., 519; 17 Pick., 511; 38 Ala., 204; 4 Blackf., 56; 212 U. S., 359; 6 Otto, 588.

Where a court once rightfully acquires jurisdiction of a cause, it has the right to retain and decide it. *34 Ark., 410; 2 id., 168; 14 id., 50; 27 id., 315; 30 id., 278; 37 id., 286; 46 id., 272; 49 id., 75.* The pendency of the chancery suit was a legal bar to the suit at law, subsequently commenced.

Sanders & Watkins and *Blackwood & Williams*, for appellee.

The pending suit in chancery was not a bar to this action of conversion brought afterwards in the Circuit Court. The test is, what was the *issue* pending in the Chancery Court, and what matters would have been concluded by a decree there? Only the question of partnership.

Unless the two actions appear to be the same identical cause, they can be prosecuted in different courts at the same time. *16 Abb. (Pr.), 98; 56 Penn. St., 355; 3 B. & Ad., 945; 5 ib., 835; 2 Bos. & P., 137.* The suits must be founded on the same facts, there must be the same parties, the same rights asserted, and the same relief prayed for. *13 Wall., 679; 27 Mich., 406.* See, also, *60 N. Y., 272; 79 N. Y., 397; 6 Ark., 86; ib., 367; 32 Ark., 336.*

Conflict of jurisdiction.

HEMINGWAY, J. Although property, of which conversion is alleged, is in the custody of a Chancery Court, an action for its conversion may be brought in a law court, since it does not affect the possession of the property, or interfere with its custody.

Actions between same parties.

If the chattels belonged to the appellee, and were converted by the appellant, this was a wrong for which a right of action arose to the appellee individually; and although there was a pending suit in chancery between the parties for an account and settlement of partnership affairs, the appellee could bring a separate action for the conversion, and was not required to litigate this claim in the chancery suit. If the objects of

two suits are different, they may progress at the same time, although the thing about, or in reference to which, they are brought, is the same in each case. *Wilmer v. A. & R. Ry. Co., 11 Myers Fed. Dec., sec. 300; Buck v. Colboth, 3 Wal., 334; Hatch v. Spofford, 22 Conn., 485.*

The charge of the court fairly submitted the cause to the jury under the law as we have stated it, and the judgment will be affirmed.

JENKINS V. NEAL.

1. PROMISSORY NOTES: *Held as collateral security: Collection.*

A sum of money collected by a creditor on a promissory note placed in his hands by his debtor as collateral security, cannot be recovered from him while the debt secured remains unpaid.

2. SAME: *Assignment: Set-off.*

After the payee of a promissory note has assigned it, he cannot plead it as a set-off in an action brought against him by the maker of the note, unless he has, by payment or otherwise, recovered it from the holder.

APPEAL from *Jefferson* Circuit Court.

JOHN A. WILLIAMS, Judge.

Josephine R. Jenkins brought an action against C. M. Neal to recover the sum of $960, which the complaint alleges was collected by the defendant as the agent of the plaintiff, on a rent note executed by one Colburn. The defendant by his answer admits the collection of the sum sued for, but alleges that the plaintiff is indebted to him in a large sum of money, and that the rent note was placed in his hands as collateral security. He exhibits a statement of the account between himself and the plaintiff, showing a balance in his favor, after crediting the $960 collected on Colburn's note, of $1190.31, for which he prays judgment. Among the items of the account thus pleaded as a set-off was a note for $1700, executed by the plaintiff to the defendant. The plaintiff filed a reply to

the set-off, denying any indebtednss to the defendant. The evidence shows that the note for $1700 had been assigned by the defendant to the Hanover National Bank, and that a suit thereon had been brought against him by the bank, and was still pending. Judgment was rendered for the defendant on his set-off, for the sum of $1061.56, and the plaintiff appealed.

White & Parker, for appellant.

Appellee was not the owner of the $1700 note. It had been assigned to the Hanover Bank, and it alone could sue upon it. *1 Ark., 220; 5 id., 649; Mansf. Dig., sec. 473; 47 Mich., 352; 31 Ark., 597; 2 Ark., 4; 14 id., 185.*

To constitute a set-off, the demand must be due the party, or the claim must be possessed by him in his own right. *2 Pars. on Cont., p. 737, note; Waterman on Set-off, ch. 3; 3 McCord (S. C.), 249; 22 Penn. St., 116; 14 Mich., 170; 10 id., 530; 12 Am. Dec., 153.*

M. L. Bell, for appellee.

The rent note was held by Neal as collateral security, and appellant was not entitled to recover until she had paid the amount due Neal. While the $1700 note was assigned to the Hanover Bank, yet he was indorser, and liable for the amount, and he held the proceeds of the rent note as collateral security to pay it.

PER CURIAM. The defendant, under the facts shown in this case, was not entitled to judgment against the plaintiff upon his set-off. He was not the owner of the note for $1700, and to allow the $960 to him in this action would subject Mrs. Jenkins to a second payment of that sum at the suit of the Hanover Bank.

SET-OFF.

Mrs. Jenkins is not entitled to recover the $960 of Neal, if the note upon which it was collected was given to him as collateral security, until she pays the $1700 note; nor is Neal entitled to judgment for the $1700 note until he has recovered it from the Hanover Bank by payment of his debt or otherwise.

Collateral securities.

Reverse and remand for a new trial.

JEFFRIES V. STATE.

1. LIQUORS: *Sales by manufacturers of wine.*

By section 15 of the license act of March 8, 1879, "one who manufactures and sells wines from grapes, berries or other fruits, and who sells no other liquors," is exempted from all the provisions of said act, and is therefore liable neither to the penalty fixed by section 5 for selling without a license, nor to that imposed by section 14 for keeping a drinking saloon or dram-shop without a license.

2. SAME: *Same.*

Such manufacturer may sell as well through clerks or agents as by contracts made with himself personally.

APPEAL from *Woodruff* Circuit Court.

M. T. SANDERS, Judge.

Defendant was indicted for keeping a dram-shop without a license.

His defense was that he only sold, as agent for the Standard Wine Company, wine manufactured by said company in quantities not less than a quart, and in sealed bottles. The proof shows that some young men came into his store and bought a quart bottle of wine. They proceeded to open the bottle and drink the wine in the store. Defendant objected to their drinking the wine upon the premises or in the house. He said that it was against his rules, and there was a sign posted over the door to the effect that it was against his rules to drink wine on the premises. He afterwards sold them six or seven bottles, and made no further objection to their drinking in his store. They drank the wine in the back room of defendant's store. The defendant was convicted and appealed.

Section 1 of the act of March 8, 1879, provides that it shall not be lawful "for any person to sell any ardent, vinous, malt or fermented liquors * * * in any quantity or for any purpose * * * without first procuring a license from the County Court." A proviso to this section allows manufacturers of such liquors to sell them in original packages

containing not less than five gallons. Section 5 of the act fixes the penalty for the sale prohibited by section 1. Section 14 of the same act is as follows: "Any person who shall keep a drinking saloon or dram-shop, without procuring a dram-shop or drinking saloon license, as provided by this act shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not less than $200, nor more than $500; and each day or part thereof the same is kept shall be deemed a separate offense."

Section 15 of the same act is as follows: "This act shall not be held to apply to one who manufactures and sells wines from grapes or berries, or other fruits, and who sells no other liquors, ardent, malt, vinous or fermented."

J. W. House, for appellant.

1. It was lawful to sell native wine manufactured by the seller, in sealed quart bottles. *Act March 8, 1879; 50 Ark., 132.* The proof shows that appellant was not keeping a dram-shop. He was merely acting as agent of the Standard Wine Company, who were manufacturers, and he *forbid* the drinking on the premises. This was all he could do. *24 Tex., 152; 49 Ark., 63.*

He was authorized to sell and it was immaterial whether the wine was drunk on the premises or carried off and drunk. *4 S. E. Rep., 257.*

Selling in quart bottles, sealed, does not constitute a dram-shop.

Under section 15 of the act, appellant is exempt from *all* the provisions of the act, even if he sold the wine by the drink.

W. E. Atkinson, Attorney General, and *T. D. Crawford*, for appellee.

Review the liquor laws and contend that appellant has not brought himself within the protection of section 15 of the license act, because, the dram-shop was not shown to belong

to a manufacturer, and the drinking on the premises made appellant guilty of keeping a dram-shop. *Rev. St., ch. 148, sec. 2; act March 8, 1879, secs. 1, 14, 15, etc.; 6 Ark., 252, 35.*

The statute makes no exceptions in favor of the agent of a manufacturer. Only the manufacturer is exempt. *15 Pet., 165; 51 Ark., 100; 101 Ill., 129.*

Section 15 act 1879 does not permit the keeping of a dram-shop, even where the wines sold are exclusively of the vendor's manufacture. If he desires to keep a dram-shop, he must take out a license.

SALE OF WINES.

PER CURIAM. But three questions arise upon this record: 1st. Can a manufacturer of wine sell only by his personal contracts and deliveries, or may he sell through clerks and agents?

2d. Does section 15 of the act of March 8, 1879, exempt the manufacturer and seller from the operation of the fourteenth section of that act, as well as from that of section 1?

3d. Does the evidence show that defendants kept a dram-shop?

Upon the first we hold that, as in all other commercial transactions, the manufacturer may sell by his agents.

Upon the second, we hold that by section 15 of said act the manufacturer of wine, who sells no other liquors, is exempted from the operation of the entire act.

As this disposes of the cause it is unnecessary to decide the third question.

Reverse and remand.

COCKRILL, C. J., dissenting. The license act of 1879 creates two offenses. One is the unlicensed selling of liquor, and the other, keeping a "drinking saloon or dram-shop," without license. The fifteenth section provides that "this act shall not be held to apply to one who manufactures and sells wines from grapes or berries or other fruit, and who sells no other liquors, ardent, malt, vinous or fermented."

Does this provision exempt the wine manufacturer from the penalties denounced against both offenses, or against that of selling alone? The answer must be drawn from the language of the act and the mischief to be suppressed. *McRae v. Holcomb, 46 Ark., 310–11.*

The object of the fifteenth section, as we found in an examination of the subject in *Chamberlain v. State, 50 Ark., 132,* was to encourage the planting of vineyards and the manufacture of wine. To accomplish the object it was necessary to allow the manufacturer to sell the product of his vines; but it was not essential to his business that he should be empowered to keep a dram-shop. Accordingly, we find that the act does not provide simply that it shall not apply to one who manufactures wines. A general provision of that nature would have left no doubt of the intent of the law makers to exempt the manufacturer from liability from all the penalties of the act. But it is argued that the drinking saloon, or dram-shop keeper sells, and therefore that he is in terms excepted from all the penalties of the act. To that argument there are two answers.

In the first place it requires no sale of liquor to constitute a drinking saloon. Dram drinking may be and often is accomplished without price, as by giving away liquor. If it is to be drunk then and there, the place where that is habitually done would be a drinking saloon. Such a contingency is no more unlikely than that a free ferry should be run as an adjunct to a whisky business, as we found had been done, in *Shinn v. Cotton, ante, p. 90.* A free drink is as likely to be offered as a free ride, as an attraction to customers. In *Minor v. State, 63 Ga., 319,* a place where the members of a social club dispensed their liquors among themselves, without selling it, was held to be a tippling house. In this State it has been frequently ruled that one may be guilty of keeping a dram-shop without proof of a sale, as under the old law against unlicensed groceries construed in *Hensley v. State, 6 Ark., 252;* and in *Moore v.*

State, 36 Ark., 222. Patton v. City, 47 Ill., 370. The statute under consideration declares that each day the dram-shop is kept, shall be considered a separate offense, but it may be kept without an actual sale on each day. Selling without a license does not alone constitute the offense of keeping a drinking saloon or dram-shop—even habitual selling to the extent of carrying on business as a liquor seller is not enough. *State v. Inness, 53 Me., 539.* Each is a distinct offense against the law, but in neither case is the offender punished for keeping an unlicensed dram-shop. The latter offense is distinct from each of the others, and the sale of liquor, when offered in evidence to sustain a conviction, is at most only one of the constituent elements of the offense. It is not itself the offense. The absurdity of pronouncing one guilty of keeping a drinking saloon, if it is kept for some purpose other than or without the sale of liquor, and not guilty if kept to sell liquor, or by selling, is not to be attributed to the Legislature. And yet, as the act professes to exempt only the manufacturer of wine who sells, that is the logical reduction of the appellant's contention.

The second reason to be assigned against the argument is, that it is but fair to presume that the Legislature used the word "sell" in the fifteenth section in the same sense given to it in all the other sections of the act. That being true, it would follow that when it is declared in that section that the act shall not apply to one who sells wine of his manufacture, exemption from the penalties denounced against selling only were in contemplation. By no other construction is any meaning at all given to the clause "and sells," for if it is omitted altogether, the section would have the meaning the court now holds it has with it. But the rules of construction, which the courts adopt as guides to the legislative intent, require that some meaning should be given these words.

Believing that the exemption claimed by the appellant is not within the letter of the exception, and not within the evil

it was intended to relieve against, I think the judgment should be affirmed.

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MARVIN v. MARVIN.

DIVORCE: *Marriage under duress.*

Where a man arrested on probable cause and without malice, for seduction, marries the woman to procure his discharge, he cannot have the marriage avoided on the ground of duress. The fact that he subsequently discovers that he could not have been convicted, will not alter the case.

APPEAL from *Franklin* Circuit Court in Chancery.
G. S. CUNNINGHAM, Judge.

This was an action brought by William H. Marvin against his wife, Edna Marvin, for divorce, on the ground that the plaintiff consented to the marriage contract under duress. The complaint alleges that he was charged with the crime of seducing the defendant, of which he was innocent, and that being under arrest upon such charge, and having been assured by the defendant's father (acting for her), that the proceeding against him would be dismissed on his marrying her, he consented to the marriage as a means of procuring his release, and through fear as to the consequences of the criminal prosecution. The Chancellor dismissed the complaint, and the plaintiff appealed.

Ed. H. Mathes, for appellant.

The contract of marriage was voidable for duress. *2 Kent Com., sec. 453; 37 Me., 128; 5 Sneed (Tenn.), 57; Stewart on Mar. and Divorce, sec. 238.*

PER CURIAM. If a man lawfully arrested on process for seduction marries the woman to procure his discharge, he cannot have the marriage avoided upon the ground of duress. The fact that he subsequently discovers that he could not have been convicted will not alter the case, if the prosecution was

MARRIAGE: DURESS.

upon probable cause, and not merely from malice. *Bish. Mar. and Div. sec. 212; 2 Kent, *453; Honnet v. Honnet, 33 Ark., 156.*

The prosecution of the appellant was upon probable cause. Let the decree be affirmed.

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FORD V. JUDSONIA MERCANTILE CO.

JURISDICTION: *Conflict of.*

After property belonging to the defendant in an action at law has been seized under an order of attachment issued by the Circuit Court, the exercise of that court's jurisdiction over it cannot be interfered with by the order of a court of chancery appointing a receiver, and directing the transfer of the property to his possession.

APPEAL from *White* Chancery Court.

D. W. CARROLL, Chancellor.

The Judsonia Mercantile Company, a private corporation doing business in White County, being insolvent, on the 27th day of September, 1887, conveyed all of its real and personal property, notes and accounts to G. W. Henson in trust for the benefit of the plaintiffs (except the Judsonia Mercantile Company, and G. W. Henson) who were creditors of said company in the sum of $5,530.87-100. By the stipulations of the deed the trustee was authorized to sell the stock of merchandise at retail at private sale for twenty days, and then upon twenty days' notice sell the stock of merchandise remaining unsold, together with all the other property mentioned in the deed, at public auction, collect the notes and accounts and apply the proceeds of the sale and collection to the payment of plaintiffs' debts, the cost of the trust and the taxes remaining unpaid, and the residue if any to be turned over to the treasurer of the Judsonia Mercantile Company for the care and benefit of the other creditors. The deed was filed for record on the day of its execution; the trustee took

possession and began to sell at private sale. The defendants in this suit, with the exception of J. H. Ford, Sheriff, were creditors of said corporation. Their claims in the aggregate amounted to more than $5,000, and they instituted in the White Circuit Court suits by attachment upon their respective claims. Orders of attachment were issued thereon, delivered to the Sheriff of White County and by him levied upon all of the real and personal property in said deed mentioned which had not been sold by the trustee, the Sheriff taking the property into his custody. While said property was in the custody and possession of the Sheriff, by virtue of said orders of attachment, on the 1st day of October, 1887, without notice of any kind to defendants, plaintiffs presented their complaint to Hon. D. W. Carroll, Chancellor for the First District of Arkansas, at chambers, in the City of Little Rock, who thereupon indorsed an order thereon appointing the trustee in said deed receiver, and directing that upon said receiver executing bond in the sum of $10,000 for the faithful performance of his duty as receiver, that he take possession of the property described in the deed, and sell and dispose of the same according to the provisions of the deed and the notices given by him as trustee; and the Sheriff was ordered to release and turn over to said receiver all the property in his possession by virtue of the levy of said attachment, which was accordingly done. At the December term, 1887, of the White Chancery Court, said cause was docketed and the defendants appeared and filed their demurrer to the complaint. The demurrer was overruled and the defendants electing to stand thereon a final decree was rendered giving effect to said deed according to the prayer of the plaintiffs. The defendants appealed.

McRae & Rives and *J. W. House*, for appellants.

1. Want of jurisdiction is good ground of demurrer where it appears on the face of the bill. *16 Ohio, 373; 47 Am. Rep., 377.*

The Circuit Court having acquired control of the subject matter, and having ample power and jurisdiction over the same, had the right to retain it for final disposition, and the Chancery Court was without jurisdiction. *16 Ohio, 373; 34 Ark., 410; 14 id., 50; 34 id., 188; Mansf. Dig., secs. 327 and 390.*

2. The instrument was an assignment and void. *Bump. Fr. Conv., 321; 1 Fed. Rep., 768; Burrill on Ass., sec. 2; 3 Md., 11; 13 id., 392; Mansf. Dig., sec. 390; 37 Ark., 150; 39 id., 66.*

W. R. Coody, for appellees.

Jurisdiction of the court depends upon the state of things at the time the action is brought, and if once rightfully acquired, it cannot be ousted by any subsequent court or circumstances. *14 Ark., 50; 2 Ark., 168; 3 Ind., 190; 2 Wheaton, 290; 34 Ark., 419.*

When the concurrent jurisdiction is between *law* and *equity* courts, a party has his election in which court he will seek his remedies, and cannot be compelled to submit to a trial in a court of law when he prefers a court of equity. *6 Ark., 85–317; 1 id., 186; 2 J. J. Marsh. (Ky.), 138–513; 13 Ark., 202–600.*

This was a trust fund in the hands of a trustee, and a court of equity had jurisdiction, and appellees having selected that tribunal and appellants having entered their appearance, the court acquired jurisdiction also of their persons, as of the subject matter, and had full authority to dispose of the whole case. *Mansf. Dig., sec. 4929; 36 Ark., 228; 4 Ark., 303; 37 id., 287; 4 John. Chy., 658; 38 Ark., 25–28; 1 McCrary, 136; 14 Ark., 32; 29 id., 475; 1 id., 31; 30 id., 246–90; 6 Ark., 357–9; 22 id., 277; 35 id., 331.*

2. The instrument was a deed of trust or mortgage. *40 Ark., 146; 38 id., 207; 13 id., 112; 23 id., 479.*

HEMINGWAY, J. When the complaint was filed and the application to appoint a receiver presented, the property involved

was in the custody of the Sheriff, who had seized and held it under writs of attachment from the White Circuit Court, against the property of the Judsonia Mercantile Company.

It appears from the complaint that the property belonged to the defendant in the writs; it was therefore rightly seized in obedience thereto. In this respect the facts differ from those presented in the case of *Willis v. Reinhardt*, decided during the present term, in which we ruled, that a stranger to an attachment might maintain replevin against an officer who seized his goods under a writ against the goods of the defendant in the suit.

CONFLICT OF JURISDICTION.

The goods belonging to the defendant in the writs, and being properly held by the Sheriff thereunder, were in the custody of the court from which they issued, and under its control. The Sheriff held them subject to the order of that court, and his possession could not be disturbed without interfering with that court in the exereise of its jurisdiction. But authority to do this appertains only to courts of supervisory or appellate powers, and as the Chancery Court has no supervisory control over the Circuit Court, it follows that It could not take this property from the Sheriff into the custody of its receiver. Such a practice would cause an unseemly clash of jurisdiction, that should be exercised in perfect harmony; and there is neither reason nor authority to justify it. *Buck v. Colbath, 3 Wal., 334; Thompson v. Van Vechter, 5 Duer, 618; Veret v. Duprez, 6 L. R. Eq. Cas., 329; Hitchen v. Birks, 10 ib., 471; Wilmer v. A. & R. Ry. Co., 11 Myers Fed. Dec., sec. 300.*

Such a bill might be entertained if all parties representing the conflicting interests consented, by so drafting orders as to avoid the improper interference by one court with property in the custody of another. We are advised that such a practice has prevailed, and observation satisfies us that it has proven salutary; but it can only be approved where the consent of parties obviates the difficulty indicated.

The bill presents no other ground for equitable relief, and

for the reasons indicated the demurrer to the complaint should have been sustained. The judgment will be reversed and the cause remanded with direction to sustain the demurrer.

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PERRY COUNTY v. CONWAY COUNTY.

1. COUNTIES: *Claims against under special statutes.*

Under a special statute providing that a county which has received territory detached by a previous act from another county, shall be liable to the latter for a just proportion of its debt, existing at the date of the segregating act, to be allowed on a claim presented to the County Court, it is not necessary to authenticate such claim in the manner required by the general statute, in case of ordinary demands against counties, if the special statute does not require it.

2. SAME: *Detaching territory of: Apportionment of debt.*

A county, by receiving territory detached by an act of the General Assembly from that of another county, is placed under a moral obligation to pay a just and equitable proportion of the latter's debt, existing at the time the act is passed; and where the act segregating the territory is silent as to such payment, the Legislature has power to provide for enforcing it by a subsequent enactment.

APPEAL from *Conway* Circuit Court.

G. S. CUNNINGHAM, Judge.

In 1873 the Legislature in creating the County of Faulkner, and fixing the boundaries of Conway County, attached to the latter territory formerly lying in Perry County. The act made no provision for the imposition of any part of the debt of Perry County upon Conway County.

By an act approved March 17, 1885, the General Assembly provided that Conway County should be liable to Perry County for a fair proportion of the debt of Perry County existing at the time its territory was given to Conway County. It was further provided that within two years from the date of the act Perry County, by its agent or attorney, might file its claim against Conway County in the Conway County Court, and it was made the duty of said court to examine the claim, upon legal testimony, and to allow so much thereof as was proven

to be justly due Perry County, within the time allowed by the act. Perry County filed the claim in the Conway County Court. It was not authenticated, as required by the general statute govering the presentation of demands against counties. The County Court rejected the claim, and on appeal to the Circuit Court a demurrer to the plaintiff's claim was sustained, and judgment rendered against it. From this judgment it appeals.

J. F. Sellers, for appellant.

1. The Legislature has power by enactment to provide for an adjustment, in the same act, of the prior indebtedness between the counties interested, and to provide the remedies for carrying the act into effect. *37 Ark., 339*, and cases cited; *73 N. C., 298; 54 Ala., 639; 2 Otto, 307*, and many others.

2. When the Legislature fails in the original act to so provide, as in this case (*Acts 1873, p. 86*), they may do so by subsequent act. *Acts 1885, p. 83; 16 Kans., 498; 28 Cal., 449; 42 ib., 446; 16 Gray (Mass.), 244; 95 U. S., 644; 1 Dill. Mun. Corp., secs. 63, 76, 189; Acts 1881, p. 102; Cooley Const. Lim. (4th ed.), top p. 81.*

E. B. Henry, for appellee.

The Legislature, when the original act does not so provide, cannot make an adjustment of the indebtedness of one county to another by subsequent act. It must be done in the act changing the boundaries, or creating the new county. *37 Ark., 339*, and the cases cited by appellant, are not applicable.

The act is unconstitutional. *Art. 5, sec. 25, Const. 1874; ib., art. 16, sec. 5.* This was a clear attempt on the part of the Legislature to exercise judicial functions.

SANDELS, J. It is objected by defendant county that the claim of Perry County was not authenticated, as required by the general statute in case of ordinary demands against counties. The special statute giving the right to sue upon this claim does not require it, and no principle of statutory construction

1. COUNTIES: Claims against.

makes it necessary. The only other question presented is whether the act of 1885 is constitutional.

The power of the Legislature to alter and abolish counties; to erect new corporations in the place of the old; to divide and dispose of the property held by counties; to charge portions of the debt of the old county upon that receiving its detached territory, is everywhere conceded, and nowhere more emphatically than in this State. *Eagle v. Beard, 33 Ark., 497,* and cases there cited.

Upon general principles of law, if a part of the territory and inhabitants of a county be separated from it by annexation to another, or by the creation of a new county, the remaining part of the county retains all its property, and remains subject to all its obligations and duties. *Laramie Co. v. Albany Co., 92 U. S., 307,* and cases cited; *100 U. S., 514.*

The only debatable question is as to whether *the act segregating the territory* must impose such proportion of the debt of the old county upon the new one, or upon the county receiving the detached territory, as is equitable and just, or whether, where such act is silent as to this, subsequent legislation may make the imposition. This has been ruled differently in the courts.

The earlier doctrine (still followed by some courts) was that the act detaching the territory must apportion the debt, and that it could not be subsequently taken from the old and imposed upon the new county. *Hampshire v. Franklin, 16 Mass., 75; Bowdoinham v. Richmond, 6 Greenl., 112.*

2. SAME: Apportionment of debt

The better doctrine is, that the power of the Legislature to impose the debt of the one county upon another, depending upon the existence of a moral obligation from the new county, or the county receiving new territory, to pay part of the old debt, the Legislature may so ordain whenever it finds the moral obligation to exist. *Stone v. Bird, 16 Kan., 489; Creighton v. San Francisco, 42 Cal., 446; Layton v. New Orleans, 12 La. Ann., 515; Laramie County v. Albany County, 2 Otto, 307; Ly-*

coming v. Union, 15 Pa. St., 166; Guilford v. Supervisors, 3 Kernan, 143; New Orleans v. Clark, 95 U. S., 654; 1 Dillon Municipal Corp., sec. 189.

The act in this case is less open to objection than those usually passed, since it makes Conway County liable for only such equitable proportion of the debt as can be established by legal evidence. The field is open to show, as against a proportion of the debt, the value of county property retained by the old county, and the equity of the imposition of any burden at all.

The demurrer should have been overruled.

Reverse and remand for further proceedings.

FERGUSON v. MCMAHON.

PLEADING AND PRACTICE: *Parties: Action in name of agent.*

Although a mortgage is executed under the direction of an agent, and is the result of a negotiation conducted by him, if it is made to and in the name of his principal alone, and the agent is not a party thereto, he cannot sue upon it in his own name. In such case the mortgage contract is not made with the agent within the meaning of sec. 4936 Mansf. Dig., which provides that "a person with whom * * * a contract is made for the benefit of another," may sue thereon without joining the person for whose benefit the action is prosecuted.

APPEAL from *Nevada* Circuit Court.

R. B. WILLIAMS, Special Judge.

John T. McMahon brought replevin against J. T. and J. N. Ferguson, to recover four bales of cotton which he claimed as agent of Thomas E. McMahon, under a mortgage executed to the latter by Daniel Dixon, who sold the cotton to the defendants. One of the instructions given to the jury is as follows:

"If the jury believe from the evidence that one Dan Dickson raised the cotton in question, and that he had mortgaged the same to Thomas E. McMahon, to secure a debt, and that said debt has not been fully paid; that said mortgage had been

filed or recorded before the purchase of the cotton in question by the defendants, and in the county where said cotton was grown, then you will find for the plaintiff, provided you find that the plaintiff was the agent of said Thomas E. McMahon."

The verdict and judgment were for the plaintiff, and the defendants appealed.

Sec. 4936 Mansf. Dig., is as follows: "An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or the State, or any officer thereof, or any person expressly authorized by the statute to do so, may bring an action without joining with him, the person for whose benefit it is prosecuted."

Atkinson, *Tompkins* and *Greeson*, for appellant.

The court erred in permitting the appellee to amend by substituting John F. McMahon as agent for Thomas E. as plaintiff, instead of Thomas E. McMahon. This was a complete change of parties and should not have been permitted. *Sec. 5080 Mansf. Dig.; 27 Ala., 326; 57 id., 168; 51 Cal., 153; 14 N. Y., 14; S. C., 67 Am. Dec., 196–7; 34 Ark., 157; Green Pr. & Pl., sec. 466; Pom. Rem., etc., sec. 420; Newman on Pl., 287; Bliss Code Pl., sec. 56 et seq.; 47 Ark., 548.*

C. C. Hamby, for appellee.

The addition of the words "as agent of Thomas E. McMahon" to appellee's name, is not a substitution; it was simply defining the capacity, or by what right the appellee *sued*, and is allowable under our statute. *28 N. W. Rep., 560; 10 ib., 884; 42 Ark., 57; 42 id., 541; 76 Ga., 693.*

An agent, or any one having an interest, coupled with the right of possession, can bring replevin. *38 Ark., 413; 47 id., 378; 11 id., 249; 50 id., 169; Waite's Act. & Def., vol. 5, p. 484.*

PLEADING AND PRACTICE: Parties.

COCKRILL, C. J. No reason is disclosed for allowing a recovery for the benefit of Thomas E. McMahon in the name of John McMahon. He is not a trustee for Thomas E.; the mort-

gage contract was not made in his name; nor is he a person with whom the contract was made and therefore entitled to sue in his own name, within the meaning of sec. 4936 of Mansf. Dig. It is true that the plaintiff, John McMahon, conducted the negotiations which led to the mortgage, and also directed its execution, but he is not a party to the instrument, and in all his dealings was only the agent of Thomas E. McMahon, the mortgagee. An agent, who makes a contract for his principal, in the principal's name, is not, in any legal sense, a person with whom the contract is made; the contract in such a case is with the principal only, and he alone is authorized to enforce it. *Bliss on Code Pl., sec. 56.* The agent in such a case has not necessarily even the implied authority to discharge the contract by receiving what is due upon it, much less the right to enforce payment by suit. *Meyer, Bannerman & Co. v. Stone, 46 Ark., 210.*

The court erred, therefore, in instructing the jury that John McMahon could in any event recover the property in dispute upon the faith of the mortgage executed to Thomas E. McMahon.

If John McMahon was the bailee of the property, or had a special interest in it, as he testified, he could maintain an action in his own name against one who wrongfully deprived him of the possession. *Bliss Code Pl., sup.* But the evidence was conflicting upon that phase of the case, and we cannot disregard the error pointed out.

Reverse the judgment and remand the cause for a new trial in accordance with this opinion.

COHN v. HUFFMAN.

APPEALS: *Decree not final.*

In a suit to redeem mortgaged lands, a demurrer was sustained to all the paragraphs of the answer, with the exception of one, in which a claim is set up for improvements made and taxes paid on the mortgaged premises. The defendant, electing to stand on his answer, the court referred the cause to a commissioner, with directions to state an account showing the amount of the mortgage debt, the value of the defendant's improvements, the amount of his tax payments, and the value of the rents. The defendant appealed. HELD: That the decree was not final, and the appeal is premature. [*Davie v. Davie, ante, p. 224.*]

APPEAL from *Jackson* Circuit Court in Chancery.

J. W. BUTLER, Judge.

This is a suit in equity, brought to redeem certain mortgaged lands. A demurrer was sustained to all the paragraphs of the defendant's answer with the exception of one, in which he sets up a claim for the value of improvements made, and for the amount of taxes paid on the property. The defendant electing to stand on his answer, the court thereupon referred the cause to a commissioner, with directions to state an account showing the amount of the mortgaged debt, the amount of taxes paid on the land by the defendant, the value of all lasting improvements made by him, and also the total rental value of the lands for each year since the defendant went into possession. The commissioner was directed to report at the next term of the court. The defendant appealed.

Compton & Compton, for appellant.

W. R. Coody, for appellee.

PER CURIAM. The decree is not final within the rule of the decision in *Davie v. Davie, ante, p. 224.*

The appeal is premature. Let it be dismissed.

TALBOT V. WILKINS.

PROMISSORY NOTE: *Consideration.*

A justice of the peace having fraudulently collected and converted to his own use the amount of a judgment recovered before him by the plaintiff, falsely represented to the latter, and to the defendant, that it had been converted by the constable, and induced the defendant to sign with him a forged note, purporting to have been executed by the constable, and induced the plaintiff to accept it in settlement of the pretended defalcation. Neither the justice nor the constable were indebted to the plaintiff in any sum, nor had the plaintiff ratified the act of the justice in collecting the judgment. HELD: That the note was without consideration, and that the plaintiff does not stand in the attitude of a purchaser thereof.

APPEAL from *Jefferson* Circuit Court.

JOHN A. WILLIAMS, Judge.

Talbot brought this action against Fall, Carroll & Wilkins, on a promissory note. The answer of the defendant, Wilkins, alleges: "That the note sued on was made without any consideration whatever, the same having been given under the circumstances and for the purposes following, to-wit: Defendant, Fall, was a justice of the peace, and defendant, Carroll, was constable. Plaintiff, Talbot, had brought suit and obtained judgment before Fall against Sterling R. Cockrill, Sr. Fall collected from Cockrill the money on the claim, fraudulently assuming and pretending that he was authorized to collect it, he having no authority whatever. Fall appropriated the money to his own use, and then fraudulently represented to Talbot and to Wilkins that Carroll had collected it and appropriated it. Under the guise of a mutual friend, Fall induced Wilkins to sign the note in suit with him as security for Carroll, and induced Talbot to accept the note in settlement of Carroll's pretended defalcation, both Wilkins and Talbot believing that Carroll's signature was genuine; whereas, the signature of Carroll was a pure forgery, as Fall well knew. Talbot never ratified or acknowledged the collection of the money by Fall, and never knew of it until long after the note was

given. At the time the note was given neither Fall nor Carroll owed Talbot anything whatever, and neither one of them has since owed him anything, and the note, therefore, was without consideration, and was procured and delivered as a mere device on the part of Fall to conceal from Carroll and the public his misconduct." To this answer a demurrer in short was entered on the record; the demurrer was overruled, and the plaintiff, admitting the truth of the answer, the court below gave judgment for the defendant, Wilkins, and Talbot appealed.

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

Talbot really accepted the note in satisfaction of his claim against Cockrill. This was a sufficient consideration. *Story on Pr. Notes, sec. 186.* And constituted him a *bona fide* holder for value. *Id., sec. 195; 47 Ark., 465.*

Even if Wilkins signed the note as a security, he is estopped from showing that the principal's name was forged. *Chitty on Bills (12 Am. Ed.), 638,* and notes; *Story Prom. Notes, sec. 135.*

W. S. McCain, for appellee.

Argued the case orally.

PROMISSORY NOTE: Consideration.

PER CURIAM. If the answer of appellee, Wilkins, be true, the note sued on was without consideration. The demurrer was properly overruled.

This case is unlike *Cagle v. Lane, 49 Ark., 465,* cited by appellant. In the latter case Lane held a note, indorsed by Cummings, for $750. In order to take up this note, Cummings procured Cagle to execute his note for $1000 direct to Lane, and received from Lane the difference in the principals of the two notes. This court held that Lane stood in the attitude of a *bona fide* purchaser of the $1000 note for value, "before maturity, and under the belief that the maker had executed it upon a valuable consideration," and for that reason was entitled to recover judgment on the note of Cagle. In this case the pretended indebtedness of Carroll for moneys collected by him

on a judgment recovered by Talbot, and converted to his own use, was the pretended and only consideration of the note sued on. In the settlement of this indebtedness, which never existed, Talbot accepted the note. Such settlement was the only pretended purpose and object of the note. Talbot never accepted it, or became the owner of it in any other way. He, therefore, does not stand in the attitude of a purchaser of the note.

According to the abstract of appellant, which is not contradicted, the judgment of the Circuit Court should be affirmed.

COCKRILL, C. J., did not sit in this case.

WILLIAMS V. CUNNINGHAM.

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1. LIENS. *On future property: Coutract for.*

When the parties to a written instrument intend thereby to create a positive lien upon property, although it be personal property not then in existence, such lien will attach in equity as a charge upon the particular property as against the contractor, and all persons claiming it under him, either voluntarily or with notice by record, as soon as his title to it is acquired.

2. SAME: *Same.*

A written agreement for the sale of a tract of land, after describing the land and stating the terms of the sale, recites that the plaintiff, who was the vendor, to secure the payment of a note given for the purchase money, "reserves to himself a lien on all crops to be grown on said premises" during the year in which the note was payable. The agreement was acknowledged and recorded. Subsequently the vendee of the land mortgaged a crop produced on it during the year specified in the contract to the defendant, who converted it to his own use. HELD: That the plaintiff had an equitable lien on the crop, and the defendant was liable to him for its value to the extent of his debt.

APPEAL from *Lincoln* Circuit Court in Chancery.

JOHN A. WILLIAMS, Judge.

J. M. Cunningham brought this suit against Robert Williams and Caswell Bunting to recover the amount of a promissory note executed by Bunting, and to enforce a lien on 5300

pounds of seed cotton, which it is alleged defendant, Williams, converted to his own use, with knowledge of the lien. The plaintiff alleges that he sold Bunting eighty acres of land on the 18th day of December, 1885, and for the purchase money took Bunting's three notes for $166.66 each, due in one, two and three years from date; that one note was due, except $50 paid, in February, 1887; that under the contract by which the sale was made he had a lien on all the crops grown upon said land during the year 1886, to secure the payment of said note; that the contract was filed for record on the 2d day of January, 1886, and was duly recorded on the 7th day of April, 1886; that Bunting raised 5300 pounds of seed cotton on the land in 1886, worth $131, and that defendant, Robert Williams, took possession of said cotton and converted it to his own use, knowing plaintiff's rights in the premises. The prayer of the complaint is for judgment against Williams for the proceeds of the cotton, to secure the payment of the balance due on the note. The contract between Cunningham and Bunting, dated December 18, 1885, is exhibited with the complaint. It provides that, "Whereas, the said first party agrees to sell to the said second party the following described land in Lincoln County, Arkansas, to-wit: The north half of the northeast quarter of section one (1), in township eight (8), south of range seven (7) west, and has this day let said second party into possession of said premises; in consideration of which the said second party has executed to first party his three several promissory notes for the sum of one hundred and sixty-six and 66-100 dollars each, the first of which is to become due in one year, with interest, etc. * * * And, to secure the payment of said notes, the said first party reserves to himself a lien on all crops to be grown on said premises during the year in which the same becomes due."

Williams demurred to the complaint, and also answered it. In his answer he states that he "knows nothing about the plaintiff's contract" with Bunting, except as stated in the

complaint; that Bunting executed a mortgage to him on all his crops to be raised on the said land for the year 1886; that said mortgage, dated June 23, 1886, was duly recorded, etc., and that he received under it, in payment for supplies furnished Bunting, cotton, which he disposed of for the sum of $103. The answer then denies that the plaintiff has a "landlord's lien" on the cotton, or a mortgage superior to the lien of defendant.

The court overruled the demurrer, and the case having been heard on the complaint, answer and exhibits, the court declared the contract between the plaintiff and Bunting to be a mortgage on said cotton, and rendered judgment against Williams for the sum of $128.35, being $25.35 more than he received for the cotton. He appealed.

M. L. Bell, for appellant.

1. The written contract was not a mortgage. *Jones on Ch. Mort., secs. 1, 2 and 3; 31 Ark., 557; Jones on Ch. Mort., sec. 11; 7 Ark., 253; Jones on Mort., sec. 9.* The reservation of a lien for purchase money is not a mortgage. See *supra.*

2. The judgment is excessive—it could not possibly have been for more than $103.

J. M. Cunningham, pro se.

The instrument is a mortgage, being evidently so intended. *Jones Chat. Mortg., 13; 33 Ark., 387; ib., 795; 65 N. Y., 465; 16 Iowa, 422; 8 West. Rep., 716; 58 Mo., 56; 60 id., 505; 32 Cal., 376; 20 N. W. Rep., 161; 3 N. Eng. Rep., 397; 39 Ark., 567.*

PER CURIAM. It is the result of all the authorities, that wherever the parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then *in esse*, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter,

1. LIENS: On future property.

and all persons asserting a claim thereto, under him, either voluntarily, or with notice by record. *Jones on Chattel Mortgages, sec. 173; Mitchell v. Winslow, 2 Story, 630; Bell v. Pelt, 51 Ark., 433.*

2. SAME. There was no evidence as to the value of the mortgaged cotton received by appellant; but he alleged in his answer that he had received therefor $103. It is evident that Cunningham lost the benefit of his lien on the cotton through the appropriation thereof by Williams to his own use. The court should have rendered judgment for the $103, and interest thereon from the date of the filing of the complaint at the rate of 6 per cent. per annum.

The decree to that extent will be modified.

COCKRILL, C. J., did not sit in this case.

SMITH V. GILLEN.

1. PROMISSORY NOTES: *Failure of consideration.*

The payees of a promissory note claimed to be the owners of certain mining claims which were to constitute the capital stock of a company they proposed to organize for mining purposes; and the note was given for shares in such stock taken by the maker. In an action on the note there was evidence tending to show that the claims were conveyed to a company formed but not legally organized. HELD: That the equitable right acquired by the defendant in such interest as the payees had in the mining claims, constituted a valuable consideration for the execution of the note, and the right to recover some amount thereon was not defeated by the failure to incorporate the mining company.

2. SAME: *Same: Instructions.*

In such action, in the absence of evidence tending to show that the consideration of the note was illegal, it was error to instruct the jury that any illegality of consideration as to one of the payees, might be pleaded against the other. And the failure to incorporate the mining company being only a partial failure of the consideration of the note, it was also error to instruct the jury that no recovery could be had upon it, if the company had not been legally organized.

APPEAL from *Garland* Circuit Court.

J. P. WOOD, Judge.

Smith sued Gillen on a promissory note executed by the latter to Smith, and Charles Cutter jointly, and indorsed by Cutter without recourse.

Gillen answered, stating that the note was without consideration, that it was obtained by the false pretenses of Charles Cutter and O. F. Smith, to-wit: That the note was a subscription to a company to be duly organized for mining purposes, possessed of certain valuable mining claims in Montgomery and Garland counties; that no such company was lawfully organized and no such claims were held; that the purpose of said scheme was to sell fraudulent stock; and the note, therefore, was void.

On motion of defendant, the court gave the following instructions to the jury, to which the plaintiff excepted:

1. The maker of the note sued on herein promised O. F. Smith and Charles Cutter, as his joint creditors, to pay the sum mentioned, and any illegality of the consideration may be pleaded by the maker against the one party as against the other as equally privy to the transaction with all its incidents.

2. The subscribers to the capital stock of an incorporation about to be formed, and in the attempt to unite as corporators, are not liable upon agreements made between them in view of the formation of such corporation as stockholders, until the formalities, which are a condition precedent to the legal incorporation of the company, are observed. And, if you believe from the evidence that the note sued on was given as a part of the subscription by a shareholder to persons proposing to organize a joint stock company, which has never yet been legally formed after the lapse of a reasonable time in which to have perfected said organization, you will find for the defendant.

The trial resulted in a judgment for the defendant, and the plaintiff appealed.

R. G. Davies and *Charles D. Greaves*, for appellant.

1. The consideration was not illegal. *Story Bills Ex., secs. 186–7.*

2. The instructions are misleading and wrong. *Smith Cont., 240, 241, 168 et seq.; ib., 168 et seq.; 1 Chit. on Cont. (11th Am. Ed.), 2931; 5 Pick., 384; 14 id., 207; 1 Metc., 93; 5 Johns. Ch., 23; 14 Johns., 527; 18 Johns., 337.*

John M. Harrell and *D. H. Cantrell,* for appellee.

1. The first instruction was not abstract. The court simply left it to the jury to say, under the proof, whether the legality of the note was impeached or not.

2. No corporation was ever formed, and the second instruction is sustained by *Morawitz on Private Corps., par. 67, 737, 738, 52, 743; 3 Am. St. Rep., 806 and notes, etc.; 64 N. Y., 77; 57 Mo., 126; 37 Pa. St., 210; 57 Cal., 396; 12 Vt., 304; 6 Bush., 443; 8 Gray, 310; 80 N. Y., 219.*

PROMISSORY NOTES: Failure of consideration: Instruction.

PER CURIAM: The instructions of the court were erroneous, and did not fairly submit to the jury the question as to the consideration of the note sued on, which they ought to have decided. It was proven that ten mining claims, which Smith and Cutter claimed to own, were to constitute the capital stock of the company to be organized, and that the note was given in part, if not wholly, for the interest that Gillen agreed to take and did take in this stock as shares. Evidence was adduced tending to prove that the claims were conveyed to a company formed, but not legally organized as a corporation. If this be true, Gillen acquired an equitable right in whatever interest or property Smith and Cutter had in the mining claims, if any, although the company was never legally organized as a corporation. Such an equitable right may be a valuable consideration. The partial failure of the consideration for which the note was given did not defeat the plaintiff's right to recover something. There was no evidence tending to show that the consideration of the note was illegal.

Reverse and remand for a new trial.

WOOLUM v. KELTON.

1. EXECUTION: *Motion to quash.*

Questions of fact arising on a motion to quash an execution, should be tried by the court, and not by a jury.

2. SAME: *Same: Appeal.*

On appeal from the judgment of a justice refusing to quash an execution, the Circuit Court, on finding against the execution debtor, should render judgment against him and the sureties on his appeal bond for the costs only (including that of both courts), and it is error in such case to permit a recovery for the amount of the justice's judgment on which the execution issues.

APPEAL from *Washington* Circuit Court.

J. M. PITTMAN, Judge.

C. R. Buckner, for appellant.

Woolum appealed from the judgment of a justice of the peace, refusing to quash an execution against him. His motion to quash alleged that the judgment on which the execution issued had been paid. The response of the execution creditor denied the alleged payment, and the issue thus formed was by consent tried in the Circuit Court by a jury. The verdict being against Woolum, the court rendered judgment against him and the sureties on his appeal bond, for the amount of the justice's judgment on which the execution had issued. He appealed.

PER CURIAM. The questions arising upon the motion to quash the execution, should have been tried by the court, but were, *by consent*, submitted to a jury. The evidence was conflicting, and their finding will not be disturbed. EXECUTION: Motion to quash.

But upon finding against appellant upon his motion to quash the executions, the court rendered judgment against him and the sureties upon an *appeal bond* for the amount of the justice's judgments. This was error.

Reverse the judgment and enter judgment here against the appellant and his sureties for the costs of the justice's and Circuit Court.

Reversed.

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FREEMAN v. WATKINS.

ATTACHMENTS: *Sale of property: Confirmation.*

The sale of attached property is not complete until it is confirmed by the court. [*Mansf. Dig., sec. 350.*] An action to recover the purchase money, brought before such confirmation, is therefore premature and cannot be maintained.

APPEAL from *Carroll* Circuit Court, Eastern District.

M. R. BAKER, Special Judge.

Freeman brought this action against Watkins and Fancher upon a promissory note executed by them for the price of a town lot, sold by Freeman as Sheriff upon a credit of three months, and purchased by Watkins. The sale was made under an order of the Circuit Court, for the satisfaction of a judgment recovered in a suit in which the lot was attached, and the attachment sustained. The judgment below was for the defendants, and the plaintiff appealed.

Mansf. Dig., sec. 350, provides that the sale of attached property "shall be subject to the confirmation of the court."

Crump & Watkins, for appellant.

That the sale was not reported, or confirmed by the court, was an irregularity merely, occurring since appellant's cause of action accrued, and one which appellees, or any one having an interest could at any time have brought before the court for its action. The bid had not been rejected, nor had the court refused to confirm the sale.

The rule of *caveat emptor* applies to judicial as well as executive sales. *Rorer Jud. Sales, 174; 32 Ark., 324; Freeman Void Jud. Sales, sec. 46; Waples on Att., 535; 4 Ark., 289; 10 id., 211; 99 N. Y., 350.*

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

Attachment sales are judicial sales. They must be confirmed by the court. Until confirmation there is only an unaccepted offer, and no contract, and the purchaser cannot be sued for his bid. *47 Ark., 419; 23 id., 41; 34 id., 346; 38 id.,*

80; 2 Freeman on Ex., 304 a; ib., 313 b; 2 Dan. Chy. Pl. and Pr. (4th ed.), 1281; 2 Ves. Jr., 336; 1 Sugd. on Vendors, marg. p. 71; 3 Dr. and War. Ir. Chy., 75; 2 Swan., 490; 129 U. S., 83.

This case is concluded by the case of *Black v. Walton, 32 Ark., 321.*

ATTACHMENT SALES.

PER CURIAM. Attachment sales are, by the terms of the statute, subject to confirmation by the court. The contract of sale is not complete until the bid of the purchaser is accepted by the court, and until acceptance there can be no enforcement of the contract by either party. The purchaser cannot, therefore, be compelled to comply with the terms of sale by payment of the purchase money, until his bid has been accepted by the court. *Freeman on Ex., sec. 304; Bell v. Green, 38 Ark., 78; Greer v. Powell, 3 Met. (Ky.), 124.*

There had been no confirmation in this case when the action to collect the purchase money was brought, and it was, therefore, premature.

If the plaintiff shall move a confirmation of the sale, the defendant can raise the other questions argued by him, in that proceeding. When the sale is confirmed the plaintiff can renew his action to recover the purchase money.

Affirm.

WELLINGTON V. STATE.

I. CRIMINAL PROCEDURE: *Appeals: Taxing attorney's fee.*

Sec. 2649 Mansf. Dig., providing that upon the affirmance of a judgment on the appeal of a defendant in a misdemeanor case, an attorney's fee of $20, to be paid to the Prosecuting Attorney, shall be taxed as part of the costs of the appeal, has not been repealed; and the taxation of such fee is proper.

2. SAME: *Same: Awarding damages.*

Sec. 2471 Mansf. Dig., imposing 10 per cent. damages on the affirmance of judgments appealed from in cases of misdemeanor, is not unconstitutional.

3. SAME: *Tax on conviction.*

The tax on each criminal conviction in courts of record, levied by sec. 5595 Mansf. Dig., is a valid exaction.

4. SAME: *Cost of printing brief: Rule 23.*

On the affirmance of a judgment of conviction in a misdemeanor case, the cost of the appellee's brief is properly taxed against the appellant, under rule 23 of the Supreme Court.

APPEAL from *Washington* Circuit Court.

J. M. PITTMAN, Judge.

E. P. Watson, for petitioner.

Motion to retax costs, quash execution, etc. For original opinion in case, see *ante*, *p. 266*.

On the affirmance of the judgment rendered against the appellant in the court below, a judgment was entered here against him, and the sureties on his *supersedeas* bond for 10 per cent. damages. The Clerk also taxed as part of the costs in this court an attorney's fee of $20, to be paid to the Prosecuting Attorney, and $5.57 for printing the appellee's brief. A part of the costs taxed in the Circuit Court, and now complained of, is a conviction fee of $3. The Clerk having issued an execution for the amount of the judgment, including the damages and costs, the appellant filed a motion to recall and quash the execution and retax the costs. He also moved to modify the judgment so as to omit the recovery for damages.

Sections 2469, 2471 Mansf. Dig. are as follows:

"Sec. 2469. Upon the affirmance of a judgment on the appeal of the defendant, an attorney's fee of twenty dollars, to be paid to the Prosecuting Attorney, shall be taxed as part of the costs of the appeal, and upon the reversal of a judgment upon an appeal by the plaintiff, a fee of five dollars."

"Sec. 2471. Where the execution of a judgment for a fine is suspended, as herein provided, upon an affirmance of the judgment, damages at the rate of 10 per cent. shall be awarded against the defendant, one-fourth of which shall be for the use of the Prosecuting Attorney."

Sec. 1307, *ib.*, provides "that the Supreme Court may make rules for the convenient dispatch of business, * * * the argument of cases or motions," etc.

Rule 23 of the Supreme Court requires that all briefs, except in certain cases, shall be printed, and provides that "the cost of printing, not to exceed fifteen dollars, a side, shall be taxed against the losing party as costs of this court."

By section 5595 Mansf Dig. a tax of three dollars is required to be collected on each criminal conviction in courts of record.

CRIMINAL PROCEDURE: Appeals: Costs, etc.

PER CURIAM. The fee of twenty dollars taxed against the appellant is authorized by section 2469 Mansf. Dig. This section was part of the original code, approved July 22d, 1868. The same Legislature passed an act regulating fees for Prosecuting Attorneys, among other officers, which was approved July 23, 1868.

Since that time the act regulating fees has been amended, but as to the items of fees of Prosecuting Attorneys, the act of 1868 and the amendatory act of 1875 are identical, except as to the amount allowed for convictions in cases of homicide not capital. There is no repeal, express or implied, and the fee was properly taxed as part of the costs. *Chamberlain v. State, 50 Ark., 132.*

The right of the Legislature to impose 10 per cent. damages upon affirmance has long been conceded and affirmed by this court. The provision imposing it (section 2471) is not unconstitutional.

The tax of three dollars complained of is imposed by section 5595 Mansf. Dig., and has heretofore been held a valid exaction.

The amount of $5.75 for printing the appellee's brief is taxed under rule 23 of this court, which is based upon section 1307 of Mansf. Dig.

These charges are not part of the punishment of the accused. Costs are awarded in order that the State may prosecute the guilty at their own expense. *Fanning v. State, 47 Ark., 442.*

Motion overruled.

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FOX v. ARKANSAS INDUSTRIAL CO.

1. VENDOR AND VENDEE: *Lien for purchase money.*

The statute [*Mansf. Dig., secs. 4398, 4399*] providing that in an action to recover the purchase money of personal property, the plaintiff may obtain an order directing the Sheriff or other officer to take the property "in possession of the vendee" and hold it subject to the orders of the court, does not create a lien in favor of the vendor, but only gives him the privilege of suing out a specific attachment against the property without imposing upon him the conditions on which that remedy is allowed to other creditors.

2. SAME: *Same.*

Such privilege of the vendor must be exercised while the property is in the possession of the vendee, and cannot take precedence of the right of a prior attaching creditor.

3. SAME: *Same.*

The vendee has possession of the propety within the meaning of the statute so long as it is subject to his control, and the right of no third party has intervened. But after it has been seized under an attachment sued out by a third person, it is no longer in the power of the vendee, and the vendor by subsequent process against it, can acquire no right beyond that of a second attaching creditor.

APPEAL from *Jefferson* Circuit Court.

JOHN A. WILLIAMS, Judge.

U. M. & G. B. Rose and *M. L. Bell*, for appellants.

1. The plaintiffs had a right to seize the property in controversy notwithstanding the levy of the attachment of the interpleader. For definition of "possession," see *Abbott, L. D., in loco; 1 Rosc. Cr. Ev., *415; 42 Vt., 495.* An attachment does not cut off the vendor's right to enforce his claim. *Mansf. Dig., secs. 4398–4401; 18 Wall., 341; 30 Ark., 117; 42 id., 451; Drake Att., sec. 245; 45 Ark., 142; 30 Ark., 266; 15 B. Mon., 279; 1 Camp., 282; 1 Wall., Jr., 311; 104 Mass., 162.*

2. Neel had no interest in the property attached, and hence the interpleader acquired none by attachment. *14 Ark., 43; 1 Freeman on Ex., sec. 335; 1 Pick., 492; 3 B. Mon., 580; 15 Ark., 341; ib., 497; 17 id., 511; 12 id., 55.*

3. The interpleader acquired no title by estoppel. *93 U. S., 33; 9 Cush., 490; 40 Vt., 51; 51 Wis., 457; Bigelow Est.,*

p. 628; 10 N. E. Rep., 205; 119 Ill., 379; 57 Vt., 474; 57 Am. Rep., 432; 109 Mass., 54; 33 N. W. Rep., 435; 39 id., 276; 18 Pac. Rep., 372; 99 N. Y., 407; 6 Dorol. & L., 189; 89 E. C. L., 494; 2 Ell. & Bl., 9; 11 Fed. Rep., 790; 1 McCrary, 58.

M. A. Austin, for appellee.

1. Neel was not in *possession* of the property. It was in the possession of the Sheriff, and appellants, having no lien, lost their right to impound the property under *Mansf. Dig., secs. 4398–9, etc.; 25 Ark., 562; Schouler Per. Prop., vol. 2, pp. 557, 581 et seq.* Appellant had no statutory lien. *45 Ark., 136; 49 id., 287.*

From the time of the levy of the attachment, appellee acquired a lien, and the property passed under control of the court and out of that of the defendant. *Mansf. Dig., sec. 325; 34 Ark., 404; 39 id., 97; 29 id., 85; Drake Att., sec. 459.*

All property which the owner himself might sell free of liens can be taken under attachment. *Drake Att., sec. 245; Bland Ch. (Md.), 284; 22 Am. Dec., 236; 56 Penn St., 286; 18 Mo., 243; 3 Dev. (N. C.), 270; 29 Ark., 92.*

2. The court, sitting as a jury, found that the property belonged to Neel, and this finding will not be disturbed. *23 Ark., 24; 5 id., 389; 1 id., 90.*

3. Appellant is estopped by allegations in his petition from denying that Neel was the owner. *20 Fla., 45; 36 Ind., 149; 11 Iowa, 387; 70 Mo., 168; 74 N. Y., 495; 3 Martin (La.), 386; 3 So. Rep., 645.*

4. He is also estopped by his conduct and representations from claiming that the railroad owned the property. *33 Ark., 465; 37 id., 47; 96 U. S., 544; 19 Ala., 430; 20 Eng. C. L., 155; 9 Cow., 274; 13 N. W. Rep., 264; 6 A. & E., 469; 37 N. W., 75; 41 id., 465; 28 Me., 525; 78 Conn., 345; 2 Ex. Ch., 654; 80 Am. Dec., 165; 17 Vt., 445–9; 21 Me., 130; Gr. Ev., sec. 207; 9 Wend., 147; 3 C. & P., 136.*

COCKRILL, C. J. The appellee company sued out a general attachment against the property of C. M. Neel, and caused it to be levied upon a lot of loose railway rails and other material used in the construction of railroads. Subsequently in a suit against Neel for the purchase money of the same property, the appellants sued out a specific attachment under secs. 4398-9 of Mansf. Dig., and caused it to be levied thereon. The question presented by the appeal is, does the privilege granted to the vendor of personal property by the statute, take precedence of the rights of a prior attaching creditor?

1. VENDOR AND VENDEE: Lien for purchase money.

It is the settled construction of the statute that it was not intended to give the vendor of personal property a lien upon the property sold, but only a remedy for impounding it, to prevent the vendee from putting it beyond his reach *pendente lite. Swanger v. Goodwin, 49 Ark., 290; Bridgeford v. Adams, 45 ib., 136; Freedman v. Sullivan, 48 ib., 215; Creanor v. Creanor, 36 ib., 91.*

The syllabus of the case of *Creanor v. Creanor, sup.*, is misleading. The opinion does not refer to the vendor's privilege as a lien, as the sylabus indicates, but denominates it an action of attachment only. All the cases recognize that the vendor's action is instituted not to enforce a lien but to create one by way of attachment. The privilege of sequestration which the statute gives exists only so long as the vendor is unpaid and the property remains in the power of the vendee—"in possession of the vendee," is the language of the statute; but the possession is the vendee's within the meaning of the act so long as it is subject to his control and the rights of third parties have not intervened. *Erwin v. Torrey, 8 Martin (La.), 90; S. C., 13 Am. Dec., 279; Heming v. Steamer St. Helena, 5 La. Ann. 349.*

2. Same.

3. Same. After the levy of the appellee's attachment, the Sheriff was in possession of the property, and Neel, the vendee, no longer had power of dominion over any part of it. The vendor's privilege could not, therefore, be exercised to acquire

any right other than is acquired by a second attaching creditor.

The right of stoppage in *transitu*, which is not defeated by the levy of process against the buyer, is appealed to by the learned counsel for the seller in this case, as a controlling analogy; but the analogy is only apparent, not real. While the purchased goods are in the hands of the seller, the common law affords him a safe remedy against them for the collection of the unpaid purchase price; the remedy is lost by delivery; delivery to the carrier for the buyer is technically delivery to the latter, but as it is not actual delivery into his hands, the seller is permitted, by a stretch of judicial favor, to disregard the technical delivery on discovering that the buyer is insolvent, and treat the goods as undelivered. When the right of stoppage *in transitu* is exercised, it is in contemplation of law, as though the seller had never parted with possession. But the statute does not pursue the analogy of the common law in this regard by extending the right to retake the goods to a time after delivery into the manual possession of the buyer—in other words, it does not undertake to restore the seller to the advantageous position he held before the delivery. The common law is, therefore, no guide to the meaning of the statute. Nor is there any feature of the statute which indicates the intention to give the seller a preference of payment over other creditors. It gives him the right to sue out a specific attachment without imposing the conditions which attach in other cases where that remedy is granted, and, in obedience to the mandate of the Constitution, prohibits the debtor from claiming the property as exempt. To that extent is the unpaid seller favored over other creditors, but not further.

It is argued that the proof establishes the fact that the property is not Neel's, but that of a railway from whom the appellant claims by purchase, since his attachment. But as the

evidence is conflicting upon that point, the finding of the court that the property belonged to Neel, is conclusive upon us.

The judgment must, therefore, be affirmed.

HEMINGWAY, J., being disqualified, did not sit in this case.

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SCHOOL DISTRICT v. CROMER.

1. STATUTE OF LIMITATIONS: *Acknowledgment: New promise.*

The written acknowledgment of a debt will not be sufficient to fix a new period for the statute of limitations to run from, if it embraces a qualification which rebuts the inference of an unconditional promise to pay.

2. SAME: *Same: Duplicate school warrants.*

Where, in the place of certain school warrants destroyed by fire, duplicates are issued for the same amount, and bearing the same date as the original warrants, with the intention that they shall stand as the evidence of the debt for which the lost warrants were issued, and with like effect, the statute of limitations will run against the new warrants from the date they bear, and not from that on which they are actually issued.

APPEAL from *Carroll* Circuit Court, Western District.

J. M. PITTMAN, Judge.

Crump & Watkins, for appellant.

1. The issuing of duplicate warrants with the word "duplicate" written across their face, was not such an acknowledgment as will take the case out of the statute. *Mansf. Dig., sec. 4493; 45 Ark., 108; 9 id., 455; 10 id., 134; 12 ib., 595; ib., 762; 26 id., 540; 1 Peters, 351; 8 Cranch., 72; 8 Wheat, 309; 1 Harding (Ky.), 301; 1 Bibb (Ky.), 443.*

The Appellee, pro se.

The making of the order and reissuing the warrants created a new point from which the statute would begin to run. It was an acknowledgment in writing of the debt. *9 Ark., 455; 10 id., 134; 12 id., 595; ib., 762; 32 Me., 200; 6 Hun. (N.Y.), 80; Wood on Lim., p. 216–201.*

COCKRILL, C. J. This was a suit by the appellee on school warrants, bearing date July 4, 1882—more than five years before suit was instituted. The statute of limitations was interposed as a defense. The judgment was for the plaintiff, on the following special finding of facts which are embodied in the judgment, viz.: "The court finds that the original warrants issued herein were issued by the board of directors on the 4th day of July, 1882; that afterwards they were destroyed by fire; that on the 30th day of May, 1884," (within five years of the institution of suit) "said board of directors being legally in session, and the fact that the original warrants had been destroyed being made known to said board, it was by the proper ordinance of said board ordered that duplicates of said original warrants be issued to take the place of the original warrants as duplicates. That in pursuance of said ordinance, warrants were issued in favor of said plaintiff, dated on the 4th day of July, 1882, with the word 'duplicate' written across the face of each one in red ink."

There is no bill of exceptions, and the only question is, does judgment for the plaintiff follow as a conclusion of law from the facts found? *Smith v. Hollis, 46 Ark., 17.*

We take the finding of the court as embodying the true interpretation of the resolution of the board of school directors, and look to it, together with the indorsement upon the warrants, for the explanation of what the board intended in reissuing them. The inference cannot be fairly drawn therefrom that it was the intention of the board to enter into an independent contract by way of renewal of the old debt. Such a presumption is repelled by the terms of the resolution authorizing and explaining the existence of the new issue of warrants, when it is declared that they shall take the place of the lost originals as duplicates thereof, as well as by the date, and indorsement of "duplicate" upon the face of each warrant. The meaning is that the new issue of warrants should stand as the evidence of the debt due the payee, just as if issued at the same

time and with the like effect as the old ones; for a duplicate has no effect other than that imported by the original. A duplicate is essentially the same as the original in its essence and operation.

In *Benton v. Martin, 40 N. Y., 345*, it was ruled that the proper construction of the word "duplicate," written upon a draft which had been issued as a substitute for a lost one of similar import, was that it was made only to take the place of the lost original, and therefore created no new liability. The plaintiff in that case having been guilty of laches in not presenting the original, was not permitted to recover upon the duplicate.

1. STATUTE OF LIMITATIONS: Acknowledgment: New promise.

If a debtor stipulate in writing that a demand made upon him is just; that he will take no advantage of the fact that the evidence of the debt is lost, and as further assurance, acknowledges that it was represented by his note of a given date and amount, but gives his creditor to understand that he will stand upon his legal rights, whatever they may be—that would not fix a new period for the statute to start from, because the acknowledgment is narrowed by a qualification which rebuts the inference of an unconditional promise to pay. The legal effect of what the directors did in this case is no more than the hypothesis stated.

Moreover, when a new promise or an acknowledgment from which a promise is implied, is made, the new promise, and not the old debt, is the measure of the debtor's liability. *Shepard v. Thompson, 122 U. S., 239*. If, therefore, the new issue of warrants was an acknowledgment of the old debt, the express condition attached to it was that the liability should be just what the new promise itself imported—that is, that the debtor should be bound according to the legal import of the promise, and not otherwise.

The right to recover upon the duplicate warrants would therefore be barred.

The case of *Paul v. Smith, 32 N. J. Law Rep., 13*, is in point, and sustains the conclusion we have reached.

The action was upon a promissory note made in 1861, but antedated five years. Six years was the period of limitation; when suit was instituted, more than that time had elapsed from the date the note bore, but not that much from the actual date of execution. The maker of the note had declined to make a general acknowledgment of the old debt, which was evidenced by note and was about to be outlawed, but agreed to give the note in question, which the creditors accepted, surrendering the old note which would have been barred earlier than the one given in lieu of it. We quote the major part of the opinion. "A note may be antedated or post-dated, and in both cases is valid, if no statute exists to the contrary; and where the purposes of justice require it, the real date may be inquired into, and effect given to the instrument. *Story on Promissory Notes, sec. 48.* The note in question was due immediately after its delivery. It was not antedated by mistake or for any unlawful purpose, but to carry into effect the object of the parties. To alter the date, or to give it a legal effect different from that expressed on its face, is not required for the purposes of justice, but would be to make a new bargain for the parties, and thus to do injustice. The consideration was the debt originally due and the substance of the transaction disclosed by the evidence was that, by giving a new note, dated about a year later than that originally made, the defendant promised to pay the debt, and remains liable to an action six years from the time the new note becomes due, but not longer.

The case thus comes within the established rule that the acknowledgment of a debt, if accompanied by a promise to pay conditionally, is of no avail, unless the condition to which the promise is subjected by the defendant is complied with or the event has happened upon which the promise depends." See, too, *Sumner v. Sumner, 1 Met. (Mass.), 394.*

2. SAME. Conceding, without deciding, that the board of school directors had the authority to enter into a contract waiving the operation of the statute, we conclude that the court erred in holding they had done so.

Reverse the judgment and enter judgment here for the defendant upon the special finding.

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BRYAN-BROWN SHOE COMPANY v. BLOCK.

1. VENDOR AND VENDEE: *Attachment to secure price of goods.*

The vendor of personal property cannot seize it by attachment to enforce the payment of the purchase money, under secs. 4398–4401 Mansf. Dig., after it has been taken by the Sheriff under process against the vendee sued out by a third person. (*Fox v. Industrial Co., ante, 450.*)

2. FRAUD: *In the purchase of goods: Right to rescind contract.*

Where the vendor of goods knowing that fraudulent representations were made by the vendee to obtain them, sues for the purchase money and prosecutes his suit to judgment, he thereby ratifies the contract and loses his right of rescission.

3. SAME: *Confession of judgment: Mistake.*

A judgment by confession will not be set aside because it is for an amount in excess of the debt for which it is given, where the excess was not due to a fraudulent purpose, but was the result of mistake and was afterwards remitted.

4. ESTOPPEL: *To contest payment of judgment.*

In an action by an attaching creditor against an insolvent debtor and certain of his creditors who have been preferred by the confession of judgments in their favor, the plaintiff will be estopped from contesting the payment of one of the judgments, where it appears from the record that he has consented to an order of distribution in which such judgment is specified as one to be paid *pari passu*, with certain others.

5. MORTGAGES: *Marshalling assets, etc.*

The mortgagee of certain lands and other creditors of the mortgagor, sued out executions against the latter, which were levied on all his property including the mortgaged lands. All the property was subsequently attached by other creditors, who filed a complaint in equity to vacate the judgments on which the execution issued on the ground that they were fraudulent. The lands were sold and the proceeds pro-rated among the judgment creditors, thereby

reducing, to the advantage of the plaintiffs, the amount to be paid out of the personal property. The mortgaged lands were not sold subject to the mortgage, and the mortgagee conveyed to the purchaser her legal title. HELD: That she could not be excluded from sharing with the other creditors in a fund derived from the sale of the personal property on the ground that her debt was secured by the mortgage and that she ought to have been required first to foreclose it.

6. FRAUDULENT CONVEYANCE: *Evidence of.*

In a suit brought by the creditors of an insolvent debtor to vacate his conveyance of certain land made about the time of his failure in business, the vendee testified that he had never been in the actual possession of the land; that he had never seen it; that he did not know how much of it was cleared and how much in the woods; that he did not know how much of it was hill and how much bottom land, and that after the sale the vendor collected the rents and assisted him in disposing of the land. HELD: That these facts in connection with a relationship existing between the parties to the conveyance, were sufficient to justify a finding that it was fraudulent.

7. SAME: *Same.*

The grantee in such conveyance being a party to the suit to avoid it, and it appearing that he had exchanged the land thus obtained for other land and sold the latter, taking a note for the unpaid purchase money, the court on setting aside the conveyance properly required the surrender of the notes and held the maker thereof as an equitable garnishee.

8. RECEIVER'S SALE: *Correction of mistake.*

The court ordered the sale of a stock of merchandise at not less than 70 per cent. of the invoice price of the goods, and they were advertised to be thus sold. A party to the action bid 70 per cent. for the goods and became the purchaser as appears from the report of the receiver who made the sale. In computing the 70 per cent. the receiver by mistake extended a lot of the goods at $2129 less than the correct amount. HELD: That the contract actually made being for the purchase of the goods at 70 per cent. of their invoice price, and the error being apparent upon the face of the record, the court properly corrected it by charging the purchaser with the true amount.

9. MARSHALLING ASSETS: *Collateral securities.*

In an action between the contesting creditors of an insolvent debtor, the court having found that one of them held notes, mortgages and commercial paper as collateral securities, ordered him to show what disposition he had made of the collaterals, and enjoined him from sharing in the assets of the debtor until the order was complied with. HELD: That this was not error.

CROSS APPEALS from *Yell* Circuit Court in Chancery. G. S. CUNNINGHAM, Judge.

Davis & Bullock, for appellants, Bryan-Brown Shoe Co., *et al.,* attaching creditors.

1. The appellees should be postponed in the distribution of the assets to the rights of appellants to the extent of the purchase money due upon the goods identified by them in the hands of the receiver. *Ch. 96, subd. 1, Mansf. Dig.; Taylor v. Mississippi Mills, 47 Ark.; 2 Story Eq. Jur., secs. 1219, 1220–1; 10 N. W. Rep., 900; 4 Atl. Rep., 190, note; 23 Wend., 372.*

2. The mortgage to Emma Block should be canceled for fraud; the judgment confessed in her favor was a fraudulent contrivance. *Bish. Fr. Conv., p. 257; Freeman on Ex., sec. 119; 2 Johns. Chy., 130; 9 N. W. Rep., 853; 12 Rep., 215; 7 C. E. Green, 35; 9 ib., 556; 9 Fed. Rep., 483; 9 N. J., 279; 12 Vroom, 142; Bish. Eq., secs. 340, 343; 31 Ark., 203; 40 Ark., 102; 32 Ark,, 478.*

3. The judgments of Mack, Stadler & Co., E. Timer and Merchants National Bank, should have been canceled, or postponed to the rights of appellants.

4. The court's findings as to the conveyances to Block, Timer, Kern, Lashtofski, Lemoyne, Lillie Miller, and the judgment against Goldman, are amply sustained by the evidence. *43 Ark., 84; Bish. Eq. (4th ed.), pp. 190–5.*

U. M. & G. B. Rose, for Mack, Stadler & Co., and the judgment creditors.

I. Judgments by confession are no more open to collateral attack than other judgments. They may be vitiated for fraud, but not for irregularties. *4 Watts, 474; 61 Pa. St., 96; 6 Or., 344; 1 Bibb, 164; 17 Fed. Rep., 98; 9 Atl. Rep., 670; 5 Ohio, 523; 13 Ohio St., 446; 30 id., 69; 9 Tex., 495; 60 Am. Dec., 176.* It is, under our statute, a judgment by consent (*Mansf. Dig., secs. 5185–7*), and operates as a release of errors. *1 Ark., 169; 11 id., 313; ib., 572.*

But if these judgments were open to collateral attack, there is no merit in the objections raised. Mansf. Dig., sec. 5186,

was complied with, and if no statement had been filed the judgments would have been good. *5 Ark., 311; 6 id., 208.*

2. Judgments can be confessed on liabilities thereafter to mature. *86 Ill., 185; 6 S. W. Rep., 237; 7 id., 5.*

3. Issuing of execution before the judgments were entered of record, does not avoid the execution. *2 Tidd's Pr., 994; 1 Freem. Ex., sec. 24; 34 Cal., 612; 4 B. Mon., 17; 33 N. J. L., 33.*

4. But if issued prematurely, they could only be avoided at the instance of defendants, and not by attaching creditors. *1 Freem. on Ex., sec. 25; 41 Cal., 232; 5 Daly, 318; 13 W. & S., 387; 42 Am. Dec., 302; 65 Penn. St., 189; 2 Flip., 305; 13 S. & R., 119; 15 Am. Dec., 589; 8 Me., 207; 1 Lea, 202; 4 id., 308; 4 Humph., 484; 47 Ark., 31.*

II. The *ex parte* affidavit of Klein cannot be read in evidence. *Mansf. Dig., sec. 2914.* There is no evidence of fraud.

The judgment, by mistake, was too large, and this error was promptly cured by *remittitur. 36 Ark., 559; 11 id., 280; 30 id., 512; 86 Ill., 185.*

Cohn & Cohn, for Emma Block, appellant.

At the date of the conveyance, Freed was solvent, and if he was not, Mrs. Block did not know it. No subsequent fraud of Freed's, if such there was, could affect her. *6 Barb. (N. Y.), 91; 13 Penn. St., 589; 1 Metc., 10; 17 Ala., 566; 19 Mo., 17; Bump. on Fr. Conv. (2d ed.), 28; 31 Ark., 554; 38 Ark., 419.*

Cohn & Cohn, for E. Timer, John Lashtofski and A. J. and Oscar Kern.

1. The conveyances were not fraudulent. No subsequent intention or act could affect a prior transaction. Cases just cited, *supra.*

Whether delivery was intended or made, is a question of fact. *Devlin on Deeds, sec. 308; 11 Atl. Rep., 611.*

It is not necessary to constitute delivery, that it should be

actually handed to the grantee, or to a person in trust for him. It is sufficient if the intention be otherwise shown.

Intention is the criterion, and any testimony showing that is sufficient. *6 Fed. Rep., 225; 32 N. J. Eq., 259; 3 Tenn. Ch., 547; 3 N. E., 261; 30 N. W., 880; 11 Atl. Rep., 611.* The conveyance being once made, there was no way of conveying back except by some recognized form of conveyance. *21 Ark., 80–82; Devlin on Deeds, sec. 300.*

Cohn & Cohn and *H. S. Carter*, for appellees, E. Timer and Klien, administrator of Block.

There is no testimony showing, or tending to show, fraud. The testimony is all the other way. The admissions of complainants, incorporated in the record, are the other way. They consented to have these sums paid. That record is a conclusive determination in favor of the validity of these judgments. *Wharton on Ev. (3d ed.), sec. 837; 43 Mo., 321; 10 Ohio St., 203.*

Cohn & Cohn and *H. S. Carter*, for appellee, Emma Block.

1. The appellants' rights under chapter 96 Mansf. Dig., subd. 1, lasted only so long as the property remained in the vendee's hands; the levy of the executions cut off all their rights as vendors. *45 Ark., 136, 143.*

They cannot now claim that the goods were obtained fraudulently. *1 Benj. on Sales (Corbin ed.), note p. 555.*

But, if they were, the institution of suits by appellants, and the issuance of attachments, after judgments obtained, was a complete and effectual waiver of the fraud. *1 Benj. on Sales, p. 580, note 10 (Corbin ed.); 1 Chitty Pl. (16 Am. ed.), *112, note S; Pollock on Cont., 507–8; 2 Chitty Cont. (11 Am. ed.), 1089, note M.*

The election to rescind, or not to rescind, once made, is final and conclusive. *99 U. S., 578, 582; 1 Wharton Cont., sec. 290.* Even if additional facts came to light afterwards. *Pollock on Contracts, 508.*

The execution sale was not made subject to Mrs. Block's mortgage. Inadequacy of price, if there had been such, was no ground for vacating the sale. *Freeman Ex., sec. 309; Rorer Jud. Sales, secs. 8, 54 et seq.* The effect of Mrs. Block's levy under execution was to release her mortgage as to this. *Jones Ch. Mortg., sec. 565; Drake Attach., sec. 35; Jones on Pledges, secs. 599, 600; 11 Pa. St., 282; 7 Watts, 477; 15 Ohio St., 84; 45 Am. Dec., 562; 3 Rawl., 109; 6 Wheat., 210; 10 Barr., 472; 18 Pa. St., 215; 88 Ill., 90; 2 Blackf., 243; 15 Ohio, 467.*

If by reason of the assertion that the sale was subject to Mrs. Block's mortgage, the property brought an inadequate price, and appellants had not been present, then the proper remedy would have been to have had the execution sale set aside and the property resold. *Freeman on Ex., sec. 310; Rorer Jud. Sales, secs. 852, 860.* And this should have been done within a reasonable time. *Rorer Jud. Sales, sec. 852.* Not after the money had all been distributed, and the possibility of placing the purchaser, or Mrs. Block, in *statu quo.* had become lost. *Ib., sec. 853; 36 Ill., 402.*

Cohn & Cohn and *H. S. Carter*, for appellant, Merchants' National Bank.

The appellees had no claim upon the paper sought to be recovered by garnishment. They would have had no right of subrogation, and no title to redeem this paper, even if it had been merely a security for a debt. *Sheldon on Subrogation, secs. 12–45.*

A mere general creditor, whose claim is not a charge upon the encumbered property, has no right of redemption. *2 Jones on Mortg., sec. 1069; 13 Ark., 112–127; 9 Johns., 589–611.* And, therefore, there was no duty on the bank's part to account to appellees, on the paper, even if it was collateral security. *2 Jones Mortg., sec. 1116.*

In general, a complete remedy to redeem from a pledge, exists at law, and chancery has no jurisdiction. *Jones Pledges, 556.*

U. M. & G. B. Rose, for appellant, J. D. Goldman.

Goldman's offer cannot be modified to his prejudice, nor can the sale be set aside now that possession has been delivered and the goods dispersed. If there has been an error resulting in loss to any one, the party making the mistake, the receiver, is liable, but as the goods were sold upon their own merits, after full opportunity for inspection, no one has been injured. It was error to charge Goldman with 70 per cent. of the coffee. *26 Ark., 28*, is conclusive. See, also, *Kerr on Fraud and Mistake, 409; 20 Ark., 424; 15 id., 286; 25 id., 196; 31 id., 151; Kerr F. & M., 328; Freeman on Ex., sec. 311; 2 id., 304l; Herman on Ex., sec. 261; Rorer Jud. Sales, sec. 108; 10 Ohio St., 557; 3 Kans., 390; 28 Md., 488; 4 Tex., 223.*

SMOOTE, Sp. J. C. M. Freed, a merchant at Dardanelle, Yell County, became largely indebted and failed in business; and on the 25th day of February, 1886, he confessed judgment in favor of a number of his creditors for sums amounting in the aggregate to something over $40,000. Among the creditors preferred by these confessions of judgment were Emma Block, Mack, Stadler & Co., Henry Kleine, and Henry Kleine, as administrator of the estate of Dora Block, E. Timer, and the First National Bank, of Little Rock, Ark. Executions were immediately issued on these judgments, and levied on the personal and real estate of Freed, including his stock of goods.

Others of Freed's creditors, who had not been preferred by confessions of judgments, instituted actions at law on their several claims, and sued out writs of attachment, and had them levied on the same property seized under executions, the attachments being subsequent to the executions. Among the attaching creditors were Bryan-Brown Shoe Company, and Adler, Goldman & Co. The Bryan-Brown Shoe Company in addition to their general attachment, sought to hold the particular goods which they had sold to Freed, for the price thereof, under chapter 96 Mansf. Dig., and to rescind the

contract of sale, upon the ground of fraudulent misrepresentations by Freed, as to his solvency, at the time of the sale.

The property was advertised for sale under the execution levies, and then the attaching creditors filed their complaint in equity, attacking the judgments by confession as fraudulent. Among those whose judgments were attacked were Emma Block, Mack, Stadler & Co., Klein, Timer and the bank.

The attack on Emma Block's judgment is upon the alleged ground that her claim is simulated and fraudulent, and further, that she held Freed's mortgage on real estate more than sufficient to secure her debt, and that she should be required to seek satisfaction by foreclosure of that mortgage, before being permitted to resort to the personal property.

The attack on the judgment of Mack, Stadler & Co., is upon the alleged ground that it was, by fraudulent collusion between that firm and Freed, rendered for them in the sum of some $1600 in excess of what was really due them.

The execution sale was enjoined as to the personal property, a receiver appointed and ordered to sell it, which was done. Goldman, of Adler, Goldman & Co., became the purchaser of the personal property, and a question arises in the record as to whether or not he has fully paid his bid. The real estate levied on was sold under the executions, and the proceeds *pro rated* among the execution creditors. The complaint in equity also sought to vacate the sales and conveyances of certain lands by Freed, to parties named, and subject the lands to the payment of Freed's creditors.

Upon final hearing, the court below found, as matter of fact, that the real estate in controversy sold by Freed, in separate parcels, respectively, to Lettie Miller, W. B. Lemoyne, A. J. and Oscar Kern, Emma Block and John Lashtofski, were each of them fraudulent and void, set them aside, and made an order for their disposition so as to make the lands available to the creditors. These lands are described in the decree. That the deed to E. Timer by Freed, to certain lands, was also

fraudulent and void. That Timer had exchanged them for other lands, and sold these other lands to one Frank Singular, who still owed the purchase money, for which he executed his notes, and ordered Timer to surrender the notes in court, and held Singular as an equitable garnishee. These lands are also described in the decree. The court also found that Goldman became the purchaser of the goods at the receiver's sale, at his bid of 70 per cent. on the invoice price of the same, and that the receiver made a mistake, in computing the 70 per cent., of $2129 in Goldman's favor, and decreed that said sum be set off against the confessed judgments involved in this suit, which were owned by said Goldman. And the court further found that the First National Bank held collaterals to secure its confessed judgment against Freed, and enjoined it from any further participation in the proceeds of the sale of the personal property, still in the hands of the court, until it disclosed what disposition it had made made of such collaterals, how much had been collected on them, and to what extent its judgment had been reduced by such collections. And the court further found that the judgment of Emma Block was not shown by the proof to be fraudulent, and that she have her *pro rata* share of the proceeds of the sale of the personal property still in the receiver's hands, and dissolved the injunction against her as to that matter. The court then dismissed the complaint as to the other creditors who held judgments by confession.

From the decree setting aside the conveyance of land, Emma Block, Lettie Miller, W. B. Lemoyne, E. Timer, C. M. Freed, A. J. and Oscar Kern, and John Lashtofski appealed. J. D. Goldman also appealed from the decree against him as to the shortage in payment for goods.

The Bryan-Brown Shoe Company and other attaching ceditors appealed from the decree dissolving the injunction against Emma Block, and allowing her to participate in the fund held by the receiver, and in refusing to either cancel her

judgment and mortgage, or remit her to her mortgage for payment; and, also, from so much of the decree as refused to cancel the judgment of Mack, Stadler & Co., and Klein, as administrator of Block, and for refusing to cancel the judgment of the bank. The bank also appealed.

So it will be seen that several questions are presented for our consideration; and we have endeavored to make the foregoing statement indicate them.

1st. The contention that the Bryan-Brown Shoe Company, and the other attaching creditors, seeking to do so, can seize the particular goods sold by them, respectively, to Freed for the purchase money under chap. 96 Mansf. Dig. is untenable, because before any claim was asserted the goods were in the possession of the Sheriff, which cut off the right of sequestration. *Fox v. Industrial Co., ante.* Neither can the right to rescind the contract, on account of Freed's fraudulent representations as to his solvency, at the time of the purchase, if any such were made, be invoked; because it was manifestly apparent from the record that these attaching creditors knew as well of that fraud, if in fact it existed, when they sued for the purchase money, as they ever did afterwards; and, notwithstanding this knowledge, they pressed their claims to judgment. The case of *Kraus v. Thompson*, in *14th Northwestern Reporter, 266*, relied upon by appellants, as to this, does not support their view. Even if it be correct law, as decided in that case (but as to this we make no decision), that a creditor, after having obtained judgment for the purchase money for the goods, may still rescind on account of such fraud, if he proceeds immediately on its discovery, still it does not help the appellants here; for it is held, and we think correctly, in the same case, that "any act of ratification of the contract, after knowledge of the facts authorizing a rescission, amounts to an affirmance, and terminates the right to rescind." Now, there can be no more emphatic act of ratification of the contract than pressing the claim for the purchase money to judgment, after

1. VENDOR AND VENDEE: Attachment for price of goods.

2. FRAUD: In the purchase of goods: Right to rescind contract.

knowledge of the fraud. And from the record in this case, it is impossible to resist the inference that such was the case here.

3. SAME: Confession of judgment: Mistake.

The appealing attaching creditors question the right of Mack, Stadler & Co. to their judgment by confession, on the ground that it is fraudulently excessive, and intentionally made so by them. The only thing offered in support of this is the *ex parte* affidavit of one Klein, which he repudiates when examined as a witness herein. The manner of his deposition does not lead us to think that anybody's rights ought to be jeopardized by his evidence. His testimony as a witness is directly in conflict with what he deliberately swore in this *ex parte* affidavit. This *ex parte* affidavit is not evidence, as he refused to verify its statement when examined as a witness. If what he swore as a witness is true, it does not impeach the judgment. It is true that the judgment is excessive, but that seems to have been the result of hurry in making up the account, and not for the purpose of fraud; and the error was afterwards corrected by a remission of the excess. We see no reason for disturbing the decree of the court below as to this.

4. ESTOPPEL: To contest payment of judgment.

The appellants are estopped from contesting the payment of the judgments of E. Timer and Henry Klein, because it appears from the record that they consented to an order of distribution by the receiver, which specified said judgments as among those to be paid *pari passu*, with certain others of the confessed judgments. Besides this, we have been referred to no evidence, and have not discovered any in the record ourselves, tending to show that these judgments were fraudulent.

The evidence wholly fails to sustain the allegation that Emma Block's confessed judgment was fraudulent, and rendered on a simulated claim. She proves very clearly that Freed owed her the money and that she was entitled to her judgment. The other point attempted to be made by appellants, as to this, is that she held a mortgage to secure her debt, upon valuable real estate, and that she ought to have

5. MORTGAGES: Marshalling assets, etc.

been required to foreclose that, before sharing with the other creditors in the fund in the receiver's hands. Ordinarily, of course, where a creditor holds securities for his own debt, to which he can resort to the exclusion of other creditors, until his debt is satisfied, the assets may be marshalled, and such creditor required to exhaust these securities before he can resort to another fund, or other property, out of which other creditors are seeking satisfaction. But we do not think the facts here bring Emma Block within that rule. She, together with the other creditors who held judgments by confession, sued out executions on these judgments, all of which were levied on the mortgaged property, which was sold under them and the proceeds pro-rated among said creditors, thereby lightening the burden on the fund in the hands of the receiver, and resulting, to that extent, to the advantage of the attaching creditors. Whether the mortgagor could have complained at this sale or not, we do not stop to decide. Certainly the attaching creditors could not, unless it resulted in some way to their injury. The only attempt they make to show that the sale did so result, is the contention that the property was sold subject to her mortgage, thereby reducing the amount which it would otherwise have brought. The court below, in effect, found that it was not sold subject to the mortgage, and we think it was amply justified by the evidence in doing so. Mr. Davis, the Sheriff, who made the sale, was among the principal witnesses who testified that the sale was made subject to the mortgage. But upon reflection he afterward testified that he was mistaken as to this, and that he made no such announcement at the sale. Emma Block's attorney, and other witnesses, testify that no such announcement was made, and that the sale was not subject to the mortgage. Besides this, it is evident that the bidders did not think the property was offered subject to the mortgage, because the property brought $6000 and no witness placed its actual value at more than $10,000, and some of them as low as $8000. The property

sold for as much as it could have been expected to bring under the hammer, if offered with a clear and unincumbered title. And in addition to this, as further evidence that the property was not sold subject to the mortgage, Emma Block, immediately after the sale, conveyed her legal title to the purchaser. By her actions Emma Block has abandoned her rights under the mortgage, and placed herself in a condition which prevents her from ever enforcing it, and the attaching creditors have not been injured thereby. We see no ground for disturbing the decree of the court below as to this matter.

6. FRAUDULENT CONVEYANCE: Evidence of.

The court below found that the sale and conveyance of certain lands by Freed to E. Timer were fraudulent. Upon considering Timer's own deposition, his statements, that he had never been in the actual possession of the land, that he had never seen it, that he did not know how much of it was cleared, and how much in the woods; that he did not know how much of bottom and how much hill land there was, and that Freed collected the rents after the sale, and assisted him in disposing of it—taking these statements of Timer in connection with his relationship to Freed, and the nearness of the time of the sale to the time of Freed's failure, we think the court below was justified in finding as it did, and that Singular was properly held as an equitable garnishee. *Tappan v. Harbison, 43 Ark., 84.*

7. SAME.

The court below also set aside the sales of real estate by Freed to A. J. and Oscar Kern, John Lashtofski, and Emma Block. After a careful examination of the facts as to these sales, we have been unable to find any evidence of fraud in making them, and none has been pointed out to us. So far as we have been able to discover from the evidence, these purchases appear to have been made by the vendees in good faith, and without intention of fraud on their part, or knowledge of fraud on the part of the vendor. We think, under the evidence, the court below erred in finding them fraudulent, and setting them aside.

The court below also set aside conveyances of land by Freed to Lettie Miller and W. B. Lemoyne, but neither of them has filed any abstract or brief. We therefore regard their appeals as abandoned and affirm the decree, as to them, for failure to comply with rule 9.

8. RECEIVER'S SALE: Correction of mistake.

J. D. Goldman, who is a party to this action, and who was the purchaser of the stock of goods at the receiver's sale, insists that the court below erred in charging him with $2129, the amount he is alleged to be short in his payment of his bid for said goods. It appears that the court ordered the sale for not less than 70 per cent. of the invoice price of the goods; that they were advertised to be sold at not less than that, and that Goldman, as appears by the receiver's report, at the sale bid 70 per cent. for them. So, the contract between Goldman and the receiver was for 70 per cent. of the invoice price of the goods. The receiver in computing that 70 per cent., by a mere mistake in extending the value of a lot of coffee, fell short of the actual amount to the extent of said sum of $2129, and this is apparent on the face of the record and papers. While as a general rule the court can only affirm or set aside sales of this sort, and is without the power to modify them, still it may correct a mere mistake made in the computation when the record and papers furnish all the elements for the correction. *Ohio Life Insurance & Trust Co. v. Gibbon, 10 Ohio State Report, 566.*

Here there was no new contract made between the receiver and Goldman, nor any modification of the contract actually made between them, but a simple correction of a mistake in computation, apparent on the face of the record and papers, in the correction of which there was no occasion for further testimony. We find no error in the decree of the court below as to this.

9. MARSHALLING ASSETS: Collateral securities.

The court below found that the First National Bank held notes, mortgages and commercial paper as security for the payment of its confessed judgment against Freed. Upon

examination of the evidence as to this, we are not disposed to interfere with said finding of facts. The witness, Kimbal, details a conversation with the officers of the bank, in which it was stated that Freed owed the bank only $600 or $700. P. K. Roots, cashier of the bank, states that in that conversation the secured debts were not referred to; that the conversation was in reference to over-drafts, amounting to some $502, which were not secured. The evidence further shows that the bank held paper indebtedness belonging to Freed amounting to $4500. Nor is this view of the matter explained satisfactorily by the deposition of Logan H. Roots, the president of the bank. Under the evidence we see nothing to justify us in reversing the finding of the court below as to the facts.

Now, as the bank holds these collaterals in pledge to secure its debts, it has the same right to them and power over them that a mortgage would give; and they come within the rule for marshalling assets as between contesting creditors, if the bank is not thereby unreasonably delayed in the collection of its claim. *3d sec. Pomeroy's Equity Jurisprudence, p. 462; Colebroke on Collateral Securities, p. 130.*

Now, all that the court below required the bank to do was to show what disposition it had made of these securities—how much had been collected on them; and enjoined it from sharing further in the fund in court until it did so. It does not seem to us that there is anything unjust or contrary to law in this. It seems just and equitable. No unreasonable delay can result from it except by the action of the bank itself. It can put the court in possession of the information it requires at once. We therefore decline to disturb the decree on that point. Let the decree of the lower court be in all things affirmed, except as to so much of it as sets aside the conveyance by Freed of lands to A. J. and Oscar Kern, John Lashtofski and Emma Block, as to which the decree is reversed and the complaint dismissed as to the lands covered by said conveyances; and this cause is remanded to the court below

with instructions to distribute the fund now in the hands of the receiver and which may arise from sale of lands the conveyances of which by Freed have been set aside as fraudulent, and not reversed by this court, among the creditors of Freed, according to their several rights and priorities.

SANDELS, BATTLE and HEMINGWAY, J. J., did not sit in this case.

CLARK V. HERSHY.

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1. SUPREME COURT: *Opinion on question not presented.*

The rule that a question decided by the Supreme Court is not open to reconsideration in the same case, on a second appeal, does not apply to expressions of opinion in the first decision, on a question not then before the court.

2. WILLS: *Election to take under.*

Where an interest in land is devised to one who claims it adversely, her election to take under the will will not be implied from facts occurring before she has any knowledge of her title to the property.

3. SAME: *Same.*

Nor will the devisee's long delay in making inquiry about her rights, and in taking steps to enforce them, in connection with acts tending to show such election, be sufficient to establish it by implication, where the acts relied upon were done in ignorance of her title, and the delay occurred while the civil war was flagrant, the courts closed, business suspended, and her husband a refugee.

4. SAME: *Same.*

Nor will such election be implied from the fact that the devisee's husband brought a suit for trespass on the land devised, in her name jointly with his, and that he had paid taxes on the land, when neither of these things was done with her knowledge or consent, and it is shown that the taxes were paid as the agent of a third person.

5. TRUST: *Under voluntary conveyance.*

The grantee of land will be held to have taken it in trust where it was conveyed to him for the nominal consideration of one dollar on account of the failing health of the grantor, and it is shown that the latter, and after his death, his widow and heir, remained in possession of the premises, making improvements and receiving the rents.

6. PLEADING AND PRACTICE: *Matters of record: Exceptions.*

On a bill seeking a partition of lands, and an account of the rents thereof, where the facts upon which the several interests of the parties depend appear on the face of the pleadings and are undisputed, no report from a master is necessary to bring them before the court; and no exceptions to such report is necessary in order to present the questions of law arising upon the facts.

7. INTEREST: *When not allowed.*

The plaintiff brought an action for the partition of lands which she and the defendants had long treated as belonging exclusively to the latter, and part of which had been sold by one of the defendants, and the proceeds used with the tacit consent of the plaintiff. All the parties having acted under the impression that the plaintiff had no interest in the property until just before the suit was commenced, no share in the rents and profits, or in the proceeds of sales, was paid to or demanded by her. HELD: That under the circumstances of the case no interest ought to be allowed to the plaintiff on the sums due to her out of such rents, etc., except from the commencement of her suit.

8. LIEN: *On partition of lands, etc.*

In such action on rendering judgment for the plaintiff, it is error to decree a lien in her favor on the defendant's shares in the unsold lands, to secure the payment of rents and profits.

APPEAL from *Sebastian* Circuit Court in Chancery.

R. B. RUTHERFORD, Judge.

Compton & Compton, for appellants.

1. The appellee elected to take, and did take under the will of Aaron, and thereby lost any right she had as heir. *17 Pick., 303; 77 Pa. St., 160; 84 id., 402; 54 Cal., 207; 63 Ill., 285.* The question of election was not in issue, nor decided, in the former case.

2. The court erred as to the interest in the lands which appellee was entitled to under our statute of descents—making the calculations to verify the proposition.

3. The allowance of interest on the claim of appellee was erroneous. *20 Ark., 410.* The claim was not liquidated, but was doubtful and disputed, and in such cases interest is not allowed.

4. Instead of being entitled to 11-48ths of lands unsold in Johnson, Perry, Sebastian and Pope Counties, appellee is entitled only to 1-8th of lands in Johnson and Perry, and 1-6th

only of one class of lands in Sebastian and Pope, and to 11-48ths in the other class, and this error exists in the money decree, issues and profits.

5. The master seems to have stated no account as to Abram C. Miller, and the decree against him is not supported by the evidence.

6. It was error to decree a lien on the interests of appellants, and in directing a sale to pay the money decree. *21 Pick., 559; 42 N. Y., 549; 4 Johns. Chy., 521; 2 Curtis, C. C., 427.* Nor was there any lien for owelty, because no partition had been made, and even if there had been, there was no express agreement between the parties to that effect, or for any other purpose. *32 Md., 57.* Besides, nearly all the *rents* decreed against Sarah Clark, arose from her own occupancy of the homestead, which was not sold.

7. By an unreasonable lapse of time, the demand of appellee is stale. *14 Ark., 62; 19 id., 16; Wood on Lim., 121.*

8. But aside from laches or staleness, the bill should be dismissed for the long acquiescence of the appellee as to the title of the property, and the use and disposition of it. *Wood on Lim., 125, 126.* If appellee was mistaken as to the legal effect of the conveyance between Abram and Aaron, and of the joint will of Nancy and Sarah, this can make no difference. Estoppel arises notwithstanding a mistake of law, even in cases of mistake or ignorance of fact after long lapse of time, especially in connection with change of situation, as in this case. *6 Mo. App., 323; 57 Mo., 384; 49 id., 98; 91 Ill., 251; 39 Mich., 270; 16 Wend., 285; 10 id., 104; 25 Cal., 619; 48 id., 395.* She was bound, notwithstanding her coverture, by the *estoppel. 10 C. E. Green (N. J.), 194; 69 Ill., 174; ib., 452; 3 Bush., 702; 14 Bush., 490; 14 B. Mon., 638; 40 Mich., 29; 56 Miss., 318; 57 N. H., 482; 26 Ohio St., 535; 2 Drewry, 363; L. R., 4 Ch. App., 591.*

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

1. The facts in this case do not show that Mrs. Hershy ever elected to take under the will of Aaron and Nancy Clark. She cannot be bound by the unauthorized acts of her husband. The will of Nancy Clark was adjudged void. No such issue as that of election was before the court, and the application to inject it in this case was properly refused. *38 Ark., 599.*

This was not a case where appellee could be put to an election. *1 Pom. Eq. Jur., sec. 473; 15 N. Y., 366.* Elections are only binding when made with full knowledge of the facts and of the parties' rights. *1 Pom. Eq. Jur., sec. 512; 4 Desau's Eq., 274; 29 N. J. Eq., 54; 42 Ga., 521; 30 Iowa, 465.*

2. Appellee not barred by laches. A married woman can sue at any time during coverture, or within three years thereafter. *42 Ark., 305; 44 id., 398.* But this is *res adjudicata.* It was decided on former appeal that appellee was entitled to maintain the suit, and though erroneous, it is still the law of the case. *5 Ark., 200; 14 id., 304; ib., 515; 29 id., 174.*

3. Nor was appellee estopped by long aquiescence. The first requisite of estoppel is, injury to the party setting up the estoppel; estoppels do not grow out of mere acquiescence, but of improper silence, resulting in prejudice to another. Mrs. Clark was not misled, nor injured. *11 Ark., 249; 36 id., 114; 15 id., 55; 17 id., 221; 39 id., 131.*

4. The question of the interests of the parties in the lands was submitted to a master; he reported upon it, and no exceptions were taken to his report. Exceptions must be made in the trial court. They cannot be made here for the first time. *108 U. S., 72; 18 How., 510; 13 Pet., 368.*

5. Six per cent. interest properly allowed since July 13, 1868. See *Gantt's Dig., sec. 4277.* The receipt by defendant of money belonging to plaintiffs raised an implied contract, and makes a case within the statute. *8 Ark., 202; 25 id., 100; ib., 134; 27 id., 365.* The right to interest before that time is equally plain. *Gould's Dig., ch. 92, sec. 1.*

6, A tenant in common, who receives more than his share of the joint property, is liable to suit for money had and received. *7 Pick., 132; 2 Gray, 424.*

7. No exception was filed to the allowance of interest by the master. It is too late now. See *supra.*

8. In suits for partition and account, the person in whose favor the balance is declared has a right to have that balance declared a lien on the interest of his co-tenant. *11 N. J. Eq., 276; 49 Ill., 78; 11 Gill. & J., 98; Freeman on Cot. and Part., sec. 512.*

SMOOTE, Sp. J. This is the second time this case has been before this court. See, *Hershey v. Clark, 35 Ark., p. 17.*

Abram and Aaron Clark were brothers. They owned, as tenants in common and in equal shares, certain real and personal property. Besides this, neither of them, during their joint lives, seems to have owned any other property. The real estate owned by them was, and is, situated in the Counties of Sebastian, Pope, Johnson, Perry and Yell.

The two brothers, during their lives, and on the 11th day of May, 1850, mutually agreed, in writing, that the survivor should take and become the sole owner of the whole of the property, real and personal, and hold the same as his own absolutely. Afterwards, and on the 17th day of May, 1851, Abram Clark died, without having made any other testamentary disposition of his property than that contained in the said written agreement between the brothers. He died unmarried and without issue of his body, leaving him surviving, his mother, Nancy Clark; his brother, Aaron Clark, and his sisters, Sarah Clark, Susan Clark, Elizabeth Miller, and Ann E. Hershey, his only heirs-at-law and distributees.

Upon the death of Abram, Aaron took possession of all the property as his own, and Nancy, the mother, by her deed of the 8th of December, 1851, conveyed her entire interest therein to him, and he held possession of all of the property, claiming it as his own until his death.

Susan died during the lifetime of Aaron, in 1851, unmarried, without issue and intestate, leaving her surviving the said Nancy, her mother, and the said Aaron, Sarah, Elizabeth and Ann E., her brother and sisters, her only heirs-at-law and distributees.

Aaron died on the 14th day of November, 1855, unmarried and without issue, after making and publishing his last will, which was duly probated. By this will he bequeathed all of his personal property, and devised all of his lands lying in Sebastain and Pope Counties, to his mother Nancy and his sister Sarah, to hold in common; to his sister Elizabeth he devised all his lands lying in Johnson and Perry Counties, and to his sister Ann E., he devised all his lands lying in Yell County, and any other lands undisposed of by the will. Aaron, during his lifetime, acquired lands other than those owned by himself and his brother Aaron in common.

All of the legatees and devisees under the will of Aaron (except perhaps Ann E., about whom as to this, there is a question in the record), seem to have accepted under the will, and entered upon the enjoyment of the property therein bequeathed and devised to them, and remained in undisputed possession thereof until about the time this suit was instituted, except Elizabeth Miller, who so remained in possession until she died in 1867, leaving her surviving Abram C. Miller, her only heir-at-law and distributee, who has been in possession since her death.

The mother, Nancy, died, on the 27th of November, 1861, after making jointly with Sarah what purported to be her last will, the contents of which it is unnecessary to notice here She left surviving her, her said daughters Sarah, Elizabeth and Ann E., her only heirs and distributees.

Ann E., instituted this suit in October, 1870, the principal defendants being Sarah Clark, and Abram C. Miller, the son of said Elizabeth Miller, deceased. The only other defendants are S. F. Clark, as executor of the will of Aaron Clark,

and her husband, B. F. Hershey, as administrator of the estate of Nancy Clark, who are little more than nominal defendants. The object of the suit is to have partition and an account of rents, profits and the proceeds of the sales of such of the lands as had been sold, and of certain personal property, and the like, as part of the estate and property hereinbefore mentioned, and to have her interest therein ascertained and enforced.

Sarah Clark and Abram C. Miller answered, relying principally on the written agreement made by the brothers in their lifetime, the deed of her interest by Nancy, the mother, to Aaron, his will, and the joint will of Nancy and Sarah, in support of their rights to the property; they also interposed the statute of limitations, and made their answer a cross-complaint.

At the hearing in the Circuit Court the Chancellor dismissed the bill for want of equity, and Ann E. Hershey appealed to this court.

Upon consideration here, this court reversed the decree of the Chancellor below, and sent the cause back to the Circuit Court, holding that the written agreement between the brothers and the joint will of Sarah and Nancy were void, but sustaining the will of Aaron, so far as it could legally operate upon the property therein bequeathed and devised, and also the sale of her interest by Nancy to Aaron; and saying that Ann E. "is not barred by the statute of limitations. She is entitled under our statutes of descents and distribution, to a share of the real estate of which her brother Abram died possessed; also to her proper share of the real and personal property of her sister Susan and her mother. She is entitled to an account, to be taken under the direction of the court, to ascertain these interests. She must elect, however, which her bill virtually does, to disclaim all rights to the property in question acquired directly to herself through the will of her brother Aaron. The will disposes of interest which she claims adversely, and a case for election arises."

1. SUPREME COURT: Opinion on question not presented.

When the case under this first appeal went back to the Circuit Court, Sarah and Miller filed an amendment to their answer, alleging, among other things, that Ann E., the present appellee, had elected to take under the will of Aaron, and that she was barred by laches and acquiescence. This amendment to the answer was rejected by the court below when first presented, but afterwards permitted to be filed. The appellee now insists that the defense above referred to, as contained in the amendment, ought not to be considered, principally upon the ground that it was diposed of and decided by this court on the first appeal.

When a question of law arising in a case has once been decided by this court, it becomes a part of the law of that case, unless reconsidered and repudiated by this court, at the term during which the decision was made; and this, too, without regard as to whether such decision was right or wrong. *Porter v. Doe et al., 10 Ark., 187; Baxter v. Brooks, 29 Ark., 185.*

But this court cannot decide a question which is not before it for decision. *Phelan v. San Francisco, 9 Cal., 16; Barne et al. v. Winona R. R. Co., 117 U. S., 228.*

Mr. Justice Field, in delivering the opinion of the court in the above cited case of *Barney et al. v. Winona R. R. Co.*, said: "We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case, on a second appeal on similar facts. The first decision is the law of the case, and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which were not required for the decision."

From an examination of the record upon the first appeal, and the opinion then delivered, we do not think the question of election was before this court; nor do we think that this court in that opinion, in remarking that the present appellee had, by her complaint, virtually elected not to take under the will, intended to cut off investigation as to that, or to prevent

the present appellants from showing that she had elected to take under the will, if, in fact, she had done so.

Under this state of case, we are of opinion that the court below did not exceed its jurisdiction, in allowing the amendment to the answer, and that the question is before us for consideration. This view, it seems to us, is sustained by the authorities above cited, and our own liberal statute of amendment.

2. WILLS: Election to take under.

We hold, however, that the opinion of this court, in the first appeal, upon the statute of limitations, does cut off the consideration of the question of laches and acquiescence upon the lapse of time, unconnected with other evidence tending to show that appellee had elected to take under the will; that if appellee is estopped at all, it is upon the ground that she had so elected in fact. In passing upon that question, lapse of time may be considered in connection with other facts in evidence upon the point.

Did the court below err in finding that appellee had not elected to take under the will? It is true that some of her acts in evidence tend to show that she had made such election. But we are satisfied, from the evidence, that neither she, nor any of the parties in interest, had any knowledge of the fact that she had any right, title or interest in the property, until a short time before the commencement of this suit. She knew of the existence of Aaron's will, and the transactions previous thereto, as hereinbefore stated. But she appears to have been ignorant of the fact that she had any right or title to the property she is sueing for herein whatever. In fact, all the parties seem to have been mutually laboring under this mistake. If this is a mere mistake of law, the appellee cannot, of course, avail herself of it.

Judge Story says: "Indeed, where the party acts upon the misapprehension that he has no title at all in the property, it seems to involve, in some measure, a mistake of fact, that is of the fact of ownership arising from a mistake of law. A

party can hardly be said to part with a right or title of whose existence he is wholly ignorant, and if he does not so intend, a court of equity will, in ordinary cases, relieve him from the legal effect of instruments which surrender such unsuspected title." *1st Story's Equity Jurisprudence, sec. 122.*

And in discussing the doctrine as to mistake, with reference to a mortgage which had been released by the plaintiff in the case, who was seeking relief upon the ground that he was totally ignorant of his title at the time of the release; and who had been relieved by Lord Chancellor Nottingham, Judge Story, among other things, says: "If it [the case] proceeded upon the ground that the plaintiff had no knowledge of his title to the mortgage, and therefore did not intend to release any title to it, the release might well be relieved against as going beyond the intentions of the parties, upon a mutual mistake of the law; and if both parties acted under a mutual misconception of their actual rights, they could not justly be said to have intended what they did." *1st Story's Equity Jurisprudence, sec. 123.*

Again he says: "There may be a solid ground for a distinction between cases where a party acts or agrees in ignorance of any title in him, or upon the supposition of a clear title in another, and cases where there is a doubt or controversy, or litigation between the parties as to their respective rights." *1st Story's Equity Jurisprudence, sec. 130.*

As to the matter under discussion we refer also to the case of *Griffith v. Sebastian County, 49 Ark., 24,* and the authorities therein cited.

In that case, Judge Smith, in delivering the opinion of this court, said (p. 33): "A fact is not less a fact though it be the offspring of the law;" and (p. 34) "a court of equity will relieve against a mistake of fact superinduced by a mistake of law."

See, also, *Scribner on Dower, pp. 481 to 492,* where the

subject of election by widows as to dower is discussed. We refer also to *4th Dessau's Equity, 274.*

All the facts tending to show an implied election under the will by the appellee, occurred before she had come to any knowledge of her title, except one. That one is an attempted sale of the lands devised to appellee, which appears from the weight of evidence to have been originally made by her husband, B. F. Hershey, and her name signed to the papers in connection with it by him, without her knowledge; and the transaction took place after the commencement of this suit. We, therefore, attach no weight to it as tending to prove that she had elected to take under the will.

3. SAME: Same.

We are next to consider, whether the lapse of time, in connection with the other facts in evidence, make out an election to take under the will. We would be much disposed to hold that the long delay of the appellee in making inquiry about her rights, and in taking steps to enforce them, would, of itself, probably, and certainly in connection with the other facts tending to show her election to take under the will, establish that election, if it were not for some other circumstances in evidence. Under the facts as they appear, the appellee was not in a condition to enforce her rights by legal coercion until the death of the mother, Nancy, in 1861. From that time until 1865 the civil war was going on, and, for the greater part of the time flagrant in that portion of the State where the property is, and where the parties resided. To a great extent the courts were closed, and business, to some extent, suspended. Considerable numbers of the people residing there had to refugee southward for safety; and among them, as the evidence shows, the husband of appellee. These are facts (except as to the refugeeing of her husband) of which we take judicial notice, as a part of the history of the State. These facts did not, of course, absolutely prevent her directly electing to take or not to take under the will. But when we consider the confused and excited condition of things, we do

not think that an election to take under the will, can be properly implied from her delay, even in connection with her other acts, as they were done in ignorance of her title to the property herein sued for.

4. SAME: Same.

There is no sufficient evidence of any direct election of appellee to take under the will. It is not shown that she ever agreed to do so; or that she ever entered upon the lands devised to her, or received any rents and profits from them. It is in evidence that a suit for trespass on the lands devised to appellee, was brought in the names of her husband, B. F. Hershey, and herself; and that B. F. Hershey had paid taxes on the lands. But the weight of evidence is to the effect that both these things were done without her knowledge or consent, and B. F. Hershey testifies that he paid the taxes as the agent of the appellant, Sarah. So, upon the whole case as to that point, we hold that there is not sufficient evidence that appellee elected to take under the will either directly or by implication.

Upon final hearing the court below decreed, among other things, that appellee is entitled by inheritance to an interest of 11-48ths in all the lands in controversy (including the southeast quarter of the northwest quarter of section 19, township 5 north, range 16 west, and the northwest quarter of section 26, township 5 north, range 17 west), in Perry County, Arkansas, known as the Cypress Mills place, except the tract in Yell County, in which she was decreed one-third interest, and that she have partition thereof; and also rendered a decree in her favor against appellant, Sarah Clark, in the sum of $11,670.67, for rents, issues and profits; and also a like judgment against appellant, Abram Miller, in the sum of $6296.45, and decreed a lien upon the lands remaining unsold at the commencement of this action, for the payment of these judgments, from which decree the said Sarah Clark and Abram C. Miller appealed.

5. TRUST: Under voluntary conveyance.

It is insisted by appellants that the court below erred in decreeing that appellee had an interest in the Cypress Mills

place above described. It appears from the evidence that this place was conveyed by John W. Miller, the father of the appellant, Abram C. Miller, in his lifetime, to Abram Clark, in his lifetime, on account of the failing health of John W., for the sum of $1; that John W., who died in 1850, improved it and had the use and enjoyment of it until his death; that Elizabeth Miller, the widow of John W., and mother of Abram C. Miller, always after that had the use and enjoyment, and received the rents and profits of it, until her death in 1867, and that neither of said brothers, Abram and Aaron Clark, was ever in actual possession of it. Under these facts, we are of opinion that the Cypress Mills place was held by Abram Clark in trust, and that appellee has no interest in it, and that it was error to hold that she had; and we therefore dismiss the complaint as to the said Cypress Mills place.

6. PLEADING AND PRACTICE: Matters of record: Exceptions.

It is urged by appellants that the court below erred as to the interest in the lands which the appellee would be entitled to under the statutes of descents, and also as to the allowance of interest. But the appellee submits that these questions were not raised by exceptions to the master's report and cannot, therefore, be considered here. In regard to the lands, the facts, upon which the several interests of the parties depend, appear upon the face of the pleadings and are undisputed. Being already before the court, no report as to them was necessary, and it was for the court, and not for the master, to determine the law upon these facts, and declare the extent of the several interests in the lands. As to the other point, the master might well report, under the directions of the court, what the amount of interest would be on claims or debts at certain rates, and if a party should desire to question the correctness of his computation, he might, perhaps, have to do so by exception to his report. But it would be for the court to determine, under all the circumstances of each particular case, whether the amount of interest so reported should be allowed without the necessity of exception to the report. But outside

of this, we find in the record exceptions as to interest which were reserved by the court for consideration, and not determined until the hearing, sufficiently broad to raise this question.

We therefore hold that both the foregoing questions are before us for consideration.

There is a controversy in the record as to the shares of the parties in the lands in controversy.

It appears that after the death of Abram, Aaron sold a part of the lands owned by them in common; and also that after the death of Abram, Aaron purchased certain other lands, a large part of which he sold before his death. We hold that the appellee, Ann E., has no interest or share in said lands sold as above mentioned which she can assert in this action, and that the court below erred in holding that she had.

As to the shares of the parties in the lands held by Abram and Aaron in common (except so much of them as was sold by Aaron in his lifetime), we find as follows:

Of said lands in Sebastian and Pope Counties the appellant, Sarah Clark, is entitled to 37-48th and the appellee, Ann E. Hershey, to 11-48ths.

Of said lands in Johnson and Perry Counties, appellant, Abraham C. Miller is entitled, as heir of his mother Elizabeth, to 7-8ths and appellee Ann E. Hershey is entitled to 1-8th.

Of the said lands in Yell County, the appellants, Sarah Clark and Abraham C. Miller, and the appellee, Ann E. Hershey, are entitled each to 1-3d.

As to the lands purchased by Aaron after the death of Abram, all of which appear to be in Sebastian County, we find as follows:

Of said lands (except so much of the same as was sold by Aaron in his lifetime) the appellant, Sarah Clark, is entitled to 5-6ths, and the appellee, Ann E. Hershey, is entitled to 1-6th. And we are of opinion that the court below erred in its findings as to the interest of the parties in the lands.

Interest was allowed and included in the sums for which the court below decreed personal judgments against appellants at 6 and 10 per cent. per annum, from various dates, extending back long prior to the commencement of this suit.

Mr. Wait says, in his work on Actions and Defences: "As a general rule, no interest should be allowed on unliquidated accounts for goods, wares and merchandise, without an agreement to allow it, express or implied. It has been held in New York, that in an action upon an unliquidated demand, interest should be allowed from the time of the commencement of the action. In general, interest is not due in law on unliquidated damages or uncertain demands. Interest from the commencement of the suit is recoverable on a money demand, even though it is not claimed in the petition. If there be unreasonable and vexatious delay in making payment of an account, though it be not liquidated, interest may be recovered. Interest is considered as an incident, legally, to every debt certain in amount, and payable at a certain time. It is now allowed in all cases where one person detains the money of another unjustly and against his will." (*4th Wait's Actions and Defences, pp. 128, 129, 130 and 132*, to which we refer for citation of authorities.)

In *Tatum v. Mohr* (*21 Ark., p. 355*), this court said: "We understand the court to have instructed the jury that the plaintiff was entitled to recover interest upon the value of the shares thus ascertained, from the date of the exchange. This was error. On general principles, in a suit like the present, for unliquidated and contested damages, the plaintiff is not entitled to recover interest as such."

In *Brinkly and Wife v. Willis, et al.* (*22 Ark., pp. 9 and 10*), which was a suit in equity to recover the value of certain slaves that came to the hands of an administrator, and in which a recovery was had as to a slave named George, this court said: "But under the circumstances in this case, we are of opinion that no interest should attend that part of the

value of George that shall fall to Brinkly and wife before the beginning of this suit, as there has been delay in its commencement which ought to operate against the plaintiffs."

7. INTEREST: When not allowed.

While we do not, from the foregoing authorities, attempt to formulate any rule applicable to all cases (see *Watkins v. Wassell, 20 Ark., pp. 419, and 420*) we think them quite sufficient to prevent any allowance of interest to appellee, prior to the institution of this suit, taking all the facts into consideration. We cannot agree with the counsel for appellee that there is, under the circumstances of this case, any implied contract for the payment of interest, or any unreasonable and vexatious withholding of it, or any withholding it against the will of the appellee. In addition to the long delay in bringing the action, all the parties were fully under the impression that the appellee had no rights at all in the property. Besides, the appellee consented to and assisted the appellant, Sarah, in the use of nearly $10,000 of notes, the proceeds of the sale of a part of the land for the benefit of her husband, and tacitly consented to the sale of another valuable part of it, by being present and making no objection to the sale, which was brought about by her husband. She and her husband lived in the house for four or five years with appellant, Sarah, during the most of which time her husband was the agent of the appellant, Sarah; and it is almost impossible, from the evidence, to resist the inference that she knew of all, or nearly all, of the transactions of the appellant, Sarah, in regard to the property, and made neither complaint nor dissent. These things equally affect the case as to the appellant, Abram C. Miller, owing to the impression of all the parties as to appellee's rights, and the undisputed possession by appellants until just before the commencement of this action. To allow interest before the commencement of the action, would be to subject appellants to loss and injury superinduced by the conduct and actions of appellee. So we hold, under the circumstances of this case, as this court held in

Brinkly v. Willis, supra, that interest ought not to have been allowed before the commencement of this suit.

It appears that Nancy and Sarah, before the death of Nancy, and Sarah, after Nancy's death, sold certain parcels of the land in Sebastian and Pope Counties, which sales were made after Aaron's death, and before the commencement of this suit, and that Sarah sold one parcel thereof to W. M. Cravens after the commencement of this suit, which last mentioned sale was for the sum of $500. And as it appears that appellee does not seek to interfere with these sales, we treat them as having been ratified by her, and the lands so sold as having been partitioned and set apart to the appellant, Sarah, by consent, leaving in said Counties of Sebastian and Pope the lands remaining unsold at the time of the commencement of this suit (except the lands sold to Cravens), to be partitioned between appellant, Sarah, and the appellee, giving appellee 11-48ths, and appellant, Sarah, 37-48ths of the lands so held in common by Abram and Aaron, in said Counties of Sebastian and Pope; and said appellee $\frac{1}{6}$th and said appellants 5-6ths of said unsold lands in Sebastian County, bought by Aaron after Abram's death. The tract of land in Yell County, devised by Aaron's will to appellee, is to be partitioned between the appellee and appellants, Sarah and Abram C. Miller, giving to each of them $\frac{1}{3}$d; and the lands in Johnson and Perry Counties are to be partitioned between the appellee and Abram C. Miller, giving appellee $\frac{1}{8}$th and Miller 7-8ths.

The lands partitioned by sale and consent, as hereinbefore held, to appellant, Sarah, are valued at the prices for which they were sold, less 11-48ths of $3722.60, as to said sales of said land in Sebastian and Pope Counties, held in common by Abram and Aaron, and $\frac{1}{6}$th of $3722.60 as to said sale of said lands in Sebastian County, bought by Aaron after Abram's death, the said sum of $3722.60 being the aggregate amount of taxes ($622.60) paid by Sarah on said lands, and of moneys ($3100) part proceeds of sale of said lands, which she had de-

posited with Brooks & Latham, and which, without fault of her own, she lost by failure of said firm, and for which two sums she was allowed credit by the court below, for the purpose of completing the partition; and the shares which may be allotted to appellant, Sarah, in the lands in Sebastian, Pope and Yell Counties, are to be charged with a sufficient amount of owelty to make appellee's shares therein (exclusive of such of said lands as Aaron sold in his lifetime) equal to 11-48ths of said land held in common by Abram and Aaron in Sebastian and Pope Counties; $\frac{1}{6}$th of the land bought by Aaron after Abram's death in Sebastian County, and 1-3d of the tract of land in Yell County (devised by Aaron's will to appellee) including the value of the lands sold by Nancy and Sarah, or either of them, as hereinbefore stated, which owelty is to be a lien upon the shares of said appellant, Sarah, in said lands but no personal judgment for the same is to be entered.

It appears, however, that the appellant, Sarah, purchased from B. F. Hershy, the husband of appellee, while he was acting as an agent for said appellant, Sarah, certain real estate in Clarksville, Johnson County, for which she paid him the sum of $9937 in notes representing proceeds of sales of parts of said lands held in common, made by appellant, Sarah; that this transaction was made with the knowledge, consent and approbation of appellee, and that she joined her husband in the deed to appellant, Sarah; and that said real estate was not worth more than $4000, making the difference between the price paid for, and the value of said real estate, $5937; and after the owelty to which the appellee is entitled as between herself and appellant, Sarah, is ascertained, the said sum of $5937, less 11-48ths of said sum of $9937, is to be deducted therefrom, as so much owelty already paid by said appellant, Sarah; and if said sum exceeds said owelty, then no owelty is to be allowed said appellee.

As it does not appear that any of the lands in Johnson, Perry and Yell Counties, in which appellee and appellant,

Abraham C. Miller, are entitled to share by partition, have been sold, the question of owelty does not arise between them.

We are of opinion from the facts in evidence that, as between herself and the appellant, Sarah, the appellee ought to have her part of the rents (according to the shares she is entitled to, as hereinbefore held) in the lands in Sebastian and Pope Counties, as follows: that is to say, she is entitled to her part of the rents of said lands in Sebastian and Pope Counties, sold after the death of Nancy, from the death of Nancy up to the time they were respectively sold, so far as the evidence shows that such rents were received by the appellant, Sarah. She is not entitled to rents from any period anterior to the death of Nancy, because before that time the rents were covered by Nancy's life estate, with the title to which she had been reinvested by Aaron's will; nor after the sales, because we have held said sales, owing to the circumstances under which they were made, to be a partition by consent. The appellee is also entitled to her said shares of the rents of that part of said lands remaining unsold at the commencement of this action (except the place afterwards sold to Cravens, and the lots in Fort Smith, Sebastian County, known as the homestead place), from the time of the death of Nancy, so far as any such rents are shown by the evidence to have been in fact received by appellant, Sarah. As to the homestead place (lots 4, 5 and 6, and part of lots 9 and 10, in block 26, in Fort Smith, Sebastian County), appellee is entitled to her share of the rental value thereof from 1870, the time from which it was allowed by the court below, and of the Cravens place up to the date of the sale thereof, for which rents appellee is entitled to personal judgment against the appellant, Sarah, with 6 per cent. per annum interest thereon from the time of the institution of this suit, as to rents then due, and on subsequent rents from the dates of their accrual, less 11-48th of the sum of $6047.97 as to the lands held in common by Abraham and Aaron in Sebastian and Pope Counties, and one-sixth of said

sum as to the lands bought by Aaron after Abraham's death, said sum having been paid out by Sarah for improvement on said land, and allowed her as a credit by the court below, and not questioned here by appellee on appeal. By this we are not deciding whether or not a tenant in common can recover for improvements, or set them off against rents; we make the allowance because it was made by the court below, and is not questioned here.

Appellee is also entitled to her said share of rents arising from said lands in Johnson and Perry Counties as against the appellant, Abram C. Miller, from his mother's death in 1867, so far as the evidence shows that the same have been received by him, for which she is entitled to personal judgment against him, with 6 per cent. per annum interest thereon from the date of the institution of this action, as to rents then due, and subsequent rents after their accrual.

8. LIEN: On partition of land, etc.

The court below decreed a lien on appellant's shares of the unsold lands to secure the payment of rents and profits. This character of lien has been sustained by the courts of New York, but we find no discussion of the question in any of the cases in that State coming under our notice. In a Kentucky case, in which it was the only point in issue, the matter was discussed, and the lien held not to exist; and it is denied by other authorities (*Burch v. Burch, 82 Ky., 622; Jones on Liens, sec. 1155; Hancock v. Day, 36 American Decisions*).

We can see no ground for such a lien on principle, and hold that the court below erred in granting it.

For the errors above indicated the decree of the court below is reversed; and this cause is remanded to the Circuit Court with instructions to make the partition and settle the accounts between the parties in strict accordance with this opinion; and with the further instructions that in doing so no further evidence shall be taken or considered outside of that which has already been taken, except as to rents accruing subsequent to the decree herein.

SANDELS, J., being disqualified, did not sit in this cause.

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CAMPBELL v. JONES.

1. DEEDS: *Delivery of: Escrow.*

A deed cannot be an escrow when it is delivered directly to the grantee.

2. SAME: *Same: Cancellation of.*

On the execution and delivery of a deed for the conveyance of land, the title vests in the grantee, and he cannot divest himself of it by merely cancelling the deed and surrendering it to the grantor.

3. HOMESTRAD: *Conveyance and exchange of: Exemption.*

A creditor cannot complain that the conveyance of a homestead is fraudulent as to a debt for the payment of which it is not subject to execution. But where the debtor exchanges his homestead for other real estate, the latter will not be exempt except as a homestead, and to the extent allowed by the Constitution.

4. SAME: *Same.*

The appellee being the owner of a homestead situated in another State, and not subject to execution there, exchanged it in 1877 for 1600 acres of unimproved lands lying in this State, taking the deed to the latter in his own name, but with the understanding that when he had divided the lands between himself and his children, the deed received should be canceled and deeds executed according to such division. He subsequently canceled the deed by a writing across its face, and surrendered it to the grantor, who then executed to him a deed for 160 acres of the land, and conveyed the residue to his children. The conveyance to the children was without consideration on their part, and they had no knowledge of it until 1882. On a bill filed in 1886 to subject the lands to the payment of a judgment recovered against the appellee in 1885, for a debt existing prior to the exchange of lands, held: (1.) That the title to the 1600 acres having vested in the appellee on the delivery of the original deed to him, the whole of said lands, except such part thereof as he might be entitled to claim as a homestead, became *eo instanti*, subject to execution for the payment of his debts. (2.) That the cancellation of such deed being ineffectual to divest the appellee's title, his children acquired no title by the conveyance which he caused to be made to them. (3.) That no title having ever vested in the children, and the lands conveyed to them being wild and unimproved, the plaintiff's action was not barred as to them by the statute of limitations. (4.) That the appellee having before the recovery of the plaintiff's judgment, fixed his homestead on the 160 acres of land conveyed by the second deed to him, he was entitled to claim its exemption. (5.) That the rest of the lands should be subjected to the payment of the plaintiff's judgment.

APPEAL from *Arkansas* Circuit Court in Chancery.

JOHN A. WILLIAMS, Judge.

Gibson & Holt, for appellant.

1. Appellee could not attack the judgment of the Desha Circuit Court in this collateral proceeding. *19 Ark., 421; 20 id., 91.*

2. The evidence fails to establish that the first deed to Jones was an escrow.

3. The cancellation of the deed from Brown to Jones did not divest the legal title. *21 Ark., 80.*

4. The conveyances were clearly in fraud of creditors. *Kent's Com., vol. 4, p. 557; Gantt's Dig., secs. 2955–6; 14 Ark., 69; 8 id., 106; 1 Conn., 525, 542; 8 Ark., 740; 10 id., 225; 22 id., 143; 23 id., 494; 29 id., 407; 32 Ark., 251, 465.*

5. The homestead laws of a State apply only to its citizens. *34 Ark., 111.*

W. H. Halliburton, for appellees.

The burden was on appellant to prove fraud. *Bump. Fr. Conv., p. 600, 365; 4 Ark., 356; 19 Ark., 168.*

The homestead of Jones, in Iowa, was exempt from Campbell's judgment, and he had the right to dispose of it at will, free from all taint of fraud. *Bump Fr. Conv., pp. 245, 620; 31 Ark., 567; 43 id., 434; Bogan v. Cleveland, 52 Ark., 101; 9 Kans., 466; 4 So. Law Rev., 7.* The homestead being exempt, the proceeds are likewise exempt from execution.

The Iowa judgment was certainly no lien on the Arkansas lands. *Rorer on Int. St. Law, p. 167.* Nor was the judgment in Desha County a lien on the lands in Arkansas County. *Mansf. Dig., sec. 3918.*

The appellant is barred. *21 Ark., 17; Story Eq. Jur., vol. 2, par. 1521 a; Angell on Lim., p. 349; Dan. Chy. Pr., vol. 2, p. p. 736-7 and note 2 to p. 736.*

HUGHES, J. On the 1st day of August, 1885, appellant recovered a judgment against John C. Jones, one of the appellees, and the father of the other appellees, in Desha Circuit Court, in Arkansas, in the sum of $3661.93, and on the 23d of

October, 1885, had an execution issued on said judgment, which on 23d of December, 1885, was returned unsatisfied. He then filed his bill in equity to set aside as fraudulent and have declared void as to his debt certain conveyances of land which John C. Jones had procured to be made to himself and to his children by one Talmadge E. Brown. The bill was dismissed and he appealed. John C. Jones owned near Des Moines, Iowa, a forty-acre tract of land, which had been set aside to him as a homestead, and which under the laws of that State could not be taken in execution for his debts. In November, 1877, John C. Jones exchanged his forty-acre homestead with one Talmadge E. Brown for 1600 acres of land in what was then a part of Desha County, in the State of Arkansas, but which was afterwards attached to Arkansas County. He had the deed to the Arkansas lands made to himself, and conveyed his homestead in Iowa to Brown with an understanding at the time the conveyances were made, that he would visit Arkansas, examine the lands purchased of Brown, determine how he would divide them between his children, and that he would then cancel and deliver up Brown's deed to him for the lands, and that Brown would thereupon make deeds according to his division of the lands, and his directions. He canceled in writing across its face Brown's deed to him; he and his wife signed and acknowledged the cancellation and delivered the deed to Brown, who then made to John C. Jones a deed for 160 acres, and to his children deeds for 1440 acres of the Arkansas lands. Two of the children were minors. The lands were wild and unimproved. The father, John C. Jones, settled upon and improved and claims as a homestead the 160 acres conveyed to him. The only consideration for the conveyances from Brown to John C. Jones and his children for the Arkansas lands was the conveyance by John C. the father, of his homestead in Iowa to said Brown. No consideration moved from the children to the father. At the time John C. Jones made this exchange of lands with Brown, there was a

subsisting, unsatisfied judgment against him in favor of appellant, Campbell, in Iowa, where his homestead was situated, and that judgment was the foundation of the judgment in Desha County, Arkansas, and was recovered in the Supreme Court of Iowa on appeal, March 18, 1875. No motion was ever made, or step taken to set aside, vacate or modify the judgment recovered in Desha County, Arkansas, and no good reason is given for the failure by appellee, John C., to make such motion, or take such step, and yet he asks to be allowed to attack the judgment collaterally, which it is hardly necessary to say cannot be done. Appellees insist that the exchange of his homestead in Iowa for the lands in Arkansas was not made to defraud his creditors, but in good faith, and to procure homes for his children; that neither his homestead in Iowa, nor the proceeds of the sale thereof, when sold by him, could have been taken in execution for his debts; that he had a right to reinvest the proceeds of the sale of the same for the benefit of his family, and that the property purchased therewith could not have been taken in execution for his debts; that his homestead in Iowa being exempt, there were no creditors as to it, and that any disposition he might have made of it would not have been a fraud upou his creditors; that having invested his homestead, thus exempt in Iowa, in lands in Arkansas for himself and his children, the lands in Arkansas taken in exchange cannot be taken in execution for this debt. It is also contended for appellees that the deed first made by Brown to John C. Jones, was an escrow, and that the title to the lands described therein did not pass thereby, nor until the conveyances were made by Brown to him and his children, according to John C. Jones' division of the lands, and after the cancellation of the first deed.

DEEDS: Delivery of: Escrow.

But this theory is not supported by the evidenee, the preponderance of which, as to this, is, that the deed first made by Brown to appellee, John C. Jones, for all the lands, was delivered to him directly. There is no evidence to the contrary.

It is well settled that a voluntary conveyance made to hinder, delay or defraud creditors, is void as to them, the grantor being insolvent without the property so conveyed. *Driggs & Co.'s Bank v. Norwood, 50 Ark., 42; Adams v. Edgerton, 48 Ark., 419; Hershy v. Latham, 46 Ark., 542; Reeves v. Sherwood, 45 Ark., 520; Danley v. Rector, 10 Ark., 225; Leach v. Fowler, 22 Ark., 145; Bertrand v. Elder, 23 Ark., 494; Massey v. Enyart, 32 Ark., 251; Oliphant v. Hartley, 32 Ark., 465; Bennett v. Hutson, 33 ib., 762, 767.*

But it is well settled, that "it is incumbent on a creditor, who complains of fraudulent conveyance, to show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt. Until this is done no injury appears."

HOMESTEAD: Conveyance of.

Creditors cannot complain that a conveyance of a homestead is fraudulent as to debts, for the payment of which it cannot be taken in execution. They could not reach it, if not conveyed, and hence the motives for the conveyance do not concern them. *Stanley et al v. Snyder et al., 43 Ark., 430; Erb v. Cole & Dow, 31 Ark., 557; Clark and wife v. Anthony and wife, 31 Ark., 546; Meux v. Anthony, 11 Ark., 411; Hempstead v. Johnston, 18 Ark., 124; Bogan v. Cleveland, ante, 101.*

CANCELLING DEEDS.

But when the deed to the 1600 acres of land in Arkansas was made and delivered to appellee John C. Jones, the title thereto vested in him, and the same became liable, *eo instanti*, to sale under execution for the payment of his debts, except such part as he might be entitled to fix and claim a homestead upon. That it was not competent for him to divest the title thus acquired by simple cancellation and surrender of the deed first made to him by Talmadge E. Brown for the 1600 acres of land in Arkansas, is, we apprehend, well settled. *Byrd et al. v. Jones et al., 37 Ark., 194; Talifero Ex., v. Rawlton, 34 Ark., 503; Neal v. Seigel, 33 Ark., 63; Strann v. Norris, 21 Ark., 80; 13 N. J. Eq., 143; 44 N. H., 438; 9 Pick., 107; 5 Conn., 262; 33 Ala., 264; 11 Mass., 332; 18 Cal., 491; 53 Wis., 36; 1 Glf. Ev.,*

sec. 265; 4 Allen, 422; 7 Peters, 171; 47 Me., 308; 46 Barb. 122; 3d Head, 562.

EXEMPTION, ETC.

The appellee, John C. Jones, is entitled to claim and have set aside to him, as a homestead, the 160 acres of land conveyed to him by Talmadge E. Brown and claimed by him as a homestead in his amended answer, and upon which he had fixed his homestead before the commencement of this suit, and before the recovery of appellant's judgment in Desha County. More than this he could not claim under the Constitution and laws of Arkansas, which limit the homestead to 160 acres of land. The title to all the lands sought to be subjected to the payment of appellant's debt having once vested in him, and become subject to his debts (save that which he might claim as his homestead), the appellee, John C. Jones, could not by cancellation of the conveyance to him and the procuring of conveyances to be made to his children, which were voluntary, defeat appellant's right as one of his creditors, to have the land thus conveyed subjected to the satisfaction of his debt.

It is insisted that appellant's right to relief was barred before the commencement of his suit, but the lands were wild and unimproved, and it follows from what has been said that no title ever vested in the children of appellee, John C. Jones, to the 1440 acres of land conveyed to them by Brown, as he had previously conveyed his title to John C. Jones, the father, in whom it still resides, not having been divested by the cancellation and surrender of the first deed made to him for all the 1600 acres of land, by Brown. Besides, in the answers filed by the children of John C. Jones to the appellant's complaint, they aver that they did not know that deeds to the lands had been made to them until 1882. The complaint in this case was filed the 4th of February, 1886.

The decree of the Arkansas Circuit Court in chancery is reversed, with directions to the court below to enter a decree in accordance with this opinion.

CROUCH V. EDWARDS.

1. ADMINISTRATION: *Action to surcharge accounts: Parties.*

A judgment rendered against the administrator *de bonis non* of an estate, in a suit to surcharge the accounts of the administrator in chief, is not binding upon the sureties of the latter, where neither he, nor his personal representative in case of his death, nor either of the sureties, was a party to the action.

2. SAME: *Settlement of accounts: Liability of sureties.*

Where the accounts of an administrator, showing that nothing is due from him to the estate, are, in the absence of exceptions thereto, confirmed by the Probate Court, no liability will rest upon his sureties, until the settlement thus made is impeached in a court of equity.

3. DOWER: *In personalty: Subrogation.*

When an administrator applies the personal property of the estate to the payment of debts, leaving the widow's claim for dower thereon unpaid, she is equitably entitled to be subrogated to the rights of creditors whose claims have been thus discharged, and to be reimbursed out of the real estate.

APPEAL from *Miller* Circuit Court.

C. E. MITCHEL, Judge.

W. B. Crouch, administrator of the estate of Helen M. Edwards, deceased, filed his petition in the Probate Court of Miller County against W. B. Edwards, administrator *de bonis non* of the estate of Thomas J. Edwards, deceased, praying for an order directing said administrator *de bonis non* to pay over to said petitioner a balance alleged to be due on the dower of said Helen M., in the personal estate of said Thomas J., she being his widow.

The petition was filed in 1886, and states that M. W. Edwards, the administrator in chief of the estate of Thomas J. Edwards, was at a previous term of the Probate Court ordered to pay over to said widow the sum of $2394.54, which the court then found to be due to her as dower in moneys realized by said administrator from the personal assets of his intestate; and that said M. W. Edwards failed to pay over the sum of $1429.39, which was never paid to said widow and remained due to her estate. The Probate Court

found that a balance of $500 was due on said dower and made an order directing the administrator *de bonis non* to pay that sum to the petitioner out of any moneys in his hands, or which might come into his possession, without regard to the source from which it was derived. On appeal to the Circuit Court, judgment was rendered against the petitioner on grounds which are stated in the opinion. It appears from the record that M. W. Edwards died in the year 1882, and it does not appear that any exception was made to his accounts as administrator, or that any appeal was prosecuted from the judgment of the Probate Court settling them.

W. H. Arnold, for appellant.

The administrator having applied the personalty to the payment of the debts of the estate, without paying the widow's dower, she is entitled to be subrogated to the rights of the creditors whose demands have been paid, and to be reimbursed out of the real estate. *8 Ark., 9; 17 id., 584.*

Neither the appellant, nor his intestate were parties to the suit in the Miller Circuit Court, nor to the judgment surcharging the administrator's accounts, and is not bound thereby. The judgment was not admissible in evidence to prove the facts sought to established. *16 Ark., 72; 2 Starkie on Ev., secs. 183-4; Freeman on Judg., sec. 154.*

T. E. Webber and *Scott & Jones*, for appellee.

It is not true that moneys due the widow on account of dower had been used for the payment of debts. A widow is not entitled to have her dower in personalty paid to her out of funds arising from the sale of real estate for the payment of debts, in which real estate she has been endowed, where there is a fund derived from personalty in existence to which her dower lien has attached; or, if said fund has been squandered or misappropriated, she, as bondsman, is directly and legally responsible for the default. But, if she had the right, she lost it by her laches.

Cite *5 Ark., 608, 614; 18 id., 422.*

COCKRILL, C. J. The Circuit Court found as a fact, that M. W. Edwards, as administrator of the estate of Thomas J. Edwards, deceased, had in his hands a sum of money realized from personal assets of the estate, at the time the Probate Court directed the payment of the widow's dower; that the widow neglected for two years thereafter to collect what was due her; and, the administrator having died without accounting for the amount, held, that the widow lost her right by her laches; and declared that she was barred for the further reason that she was one of the sureties of the defaulting administrator, and could not claim indemnity out of the real assets of the estate, until she had discharged her liability arising by reason of her suretyship.

ADMINISTRATION: PARTIES

It is not necessary to examine the details of the facts disclosed by the record to ascertain if the conclusion reached by the court is that which the law pronounces upon the facts found, because there is a total want of legal evidence to prove the main fact which is the basis of the finding and judgment; that is, that the administrator was indebted to the estate when the judgment for dower was rendered, and at the time the petition herein was filed. The finding is based upon a judgment of the Miller Circuit Court in a suit to surcharge the administrator's accounts, wherein the default is found and adjudged as the court in this case declared. But neither the defaulting administrator nor his administrator, nor any of the sureties upon the bond, was a party to that proceeding. Creditors of the estate of T. J. Edwards, deceased, were plaintiffs, the only defendant being the administrator *de bonis non* of the estate of Thomas J. Edwards. But he was not authorized to represent the bondsmen of the first administrator, nor to make a settlement for them, and the judgment against him was *res inter alios acta* and not binding upon them. It proved nothing against them. *State v. Drake, ante, 350; 12 S. W. R., 706.*

Liability of sureties

The judgment of the Probate Court settling the accounts of the administrator for whom Mrs. Edwards was surety, show

nothing due from him, and until they are overturned in a court of equity, no liability rests upon his bondsmen.

Dower: Subrogation.

If it be true, as recitals in the Probate Court records indicate, that the administrator (who before assignment of her dower in personalty, is trustee for the widow) applied the personalty to the payment of the debts of the estate without paying off her claim for dower, she is equitably entitled to be subrogated to the rights of the creditors, whose demands have thus been discharged, and to be reimbursed out of the real estate. *Wells v. Fletcher, 17 Ark., 581.*

Reverse the judgment and remand the cause for a new trial.

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PRIDE V. STATE.

1. COUNTY WARRANTS: *Jurisdiction to cancel or reissue.*

On appeal from the judgment of a County Court rejecting warrants of the county presented for re-issuance, the Circuit Court can render only such judgment as the County Court should have rendered. It may examine witnesses and ascertain from the evidence whether the warrants are just and legal demands; but it can exercise no equity power, such as directing a reference to a master to state an account between the holder of the warrants and the county, on the claim by the latter of an equitable set-off.

2. EQUITY: *Stating accounts: Declaring trusts: Set-offs, etc.*

Under an order made in 1887, calling in the outstanding warants of a county, the defendant presented for re-issuance, warrants amounting to the sum of $65,000, which the County Court rejected, and he appealed from its judgment. At a subsequent term during the same year, the court rendered judgment against the defendant for the sum of $118,000, found to be due from him to the county for moneys received by him as Collector of revenue, in 1864. He also appealed from the latter judgment, and while both appeals were pending, the State, for the use of the county, filed a complaint in equity against him, alleging that he received the warrants as part of the revenue of the county, for the year 1864, and converted them to his own use; that he was insolvent and his bond as Collector had been lost; and praying that he be restrained from collecting the warrants, or, if he was entitled to have them re-issued, that an equal amount of his indebtedness to the county be set off against them. HELD: (1.) That whether the warrants were part of the county revenue or

legally belonged to the defendant and he was found to be indebted to the county, in either case a court of equity only could afford the plaintiff proper relief. (2.) That the equitable action to obtain such relief is not barred by the pendency of the causes originating in the County Court, since, although they relate to the same matters set out in the complaint in equity, they seek a different object. (Following *Garibaldi v. Wright, ante, 416.*)

2. SAME: *Staleness of demand.*

On the facts alleged in such complaint, the defendant cannot resist the relief it seeks, on the ground that the demand of the county is stale.

3. STATUTE OF LIMITATIONS: *In actions against Collectors.*

The statute of limitations will not begin to run in favor of a County Collector who converts to his own use the public revenues, until the amount due from him is ascertained by settlement of his accounts.

APPEAL from *Sevier* Circuit Court in Chancery.

R. D. HEARN, Judge.

This is a suit in equity, brought by the State for the use of Sevier County, against Henry C. Pride. It appears from the allegations of the bill that Pride was Collector of revenue for Sevier County, in 1864; that he colleeted the revenue of that year and failed to pay it over to the Treasurer, or to make any settlement with the County Court, but fraudulently converted the same to his own use; that the County Court, at the July term, 1861, made an order appointing commissioners in each township to relieve the families of volunteers in the Confederate and State armies, and that taxes were assessed and collected for that purpose; that in October, 1861, an order was made that all allowances made for the relief of such families, should be drawn by the Clerk of the Court on the Treasurer; that at the same term of the court, on November 1, 1861, it was ordered that all the appropriations before that time made, and for which taxes had been assessed, including allowances for the support of the families of volunteers in the army, be collected and paid into the county treasury as ordinary county revenue, and that the several appropriations and allowances should be consolidated; that it was further ordered that all orders made at that term of the court directing the Clerk to draw his

warrants on the Treasurer out of any particular fund, be set aside, and that he draw all his warrants on the Treasurer for all allowances made by the court, in the ordinary manner of drawing county warrants; that these orders were in full force in 1864 and 1865, including the assessment and collection of taxes to pay the orders of the court, in allowing claims against the county; that at the April term, 1864, of the court, it was ascertained that to pay the current expenses of the county for that year a tax of $8000 should be levied, to pay for the support and relief of the families of soldiers in the army, a tax of $82,000 should also be levied, and for these purposes 3 per cent. on all the taxable property in the county was assessed, extended upon the tax-books and collected as a whole that is to say, that the taxes for both purposes were consolidated and made one, all allowances for the relief of the families of soldiers in the army, and all allowances for ordinary expenses, being made and entered of record on the same day, and frequently in the same order; that the Clerk drew all warrants for the payment of such allowances on the Treasurer, to be paid out of the taxes consolidated and collected as stated, and that all the orders of the court allowing claims against the county for the ordinary expenses were so mixed with the allowances made for and in aid of the war, and the warrants were so drawn that they are all alike illegal and void, though the warrants have on their face a money value; that in the latter part of 1863, and all of 1864, all the able-bodied men of Sevier County, between 18 and 50 years of age were in the regular service in the army, and their families were almost wholly dependent upon the relief given them under the orders of the County Court; that large amounts of county warrants were issued at every term of the court during the period of the war, for such purpose, by means of which large amounts of warrants were in the hands of the tax-payers of the county at the time of the collection of the taxes of 1864, and were collected and received by the Collector of the county, and by

him retained and converted to his own use, and he is now attempting to collect the face value of such warrants from the county as the *bona fide* owner thereof; that the bond of Pride as Collector is lost, and that he is wholly insolvent; that on April 6, 1887, the County Court of Sevier County made an order calling in her outstanding warrants for examination, cancellation and reissuance; that in obedience to this order Pride, on July 25, 1887, appeared in court, and presented for examination and reissuance 501 warrants, amounting in the aggregate to $65,071.33, which, on examination, were rejected, and Pride appealed to the Circuit Court, where the matter is now pending and undetermined; that in April, 1887, the County Court made an order reciting that Pride had colleeted the taxes of the county for the year 1864, and requiring him to make a settlements thereof; that Pride appeared at the January term next following and filed an answer, to which a demurrer was sustained, and refusing to plead further, judgment was rendered against him for $118,237.39 county taxes, and $450 ferry license, from which he appealed to the Circuit Court, where the appeal is now pending and undetermined; that the warrants presented by Pride for examination and reissuance are regular on their face, and can only be defeated by extrinsic evidence that the county is not legally bound to pay them. The prayer of the bill is for general and special relief, and is substantially as follows: The plaintiff asks the court, by proper orders, judgments and decrees, to grant to her such relief in the premises as to equity and good conscience may pertain, and that she may have all the benefit and advantage of all equitable set-off and limitation on the hearing of the cause; that the defendant on the final hearing be perpetually restrained from the collection of the warrants presented by him for reissuance; that in the event such warrants should be found to be a part of the revenues collected by the defendant in 1864, that they be canceled, and that if the defendant shall recover any part of the warrants, that the plaintiff have her

equitable set-off as may be proven; and that if, upon the hearing, it should appear that by the orders of the County Court, mixing and collecting the revenues in aid of the war with other revenues, the whole system of revenue during the war was void, that the plaintiff may recover all her costs, and such other relief as to equity may pertain, the plaintiff in no case asking to recover of the defendant the revenues of the year 1864, more than a sufficient amount to set-off and defeat the claim of defendant. The defendant demurred to the complaint on the ground (1), that it states no cause of action, and (2), that the court had no jurisdiction of the matters which it sets forth. The demurrer was overruled and the defendant refusing to plead further, the court rendered a final decree on the merits, finding that the defendant had collected warrants of the county in payment of the taxes of 1864, amounting in the aggregate to $118,237.39, which he never accounted for to the county, but converted to his own use; that the 501 warrants, presented by the defendant to be reissued, aggregating the sum of $65.173.33, were, each and all of them, part and parcel of the warrants collected by him and converted as aforesaid; and decreed their cancellation, and enjoined him from ever prosecuting any action thereon. He appealed.

G. W. Williams for appellant.

1. Equity follows the law in the application of the statute of limitations. *Wood on Lim., sec. 58 et seq.; 16 Ark., 129; 19 id., 16; 46 id., 25; 47 id., 301.* Laches and neglect are always discountenanced in equity. *95 U. S., 157; 1 Dan. Ch. Pl. & Pr., * p. 561.* The appellee was barred. *Mansf. Dig., secs. 4481-5832-3, 5839, 5844, 5847.* Twenty-three years had elapsed since appellant's alleged liability had accrued.

2. There was no ground for equity jurisdiction on account of set-off. The County Court had the authority under *Mansf. Dig., secs. 1147-8, 1153,* to call in and cancel the warrants, and

this would have disposed of the whole matter. The remedy at law was adequate. *15 Wall., 373– 13 id., 618.*

3. The plea of set-off was inconsistent with the allegations of the bill.

Appellee had elected to proceed at law, and had two judgments *in her favor*, and cannot now call in the aid of equity to assist her in disposing of them, thus ousting the jurisdiction of the law courts. *6 Ark., 368; 1 id., 186; 6 id., 85; 5 id., 501; 14 id., 32; 22 id., 277; 26 id., 63; 43 id., 107; 35 id., 109; 14 id., 360; 9 Wheat., 532.*

She does not allege that she was deprived of any defense by surprise, accident, mistake or fraud, etc., or that she was ignorant of important facts material to her defense on the trial at law, etc. Chancery has no power to correct judgments of the Probate Court. *14 Ark., 71; 39 id., 172; 46 id., 260; 37 id., 650; 39 id., 485.* A defendant must make all his defenses legal and equitable at law; if he does not, equity cannot be invoked. *46 Ark., 272; Mansf. Dig. sec. 4932.*

Under section 5173 of Mansfield's Digest, one judgment might be set-off against another in the law court, and chancery should not interfere. *49 Ark., 136.*

The facts alleged constituted a good defense at law, and the demurrer should have been sustained. *15 Wall., 373,* a case similar to this. *13 Wall., 616.*

The claim is stale. *37 Ark., 110; 39 id., 139; 48 id., 238.*

Compton & Compton for appellee.

1. On the facts stated in the bill, one of the acknowledged grounds of equitable jurisdiction is manifest—a complicated account between the parties, they having mutual demands against the other. *8 Ark., 57; 31 id., 345; 48 id., 426; 58 Miss., 835; 30 id., 218; 5 Humph., 242; 1 Sch. & Lef., 309; Bisph. Eq., sec. 484; Story Eq., Jur., secs. 451, 452, 457; 2 Am. Dec., 291.*

2. The *fraudulent* conversion of the warrants to his own

use, and his insolvency is another ground of equitable jurisdiction.

The judgments could not be set off at law, for the judgments to be set off must be "for the recovery of money." *Sec. 5173 Mansf. Dig.* But *sec. 5174* provides that judgments that could be set-off may be enjoined.

Taking all the fact together, three distinct grounds of equitable cognizance appear: 1. Complicated account. 2. Fraud. 3. Equitable set-off.

The prayer is for general as well as special relief. *Story Eq. Pl., sec. 40.*

There is no statute of limitations which runs against the county because of neglect or failure of the County Court to perform its duties. Section 4481 applies only to actions, brought pursuant to section 5873. See *secs. 5832-3-9, 5844, 5847, 5850, Mansf. Dig.*, and not to cases where there has been an omission of duty on the part of the County Court, and no action ever brought against the delinquents.

It is the claim of Pride that is stale, and is thoroughly tainted with fraud. See authorities cited by counsel for appellant.

HEMINGWAY, J. Upon appeal from the County Court the Circuit Court acquires only such jurisdiction as the County Court had, and may render such judgment only as the County Court should have rendered.

COUNTY WARRANTS: Cancelling, etc.

In the matter of the presentment of county warrants by the appellant for reissuance, it was authorized to examine them and to reject such as in its judgment the county was not justly and legally bound to pay, and reissue those not rejected. *Mansf. Dig., sec. 1152.* In ascertaining what warrants the county was justly and legally bound to pay, it might summon and examine witnesses, but it had no equity powers and could not direct any reference to a master to take proof, examine records and documents, and state an account. If, upon its ex-

amination, it found the warrants, or any of them, just and legal demands, it could only reissue them, and it could not decline to do so, although it might believe that upon the determination of a claim by the county against the person presenting them, he would be found indebted to it in a large sum. In this case, although the claim of the county had been established and the amount due it ascertained, it is doubtful if the court would be authorized to cancel the warrants legally due and refuse to reissue them. An appeal had been taken from the judgment fixing the appellant's liability, and it was entirely possible that it would not be determined until after the other cause, in which event if the court found that any of the warrants were just and legal debts, they might be reissued and disposed of before his liability was fixed.

In the proceedings of the County Court to procure a settlement of the appellant's account, the court was authorized duly to adjust his account, ascertain the amount due by him, and to render a judgment against him in case he failed, at the next term of the court to show cause to set aside the settlement. *Mans. Dig., secs. 5844–47.*

By the settlement appealed from, he was found to be indebted to the county in the sum of $118,000. But he was insolvent and his bond lost; if any warrants should be delivered to him they could be easily placed beyond the reach of legal process. Equity is invoked to prevent this.

EQUITY: Trusts: Set-offs, etc.

But it is alleged and the demurrer admits, that the warrants were received by appellant as a part of the revenue of the county, and by him retained and converted. If so, he held them for the county; he was a naked trustee, and the county the real owner. A court of equity only has the power to declare the trust, and compel the delivery of the trust property to the real owner. Even if a court of law could determine all the rights of the parties, its process could not enforce them. But a court of equity in one cause, could adjudge the rights of the parties as to all the matters involved in the pend-

ing controversies, as well as to those not involved in either of them, so as to do full and complete justice between them. In either case, whether the warrants were a part of the revenue converted by the appellant, or he was found indebted to the county upon a settlement of his account and the warrants legally belonged to him, a court of equity could, but the County Court could not, afford the proper relief. The causes pending were about the same matter set out in the complaint in this cause, but they did not seek the same object. This case, therefore, comes within the rule announced by this court in the case of *Garibaldi v. Wright*, decided during the present term. The courts do not favor a multiplicity of suits, between the same parties, about the same matter, seeking the same object, and when one is pending in a court of competent jurisdiction, they have declined to entertain another such because it would be unreasonable and unnecessary, and therefore vexatious and oppressive. We do not so regard this suit, but it seems to us reasonable and necessary, and we think the complaint discloses a proper case for equitable cognizance. *Hatch v. Spofford, 22 Conn., 485.*

The case of *Grand Chute v. Winegar, 15 Wal., 373*, relied upon by counsel for appellant to sustain the contrary, was not like this. There an action had been brought on certain claims which the defendant alleged were invalid. Their validity was the only matter in controversy between the parties, and the court held that as this could be determined in the action at law, equity should not interfere.

Staleness of demand: Limitation.

Admitting the allegations of the bill, the defendant could not claim the benefit of the equitable principle which protects a party against stale demands. It is not a shield for fraud or concealment. The facts fail to disclose a bar by limitation, as no suit could have been brought against appellant, until his accounts were settled and a balance found due by him. *Davis*

v. Tarwater, 15 Ark., 296; Pomeroy's Eq., secs. 418, 419 and 1080.

We think the judgment was right, and it is affirmed.

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School District v. Bennett.

1. School Directors: *Election of: Notice.*

The act of April 4, 1887, amending sec. 6206 Mansf. Dig., and providing that any person chosen to the office of school director, and accepting that position, shall, within ten days after having been notified of his election, take the oath prescribed by the Constitution and file the same in the office of the Clerk of the County Court, does not make it the duty of that court to canvass the vote for directors and certify the result to those elected.

2. Same: *Same.*

It is the duty of the officers holding an election for school directors to give notice of their election to the persons who are chosen. But where a person elected is present and having learned the result, announces that he accepts the office, no further notice to him is necessary.

3. Same: *Oath of office.*

Under the act of 1887, a school director must qualify by taking and subscribing the official oath and filing it with the County Clerk within ten days after he is notified of his election.

4. Same: *Same.*

It is not sufficient to take such oath orally; and where the new director fails to qualify within the time and in the manner directed by the statute, the term of his predecessor will continue, as provided in Mansf. Dig., sec. 6205.

3. Same: *When contracts of, binding.*

Two of the three directors of a school district may bind it by a contract made at a meeting of the directors, attended by the third director, or of which he has had notice. But no contract can be made except at a meeting, and no meeting can be held unless all the directors are present or the absent member has been notified. Notice of a regular meeting is, however, unnecessary where such meetings are held at stated times fixed by the board.

APPEAL from *Clay* Circuit Court, Eastern District.

J. E. Riddick, Judge.

E. F. Brown, for appellant.

1. Sec. 6206 Mansf. Dig. was amended by Acts 1887, p. 231, by changing the time from ten days from October 15th to ten days from the May meeting. Rodery having been notified of his election, and having accepted the office, was sworn in to succeed Baker. This May meeting is clothed with authority to count the ballots and notify any elector of his election as director. *43 Ark., 415; Mansf. Dig., secs. 6224--6.*

Rodney was at least director *de facto.* *9 Am. Dec., 50.*

2. Acts of officers of quasi municipal corporations are of two kinds, judicial and ministerial, and the meeting of a school board for the employment of a teacher is a judicial act, and all the members of the board must be present. *1 Bos. and Pul., 229; 31 Miss., 533; Dill. Mun. Corp., sec. 283, note 1; ib secs. 289, 262-3-4-5.* While two directors may perform a ministerial act (*36 Ark., 446*), yet before a majority can act to bind the district there must be a quorum to transact business, and a majority is not a quorum where the absentee has no notice, except at a regular meeting. *13 Pa., 144; 22 Ohio, 144; 27 Kans., 129; 87 Penn., 395; 47 Mich., 629; 41 N. Y., 312; 11 Ver., 39.*

The employment of a teacher is a judicial act, and a meeting of two without notice to the third is not a quorum. There was no lawful meeting of the board and the contract is void.

J. C. Hawthorne, for appellee.

1. Did Baker's term of office expire immediately on the election of Rodery as his successor? Cites *Acts Adj. Sess. 1875, p. 73; secs. 57, 56, 58; Acts 1887, p. 231; Acts 1883.*

But Rodery never qualified until the 26th of September, 1887. He must take and subscribe the oath of office and file it with the Clerk.

2. A majority of the school directors, without calling a meeting of the three, can enter into a valid contract. *Sec. 6366 Mansf. Dig.; 36 Ark., 446.*

HEMINGWAY, J. Baker, Pollard and McCleskey were directors of the appellant school district, when the annual district meeting convened in May, 1887. Baker was the senior member of the board, and Rodery was elected by the meeting to succeed him. The vote was canvassed and the result declared, when Rodery announced that he would accept the office. At some subsequent time, Rodery took some kind of oral affidavit before a justice of the peace; but he did not "subscribe to the oath prescribed for officers by the Constitution of this State," "and file it in the office of the Clerk of the County Court" until the latter part of the following September. During the interval Baker continued to act as a director. On the day that Rodery's oath was filed with the County Clerk, the appellee made a contract with Baker and Pollard as directors of the district, to teach a school in the district for three months at $40 per month.

The appellee taught the school, the directors refused to pay him, he brought this suit, recovered a judgment and they have appealed. He was notified by Rodery and McCleskey, before he began to teach, that they disputed the validity of his contract and would not pay him if he taught. It does not appear whether the contract was made at a meeting of the board or by the two directors acting separately; but it was not made at a meeting held at the stated time for meetings in that district, and McCleskey had no notice of the meeting, if one was held. The court, in its instructions, charged that notice to him was not necessary.

Two directors can act for the board, if they proceed in conformity to law. *Mans. Dig., sec. 6366.*

This settled, the appeal tenders two questions for our consideration: Was Baker a director when he signed the contract? If so, was it the contract of the board unless made by a majority of the directors, at a meeting of the board, of which the director absent had notice?

Baker's term continued until his successor was elected and qualified. *Mans. Dig., sec. 6205.*

The statute provided that the term of office should begin on the 15th of October, after the election; *Mans. Dig., sec. 6205*; and that the party elected within ten days after the 15th of October, take and subscribe, before a justice of the peace, the oath prescribed for officers by the Constitution and file it with the County Clerk. This was amended by the act of April 4, 1887, which provides that any person elected and accepting the office, should, within ten days after having been notified of his election, file his acceptance with his predecessor, subscribe the oath and file it with the Clerk, and enter at once upon the discharge of his duties. It is insisted that under the law as amended, the term of the member elected does not begin until October; that the officers holding the election are required to return the result to the County Clerk ten days before the court meets for levying taxes, and that it is thereby implied that this tribunal shall canvass the vote for directors and certify the result to those elected, and that as it convenes in October the term cannot begin sooner.

1. SCHOOL DIRECTORS: Election of: Notice.

When the justices of the peace sit with the County Judge, the Constitution directs the scope of their work; which is to assist in levying taxes and making appropriations. *Con. 1874, art. 7, sec. 30.* There is nothing in the nature of this duty, akin to that of canvassing and certifying the vote for officers, and as the statute does not cast it upon them in express terms or by necessary implication we must assume that the return is made to the County Court at the time designated, to enable the court to levy the tax voted and that it has no further duty in the premises. True, the return shows the number of votes cast in favor of each person voted for for director, but this no doubt is intended to furnish the court and all other persons interested, a list of school directors.

2. SAME: Same.

The law did not then prescribe how notice of his election should be given to the person chosen, but we think it was in-

tended that the officers who held the election should give it. In most cases, as in this, the person is present, learns the result and signifies his acquiesence; in such cases, no further notice was deemed necessary. Rodery was present when he was elected, and having announced that he accepted the office, it was unnecessary to give him any formal notice of his election.

3. SAME: Oath of office.

The law required that he qualify within ten days after his election and enter at once upon the discharge of his duties. To qualify, the law required that he should subscribe the oath and file it with the Clerk. These provisions seem wise, and we think they are mandatory; if directors could neglect them and meet their requirements by going before an officer and orally taking some oath, the fiscal officers of the county could never know who composed the various boards of directors, and confusion and disorder would result. As Rodery did not qualify as the law directs, Baker's term continued. *State v. Johnson, 26 Ark., 281.*

4. SAME: Same.

The new director should file his acceptance of the office with his predecessor, but we are not inclined to think that the statute in that regard is mandatory.

5. SAME: When contracts of, binding.

Is it necessary that a contract to be binding on the district, should be executed at a board meeting, at which all the directors are present, or of which the one absent had notice?

We appreciate the practical importance of this question, but entertain no doubt as to its proper solution either on reason or authority. The different members of a board, scattered in the pursuit of their several avocations are not the board. Duties are cast upon boards composed of a number of persons, in order that they may be discharged with the efficiency and wisdom, arising from a multitude of counsel. This purpose cannot be realized without conference between the members of the board with reference to the matters intrusted to them before they take action thereon. After conference, the board will often escape unwise measures, to which each of the members acting separately would have committed themselves

either from haste, immature consideration, the demands of private engagement, or an unwillingness to shorten the allotted span of life under the entreaties of an importunate agent or teacher.

The public select each member of the board of directors, and is entitled to his services; this it cannot enjoy, if two members can bind it without receiving or even suffering the counsel of the other. Two could, if they differed with the third, overrule his judgment and act without regarding it; but he might by his knowledge and reason change the bent of their minds, and the opportunity must be given him.

We conclude that two directors may bind the district by a contract made at a meeting at which the third was present, or of which he had notice; but no contract can be made except at a meeting, and no meeting can be held unless all are present, or unless the absent member had notice.

No notice of a regular meeting is necessary where the board has fixed stated times for them. Our views find support in many adjudged cases. *Aikman v. School Dist., 27 Kan., 129; Hazen v. Lerche, 47 Mich., 626; Schl. Dist. v. Jennings, 10 Ill., Ap., 643; Ballard v. Davis, 31 Miss., 533; Downing v. Rugor, 21 Wend., 178.*

We do not decide that the members of the board may not act separately and without meeting, in a matter which involves no exercise of discretion.

The instructions were erroneous, and the judgment will be reversed and the cause remanded.

COCKRILL, C. J., did not sit in this case.

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ARKANSAS MIDLAND RAILWAY v. CANMAN.

1. INSTRUCTIONS: *In civil cases.*

In charging the jury in civil cases the word "satisfy" should not be used in an instruction, in such connection that it may be taken to mean that a verdict cannot be given on a preponderance of the evidence.

2. RAILROAD COMPANIES: *Negligence: Instructions.*

In an action against a railway company for injuries to a passenger caused by the derailment of a car, the court instructed the jury that if they found "there was a spread or bent rail at the the time and place of derailment," they might "infer negligence from that fact," and that the burden of disproving it was on the defendant. HELD: That the instruction was erroneous, as it assumed that any spread or bend in a rail is negligence, without regard to its sufficiency to cause the derailment of a car, or otherwise impair the safety of a train.

3. SAME: *Care required for safety of passengers.*

Railway companies are required to provide for the safety of passengers all such things as are reasonably consistent with their business and appropriate to the means of conveyance they employ, but they are not required in order to make their roads perfectly safe to incur such expenses as would render the business of carrying passengers wholly impracticable.

SAME: SAME: *Separate trains for passengers.*

It is not the duty of a railway company to run separate passenger trains where its business is not sufficient to warrant it in doing so. But if the business of the company is sufficiently large and profitable to warrant such trains, and the safety of passengers is endangered by having the passenger coaches mixed in the same train with freight cars, then it is the duty of the company to run separate trains.

5. SAME: SAME.

Where it is not the duty of a railway company to run separate passenger trains, the statute [*Mansf. Dig., sec. 5477*] requires it, in forming mixed trains, to place the baggage and freight cars in front of the passenger coaches; and if the use of bell-pulls and air-brakes on trains thus formed is impracticable, the law will not require it. But if the use of such appliances on mixed trains is practicable, and is necessary to the safety of passengers, then the law will demand it.

6. VERDICTS: *Special finding of facts.*

Secs. 5142, 5143 Mansf. Dig. provide that the court may require the jury "in any case in which they render a general verdict, to find specially upon particular questions of fact to be stated in writing," and that when the special finding of facts is inconsistent with the general verdict the former controls the latter, and the court may give judgment accordingly. HELD: That where such special

finding is required, if the general verdict is sustained by any one of two or more interpretations of the evidence, it cannot be impeached by showing that part of the jury proceeded upon one interpretation and part upon others. But if the jury must necessarily agree upon the answer to a particular question before they can find a verdict, and their reply to such question is that they cannot agree, then the reply and the verdict being irreconcilably in conflict, the latter ought not to be received.

APPEAL from *Phillips* Circuit Court.

M. T. SANDERS, Judge.

John J. and E. C. Hornor, for appellant.

1. *Prima facie*, where a passenger is injured without fault of his own, there is a legal presumption of negligence, which the railway company must rebut. *34 Ark., 613.*

The testimony shows beyond question that the appellant was guilty of no negligence. The road was properly and skilfully constructed and maintained; there was no defect in the machinery of the train; no negligence in the method of operating the road; the train was sufficiently and properly officered by competent men; all was done that could have been done. The accident was simply an inevitable casualty against which human skill and prudence could not provide. The presumption of negligence was rebutted, and appellee must make out his case by a preponderance of testimony. *23 A. & E. R. Cas., 492; 28 id., 170.*

2. The preponderance of the testimony is that there was no bent rail; no loose spikes at the point of derailment; and that gravel ballast would not have added to the safety of the passengers if it had been practicable to have ballasted this road with gravel.

3. A failure to provide bell-cord and air-brakes was not negligence. This was a mixed train, and its speed only eight miles an hour. Under these circumstances, even were it practicable to use air-brakes and bell-cord, their absence was not negligence. *Whittaker-Smith Neg. p. 1; Patterson R. Ac. Law, 244; ib., 279; 93 U. S., 291;* nor would their use have contributed in any way to prevent the injury. *95 U. S., 130.*

Having exercised the highest degree of prudence and skill which human foresight could effect, the railroad was not liable. *44 N. Y., 478; 55 Ill., 194; 48 Iowa, 236; 24 A. & E. R. Cases, 405.*

4. The first instruction is erroneous. The rule of law only requires the defendant to *rebut* the presumption by a *preponderance of testimony*, not to *satisfy* the jury. It is only in criminal cases that the jury must be *satisfied*, etc.

5. The second instruction is erroneous in assuming that *any* spread or bend in a rail is negligence; and then in casting the burden on defendant of "*disproving*" it.

6. Review the other instructions and contend they were erroneous and misleading.

7. The court erred in refusing instructions 6, 7, 8 and 9 asked by defendant. The utmost degree of diligence *which human skill and foresight can effect* means the *utmost care and diligence for very cautious persons under like circumstances and conditions.* The law only requires that all companies must provide a safe track and sound machinery and cars, and capable and trustworthy operatives, but they are not required to use every appliance or machine that may be found valuable in diminishing the danger in railroad travel and which may come into general use on the great trunk lines, or lines connecting great cities, or carrying thousands of passengers, etc. Such a rule would bankrupt many railroads. *1 A. & E. R. Cases, 79; 48 N. H., 316; 93 U. S., 297; 28 A. & E. R. Cases, 170; 23 id., 492; 99 Ind., 551; 37 A. & E. R. Cases, 137.*

A railroad is bound to exercise the highest degree of care and diligence which is reasonably consistent with the practical operation of its railroad and the conducting of its business. *34 A. & E. R. Cases 405; 26 id., 229; Story Bailments, sec. 601; 28 A. & E. Cases, 167; 3 id., 343; Patt. R. Ac. Law, sec. 247.*

8. It was error to instruct the jury that if they found negligence on the part of defendant and could not agree what

the particular negligence was, they might so state. *21 Kans., 484; 2 Thomps. Trials, sec. 2670; 12 Pac. Rep., 103; 15 Pac. Rep., 499; 17 id., 791; 38 N. W. Rep., 132.*

9. The answers to the special interrogatories were inconsistent with the general verdict, and the general verdict should have been set aside. *40 Ark., 298.*

10. The verdict was excessive, and instead of allowing a remittitur, the court should have awarded a new trial. *15 Pac. Rep., 499; 3 Bush., 81; 7 S. W. Rep., 492; 38 N. Y., 178.*

E. W. Kimball and *Stephenson & Trieber*, for appellee.

1. The instructions for appellee are copied from instructions approved by this court. *34 Ark., 613; 40 id., 298; 37 id., 519; 51 id., 459.* And as to the measure of damages, see *48 Ark., 396.*

2. Instructions 6 to 9 asked by appellant, were properly refused. They seek to change the rule by substituting "practicability" for "the highest skill and utmost diligence." The rule laid down in *34 Ark., 614*, has been approved in every case since. *36 Ark., 451; 40 id., 298; 51 id., 459; 10 S. W. Rep., 741.* See, also, *117 Ind., 435.*

Railroads are responsible for the slightest negligence. *40 Ark., 298; 14 How., U. S., 486.*

The 8th instruction asked by appellant, that this was a mixed train, and for that reason the company was not bound to exercise the same diligence as would have been required of it, had it been a passenger train only, is against the great preponderance of authority. *58 Me., 187; 33 Wisc., 4; 93 U. S., 291; Thompson Car., 328; 26 Ill., 373; 30 Ill., 9; 51 Ark., 459; 39 N. Y., 227; 23 A. & E. Cases, 498; 104 Ind., 264.*

3. The burden of proving negligence is not shifted back upon plaintiff by the introduction of testimony in rebuttal. *51 Ark., 459; 16 Kans., 200.* But the legal presumption of negligence in this case, was reinforced by direct testimony, that the track spread.

4. Conceding that appellant had a right to have the special interrogatories answered, yet having failed to object to the reception of the verdict at the time, it waived this right. *12 Pac. Rep., 512; 30 Ind., 103; 110 id., 225; 15 N. E. Rep., 227; 99 Ind., 551; 19 Abb. Pr., 314; 21 Mo. App., 618; 42 N. W. Rep., 632; Thomps. on Trials, sec. 2685.*

But it is not necessary that a jury must agree in every case on all the special interrogatories, before its general verdict can be received. It is within the discretion of the court whether a jury will be required to answer any special interrogatories. *Mansf. Dig., sec. 5142.* The entire matter is within the control of the court. Its acceptance of the general verdict was a tacit withdrawal of the special interrogatories. *25 Kans., 236; 19 Abb. Pr., 314.*

See, also, *Thompson on Trials, sec. 2688; 16 Kans., 200; 22 N. E. Rep., 14; 50 Ark., 314; 52 Ind., 505.*

If special findings can, upon any hypothesis, be reconciled with the general verdict, the general verdict will be upheld. *42 Ind., 157; 59 id., 542; 22 N. E. Rep., 14.* The conflict must be irreconcilable. *35 Iowa, 107; 39 Ind., 521; 107 Ind., 485; 113 id., 460; 27 Cal., 360; 12 Pac. Rep., 103; 15 id., 490; 17 id., 791; 38 N. W. Rep., 132; 4 George (Miss.), 47.*

5. The verdict is not excessive. If it was, the remittitur cured that. *39 Ark., 491; 55 Wisc., 121; 62 id., 137; Doyle v. Dickson, 97 Mass.*

BATTLE, J. The Arkansas Midland Railroad Company is a corporation owning and operating a railroad between Helena and Clarendon, in this State, for the carriage of passengers and freight to and from its termini and intervening points. It has never run trains, exclusively, for transporting passengers, but the trains on which it has carried them were composed of passengers and freight cars, and carried freight. On the 12th of January, 1888, for a valuable consideration, it undertook to carry O. G. Canman, as a passenger, on a train composed of

two box cars, a baggage car and two passenger coaches, from Helena to Clarendon. The box and baggage cars were placed in front of the coaches. The train was not provided with air-brakes nor with bell pulls, but was furnished with hand-brakes and two brakemen. Canman took a seat in one of the coaches. The train moved out and was running at the rate of about eight miles an hour, and had gone a short distance when the coach in which Canman was seated left the track, turned over, and severely injured him. For the damages he suffered in consequence of the injuries received he brought this action, and alleged that they were caused by the negligence of the railroad company.

The foregoing facts were proven in the trial. It was also proved that the road-bed of the defendant was ballasted with dirt, and evidence was adduced tending to prove, that it was impracticable to use a bell-rope and air-brakes on a train composed of freight and passenger cars; that the coach that was overturned was derailed at a point where the rail in the track, on the east side, was slightly bent out of line, and "a spike seemed to be pushed towards the east;" and that in leaving the track the wheels on the east side of the coach went between the rails, and the others, on the outside and west of the track.

Among other instructions the court gave the following, over the objections of the defendant, to the jury:

"1. Where a passenger for hire being carried on the train of a railroad company, is injured without fault of his own, the law presumes that the railroad company has been guilty of negligence, which presumption the railroad must remove by evidence, and if the jury find that plaintiff, while a passenger as aforesaid on defendant's train, was injured without any fault of his own, and the defendant has failed to *satisfy* you by the evidence introduced, that it was not through its fault that the accident occurred, or that it was caused by plaintiff's own or contributory negligence, the verdict must be for the plaintiff.

"2. If the jury find from the evidence that there was a spread or bent rail at the time and place of derailment, the jury may infer negligence from that fact, and the burden of disproving it is on the defendant."

The defendant asked and the court refused to give the following instructions: "If the jury find from the testimony that the train on which plaintiff was a passenger at the time he was injured was a mixed train for carrying passengers and freight, and that such train at the time when such injury was received, was not provided with air-brakes or a bell-cord, and if they further find from the testimony that it is not practicable to use air-brakes and bell-cord on such trains, then the jury are instructed that the want of such appliances was not negligence in defendant."

The defendant asked for further instructions as to the degree of diligence, care, skill and prudence it was bound to exercise in the construction, maintenance and operation of its railroad, which the court refused to give.

The result of the trial was a verdict and judgment in favor of plaintiff, and an appeal by the defendant to this court.

1. INSTRUCTIONS: In civil cases.

The first instruction, construed in connection with other instructions given, contained no error. More appropriate words, however, and words adapted to express the idea intended, should have been used instead of the word "satisfy." In order to overcome the presumption of negligence it was not necessary for the defendant to introduce evidence sufficient to convince the jury, beyond a reasonable doubt, that it had not been negligent. "It is never necessary," says the court in *Shinn v. Tucker, 37 Ark., 589,* "in a civil case that a jury should be satisfied of the truth of their verdict, in the sense of resting upon it, confidently. That principle belongs to criminal law. Civil verdicts should be given on preponderance alone, for the party whose evidence, considered altogether, outweighs that of the other as to the facts in issue; or, against

the one having the onus, if, on the whole, the weight seems balanced."

2. RAILROAD COMPANIES: Negligence: Instructions.

The second instruction given was erroneous. It assumes that any spread or bend in a rail is negligence, without regard to its sufficiency to cause the derailment of a car, or in some way or manner impair the safety of the train. It is true that the court instructed the jury, that, if they found that the accident to the train was occasioned by a defect in the road-bed or track, and "that defendant had taken all the means which would have been taken by a cautious and prudent person in the exercise of the utmost prudence to prepare and maintain its road-bed and track where the car was derailed," the defendant would not be liable; but, at the same time, it told the jury, in effect, that, if they found that there was a spread or bent rail at the time and place of derailment, they might infer that the defendant had not used such means and prudence, and was guilty of negligence.

3. SAME: Care required for safety of passengers.

Railroad companies "are bound to the most exact care and diligence, not only in the management of trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers." While the law demands the utmost care for the safety of the passenger it does not require railroad companies to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible peril. They are not required, for the purpose of making their roads perfectly safe, to incur such expenses as would make their business wholly impracticable, and drive prudent men from it. They are, however, independently of their pecuniary ability to do so, required to provide all things necessary to the security of the passenger reasonably consistent with their business "and appropriate to the means of conveyance employed by them," and to adopt the highest degree of practicable care, diligence and skill that is consistent with the operating of their roads, and that will not

render their use impracticable or inefficient for the intended purposes of the same. *Philadelphia & C. R. R. Co. v. Derby, 14 How., 486; Simmonds v. New Bedford & Steamboat Co., 97 Mass., 361; P. C. & St. L. R. R. v. Thompson, 56 Ill, 138; Pershing v. Chicago & R. R. Co., 34 Am. & Eng. R. R. Cases, 405; 2 Wood's Railway Law, sec. 301, pp. 1074, 1079,* and cases cited; *Hutchinson on Carriers, secs. 502, 529,* and cases cited; *Patterson on Railway Accident Law, sec. 247.*

In *Indianapolis & St. Louis Railroad Company v. Horst, 93 U. S., 291,* which was an action against a railroad company for injuries received by the plaintiff while riding on a cattle train, the court, after saying, "the highest degree of carefulness and diligence is expressly exacted" of railway companies, said: "The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from all possible peril, nor such as would drive the carrier from his business. It does not, for instance, require in respect to either passenger or freight trains, steel rails and iron or granite cross-ties because such ties are less liable to decay and hence safer than those of wood; nor upon freight trains air-brakes, bell-pulls and a brakemen upon every car; but it does emphatically require everything necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed."

4 SAME: Same: Separate passenger trains.

Was appellant required to run separate passenger trains on its road? All carriers are not required to adopt a like expensive provision for the safety of passengers. The business of a road might render it unsafe to use a single track, and necessary to the safety of the passengers to use a double one. It would, unquestionably, be safer for all railroads to have two tracks and run all trains going in the same direction over the same track, but this does not make it the duty of all railroads to have double tracks. The provisions required to be adopted by passenger carriers for the safety of their passengers vary as

the exigencies of the traffic and its remunerative character demand and justify. A railway constructed through a thinly settled country, moving but little freight and few passengers, and running its trains at a slow rate of speed, cannot be expected to be equipped and operated in the same manner as is necessary in the case of a railway running through a densely populated territory, and moving a large volume of traffic. So the line of a railroad may be short and the business done by it so small as to make it unreasonable to require it to run separate trains for freight and passengers. If the business done does not warrant it, it would be unreasonable and oppressive to demand it, and it would not be required. But on the other hand, if the business was sufficiently large and profitable to warrant it, and the safety of the passengers was endangered or diminished by having the passenger coaches mixed in the same train with freight cars, it would clearly be the duty of the railway company to run separate trains.

5. SAME: Same.

If it was not the duty of appellant to run separate passenger trains, then, under the statutes of this State, it was its duty, in forming trains, to place the baggage and freight cars in front of the passenger coaches. (*Mansf. Dig., sec. 5477.*) Under such circumstances the law would not require bell-pulls and air-brakes to be used on such trains if it was impracticable to do so. But, on the other hand, if the rule as to care and diligence already laid down required them to be used, it was the duty of the appellant to have done so.

6. VERDICTS: Special finding of facts.

Another question is presented for our consideration. The statutes of this State provide that the court may require the jury "in any case in which they render a general verdict, to find specially upon particular questions of facts to be stated in writing," and that "when the special findings of facts is inconsistent with the general verdict the former controls the latter, and the court may give judgment accordingly." (*Mansf. Dig., secs. 5142, 5143.*) In pursuance of these statutes the court

propounded interrogatories and gave instructions to the jury, on motion of the appellant, as follows:

"1. Was the derailment of the coach in which plaintiff was a passenger caused by the insufficient skill and care of the defendant in constructing its road-bed?

"2. Was the derailment of the coach in which plaintiff was a passenger caused by the want of skill and prudence of defendant in maintaining its road-bed?

"3. Was such derailment caused by the defect in the rolling stock in the defendant's train or any of its appliances?

"4. Was such derailment caused by any negligence in operating such train?

"5. If the jury find negligence in either case they will state in what said negligence consisted.

"6. If the jury find that after the derailment of the car the track was torn up and the ties broken, they will state whether the tearing up of the track and the breaking of the ties contributed to the injury of the plaintiff, and if so, in what way and to what extent."

And against the objection of the defendant, instructed the jury as follows:

"If the jury find negligence and cannot agree what the particular negligence was which caused the derailment of the car, they may so state."

"If the jury find that the derailment was caused by a bent rail or spreading of the track, say so."

To each of the interrogatories the jury responded: "We fail to agree," and further said: "We find negligence on the part of the defendant, but fail to agree as to what particular neglect caused the derailment of the train."

The appellant contends that the court erred in instructing the jury that if they found that the appellant had been guilty of negligence, and could not agree as to what the negligence which caused the derailment was, they might so state; and insists, that before a verdict could have been legally re-

turned against it, there must have been an agreement of the minds of the twelve jurors as to the existence of some particular fact constituting negligence, and that they must have agreed on an affirmative answer to one of the interrogatories. The correctness of this contention depends on the evidence. It is not necessary that a jury, in order to find a verdict, should, in all cases, concur in a single view of a transaction or occurrence disclosed by the evidence. If the verdict is sustained by any one of two or more interpretations of the evidence, it cannot be impeached by showing that a part of the jury proceeded upon one interpretation and a part upon the others. *Murray v. New York Life Ins. Co., 96 N. Y., 614; Chicago & N. W. Ry. Co. v. Dunleavy, 22 N. E. Rep., 15.* But if they must necessarily agree upon the answer to any particular question before they can find a verdict, they would be guilty of a violation of duty if they returned a general verdict without doing so. *Eversole v. Northern Central Railroad Co., 23 Hun., 114.* If they should reply to such a question, to the effect they cannot agree, the court ought not to receive their verdict, as the reply and verdict, in that case, would be in irreconcilable conflict. As to the consistency of the verdict, and the answers of the jury to the interrogatories in this case, we express no opinion.

Reversed.

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ST. L., I. M. & S. RY. v. WORTHEN.

1. TAXATION: *Valuation of property.*

Under the Constitution of this State (article 16, section 5), the Legislature has power to classify property for purposes of taxation, and to provide for the valuation of different classes by different methods.

2. SAME: *Same.*

Such classification under a statute which operates equally and uniformly upon all property of like kind, is not prohibited by the Federal Constitution.

3. SAME: *Same.*

The power to classify property for taxation, makes it competent for the Legislature to provide the mode of assessing the several classes, and the period for which the assessment of each class shall be made.

4. SAME: *Same: Assessment of railways.*

The separate classification of railway property for taxation, and its assessment by an instrumentality different from that employed in the valuation of other property, are justified by its peculiar nature and uses.

5. SANE: *Same.*

The provisions of the revenue act of 1883, embraced in Mansf. Digest, secs. 5647-5659, are not unconstitutional on the ground that they require the tracks and "rolling stock" of railways to be assessed by a State Board of Commissioners, while the act provides for the valuation of all other property by County Assessors.

6. SAME: *Same.*

It is also competent for the Legislature to require the annual assessment of railway tracks, while other real estate is required to be assessed only once in two years—the distinction thus made being justified by the dissimilarity of such tracks from all other real property.

7. SAME: *Same.*

The revenue act having fixed the time and place for the meeting of the State Board for the valuation of railway tracks, and no obstruction existing under the statute to the appearance of any one before the board to assert his rights, the failure to require that notice of the board's meeting shall be given to the railroad companies, does not render the act obnoxious to the charge of taking property without due process of law.

8. SAME: *Same.*

Nor is said statute unconstitutional because it fails to provide for an appeal from the valuation of railroad property fixed by the State board.

9. SAME: *Same.*

Where no fraud is charged in the assessment of railroad property, a Chancellor will not be warranted in restraining the collection of a tax levied upon it, merely because in his judgment the assessing board has over-valued it.

APPEAL from *Pulaski* Chancery Court.

D. W. CARROLL, Chancellor.

This suit was brought by the St. Louis, Iron Mountain and Southern Railway Company against R. W. Worthen, as Collector of Pulaski County, and others, to enjoin the collection of taxes levied upon the company's railway "track" and "rolling stock" in the various counties through which its road extends. The complaint alleges that all of plaintiff's property was duly assessed for the year 1885; that plaintiff duly made its report to the commissioners as required by law, in March, 1886, of all its property, giving its value, etc., as required; that the commissioners proceeded thereafter to appraise plaintiff's property, and raised said appraisement and assessment greatly in excess of the value as appraised in 1885, the year before. The bill then charges: "First—That the meeting of the Board of Railroad Commissioners was without notice to plaintiff. Second—That, regardless of the fact that it had appraised and assessed plaintiff's 'railroad tracks,' classed by the revenue law as 'real estate' in April, 1885, it did, on April 1, 1886, arbitrarily, unjustly and illegally, assess the railroad tracks denominated 'real estate,' for the year 1886, by doubling the values upon said property. Third—That the law authorizing the appraisement of plaintiff's railroad tracks, denominated 'real estate,' every year, was in violation of section 21, article 2, of the Constitution of Arkansas, and of the fifth and fourteenth amendments to the Constitution of the United States. Fourth—That the law under which the assessment was made was void, because it deprived plaintiff of all right of appeal." The bill, after tendering and offering to pay into court the taxes upon its personal property amounting to about $50,000, prayed for a temporary injunction, restraining the said

several Collectors from attempting to collect the tax so made under said illegal assessment, and upon final hearing that a perpetual injunction be granted. The defendants filed a demurrer upon the ground that there was no equity in the bill. The court sustained the demurrer, and plaintiff declining to amend, the bill was dismissed.

Section 5647 *et seq.*, Mansf. Dig., contain the following provisions with reference to the taxation of railroad property:

1. A sworn schedule or statement of such property is required to be filed annually with the Secretary of State, by every person, company or corporation owning or operating a railroad in the State. 2. The board, consisting of the Governor, Secretary of State and Auditor of Public Accounts, at a time and place fixed by law, are required annually to examine such lists or schedules, and to appraise the value of such property. There is no provision in the law requiring the giving of any notice to the railroads, nor for any formal public hearing, contest, or review of the board's action, nor is any appeal to any revisory board or court provided. In short, the board's finding or assessment is final and conclusive. The law provides that all property, other than railroad "rolling stock" and "tracks," shall be assessed by the County Assessor; real estate, biennially, and personalty, annually. The statute makes railroad "tracks," realty, and "rolling stock" personalty.

Dodge & Johnson for appellant.

Secs. 5647 to 5784 Mansf. Dig. are unconstitutional, and void on three grounds:

First—Because the assessment, according to which they are levied, was made in pursuance of the discriminating provisions of the State laws, in the enforcement of which the company's "railroad track," classed by law as "*real estate*," was assessed each and every year, when all other real estate, other than railroad, was only assessed once every two years, thus subjecting railroad real estate to an unjust proportion of the

public burdens, and denying it the equal protection of the laws guaranteed by the fifth and fourteenth amendments of the Federal Constitution.

Second—Because the assessment was made in pursuance of certain provisions of the State laws which gave (*a*) no notice to the railroad company; nor (*b*) afforded any opportunity to be heard respecting the value of the property: nor (*c*) afforded any remedy for the correction of any errors by the Board of Railroad Commissioners, by appeal or otherwise: nor (*d*) required the board to assess railroad property in the same manner as individual property was assessed; nor (*e*) required said board to adopt any rule or regulation in the assessment of railroad property as is done and required of County Assessors in assessing all property other than that of railroads, thus depriving it of its property without that due process of law guaranteed by the fifth and fourteenth amendments of the Federal Constitution.

Third—Because said assessment was made under certain State laws violative of section 21, article 2, and section 5, article 16, of the Constitution of Arkansas.

The act denies to railways the equal protection of the laws, and deprives such persons of their property without due process of law.

Assuming that corporations are persons within the meaning of the fourteenth amendment to Constitution United States, the discriminations complained of are:

1. A different manner of assessment. Sec. 5676 Mansf. Dig. provides that the real estate *of all persons* other than railroads, shall be assessed *every two years*.

Under sec. 5650 "railroad tracks" are declared for the purpose of taxation, to be "real estate," yet by sec. 5652 railroad tracks are assessed *every year*. This is discrimination. *Sec. 1, art. 14, Const. U. S.; sec. 2, art. 2, and secs. 3 and 20, art. 2, and sec. 5, art. 14 Const. Ark.; 27 Iowa, 42,*

2. There must be uniformity in the mode of assessment as well as equality in the rate of taxation. *Cooley on Const. Lim., 3d ed., p. 622; 13 Fed. Rep., 733; 9 Dana, 513; 3 Ohio St., 1; 41 Cal., 335; 25 Ark., 295; 32 id., 31; 2 id., 299; 5 id., 205; 103 U. S., 408; 5 Allen, 436; 12 id., 237; 73 N. C., 474; 118 Mass., 389; 13 Am. Law. Reg., N. S., 443; 36 N. J. Law., 70.*

3. Denial of appeal from the assessment as made by the Board of Railroad Commissioners.

All property owners *other than railway corporations*, have this right of appeal. *Mansf. Dig. secs. 5687-9, 5692, 1436.* As to railroads no provision whatever is made for an appeal, the action of the board is final, and they have no redress. *6 Cranch, 133-5.* The Constitution guarantees the right of appeal in all instances. *Sec. 15., art. 7, and secs. 33 and 35, art. 7; secs. 37, 42, 61, 52, art. 7, Const. Ark.; 5 Ark., 362.*

4. The assessment is made without notice.

5. None of the safeguards which the laws throw around the valuation of property other than railroads are applied. *Mansf. Dig. secs. 5668-9, 5674-5, 5672, et seq.* And the right of appeal is expressly granted. *Sec. 5687.*

Now, what are the provisions of law as regards the assessment of railroad property by the Board of Railroad Commissioners?

1st. The board are required to assess the personal property of railroads *once every year.* (*Sec. 5652, Mansfield's Digest.*)

2d. It shall also assess the real estate denominated Railroad Track, *once every year.* (*Sec. 5652.*)

3d. The assessment shall be made according to the opinion of the board, and it is left discretionary to put any valuation it may see proper, *in its opinion,* upon railway property. There is no rule of guidance whatever, no limit placed to the judgment, opinion or discretion of the board. (*Sec. 5652.*)

4th. The value of railway property is not limited to its

true market value, but is limited to such a valuation as may, in the *opinion* of the board, seem *fair* or *reasonable*.

5th. No appeal is allowed from the Board of Railroad Commissioners; their appraisement is final and irrevocable.

6th. No notice is given of the final assessment when made by the board, prior to the certification of the lists to the several counties.

Such seems to us to be a difference fatal to the validity of the statute under discussion.

W. E. Atkinson Attorney General, and *T. D. Crawford*, for appellee.

1. The act, it would seem, was copied from the Illinois act, which is quoted in *92 U. S., 578*. Similar acts have been passed in many of the States, citing them, and have been upheld by the courts. It has been frequently attempted to show that the acts are within the prohibition of the Constitution as to *uniformity of taxation*.

That the Legislature can classify property for the purposes of taxation, is clear. *39 Ark., 353*. The Legislature is left free to direct the manner in which the value is to be ascertained, so that it make the value equal and uniform throughout the State. *4 Wheat., 430; 101 U. S., 160; 46 Wisc., 176; 60 Cal., 12; 92 U. S., 601; 115 U. S., 331; 81 Ky., 495; 67 Iowa, 199*.

2. Due Process of Law.

The act does not deprive railroads of their property "without due process of law." This phrase and "the law of the land" mean the same. *Sec. 21, art. 2, Const. 1874*. And as applied to proceedings for the levy and collection of taxes, does not imply or require the right to such notice and hearing as are considered essential to the validity of the proceedings and judgments of judicial tribunals. *92 U. S., 575–618; 81 Ky., 511; 115 U. S., 331*.

As sustaining the rule laid down in *115 U. S., 331*, which is conclusive upon every question raised in this case, see *76 Ill., 598; ib., 201; 48 N. J. L., 146; 65 Ala., 142; 119 Ill., 182; 9 Mo. App., 458; 127 Ill., 27; ib., 627.*

In answer to the complaint that the board doubled the assessment of 1885, the road having the same mileage, see *127 Ill., 627.*

COCKRILL, C. J. This appeal raises the question of the constitutionality of the provisions of the revenue act of 1883, creating the State Board of Railroad Commissioners for the assessment of railway property for taxation. *Secs. 5647, et seq., Mansf. Dig.* It is an attempt on the part of the railway to enjoin the collection of taxes on account of the invalidity or nullity of the assessment.

The legality of the proceedings of the Board in assessing railway property was affirmed by this court in the case of *Ry. v. Worthen, 46 Ark., 312*, and by the Supreme Court of the United States in *Huntington v. Worthen, 120 U. S., 97;* and thus the constitutionality of the act creating the board was impliedly recognized by both tribunals; but the question was not argued in either case, and we are now asked to overthrow the act because (1), it authorizes the assessment of railways by a different instrumentality from that employed to assess other property; because (2), it authorizes the assessment of "railway tracks" (a term which includes the right of way) annually, whereas other real estate is assessed biennially; because (3), it is said the board meets without notice to the railways; and because (4), no appeal is provided from the assessment of the board, whereas that privilege is accorded to the owners of all other property.

Similar statutory provisions exist in many States of the Union, and numerous decisions are reported from various States and from the Supreme Court of the United States, affirming the validity of the acts, in some one of which every

question here raised has been pressed upon the attention of the court, but no case is cited denying their legality.

1. TAXATION: Valuation of property.

The Constitution of this State provides that the value of property for taxation shall be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform. *Sec. 5, art. 16.* There is nothing in this or any other provision of the Constitution which either expressly, or by necessary implication denies the Legislature the power to classify property for the purpose of taxation; *Railway v. Worthen, 46 Ark., 330;* and that classification is not prohibited by the Federal Constitution, so long as the law operates equally and uniformly upon all property of like kind, is definitely settled by the Supreme Court of the United States. *State Railroad Tax Cases, 92 U. S., 801; Cummings v. Bank, 101 ib., 100; Kentucky Railroad Cases, 115 ib., 321.*

2. SAME: Same.

3-6. SAME: Same: Assessment of railways.

From the peculiar nature of railroad property, its dissimilarity in use and value from the mass of other property, and its continuous extent through different localities, it is commonly regarded by the States that it cannot, in justice to the owners, be as fairly and uniformly valued by the numerous local instrumentalities provided for assessing other property, as by a State board created for the purpose. The industry of the Attorney General has furnished us references to the statutes of a large number of States showing that the practice of assessment of railways as units by State boards is almost universal.

In considering a statute of the State of Kentucky, which pursued this system, the Supreme Court of the United States, in the case cited, says: "There is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods. The rule of equality in respect to the subject, only

requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the method and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination, in this respect, which the discretion of the Legislature has seen fit to impose."

In a like case in California it was said: "The Constitution of the State requires all property to be assessed at its actual value. We are unable to see how the fact that the value of one kind of property is to be ascertained by one officer or board, and the value of another kind of property by another officer or board—each clothed with the duty and responsibility of ascertaining the actual value—can be held to operate a deprivation of legal protection to the owners of either kind of property. The State board in the one case, the Assessors and county boards in the other, are but different instrumentalities through which the same result is reached; the fair and just valuation by reference to the same standard, and, therefore, the equal and uniform valuation of property for purposes of taxation." Authorities might be multiplied to the same effect.

The objection of the railways to be placed in a class to be dealt with separately by the Legislature is thus seen to be without foundation or authority. But the power thus to classify makes it competent for the Legislature to provide the periods for the assessment of each class, as well as the mode. It is competent to provide that one kind of property shall be assessed every year, while the requirement reaches another only once in two years. Such a distinction between real and personal property is made without objection; but the difference between a railway with its equipments and real estate is perhaps not greater than between real estate and some species of personalty. The fact that this statute denominates railway

tracks as real estate, does not obliterate the difference between them and ordinary farm lands, any more than it would in fact convert railroads into personalty to call them so, as was done for the purpose of taxation by the Acts of 1871 and 1879. *Acts 1871, p. 135; Acts 1879, p. 40.* The nature of the property justifies classification and separation from the body of the real estate upon the grounds that justify the separate classification of realty and personalty. The requirement of an annual assessment of railways affords, therefore, no greater cause for complaint than does the like requirement for personal property, and the complaint of discrimination is groundless. *Railroad v. Board of Supervisors, 67 Iowa, 199.*

7. SAME: Same.

More baseless than either of these objections is the argument that the company's property is taken without due process of law because no notiee is given the company and no opportunity to be heard before the assessment becomes fixed. The time and place for the meeting of the board is fixed by the statute and notice by statute is practically sufficient, and all that can be required in such proceedings. *Pulaski Equalization Board Cases, 49 Ark., 518.* As was said in the *State Railroad Tax Cases, 92 U. S., supra:* "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked."

8. SAME: Same.

The objection urged here to the failure to provide for an appeal from the valuation fixed by the State board, was disposed of in the Kentucky Railroad Tax Cases, cited above, and what is there said of the relative rights of the owners o railways, and of the owners of other property, and of the power of the tribunals which fix the values of the several classes of property for taxation, is so nearly applicable under the laws of this State, that we quote the language as disposing of the question. "The final point of objection seems to be reduced to this. In the case of ordinary real estate it is

said, when the Assessor has made his valuation, it is submitted to a board of supervisors, who may change the valuation, but not so as to increase it without notice to the tax-payer, and an opportunity for a formal hearing, upon testimony to be adduced under oath, and with a right of appeal on his part, first to a County Judge, and again, if the amount of the tax is equal to fifty dollars, to the Circuit Court. This is contrasted with the proceedings in the case of railroad property before the board of railroad commissioners, in which it is alleged there is no notice of an intended change in the valuation returned by the company, and no appeal allowed if it is increased.

"The discrimination, however, is apparent rather than real. An examination of the statutes shows, that the original valuation of the Assessor, in case of ordinary real estate, is conclusive upon the tax-payer, no matter how unsatisfactory; and the appeal allowed is only from the action of the board of supervisors, in case they undertake to increase the valuation made by the Assessor. But in the case of railroad property no board has the authority to increase the original assessment made by the railroad commissioners, and there is, therefore, no case for an appeal similar to that of the owner of ordinary real estate.

"But were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws, does not require in any case, an appeal, although it may be allowed in respect to other persons, differerently situated. This was expressly decided by this court in the case of *Missouri v. Lewis, 101 U. S., 22, 30.* It was there said by Mr. Justice Bradley, delivering the opinion of the court and speaking to this point, that 'the last restriction, as to the legal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to the sub-

ject matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress.' The right to classify railroad property as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the Constitution of the State in its Legislature, necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws."

The provision contained in the Kentucky act for the enforcement of the tax by proceeding in an ordinary court of justice, does not alter the case as to the questions presented, for in such proceedings the valuation fixed by the board is conclusive in the absence of a statutory provision authorizing inquiry into their finding, and it could not be assailed unless for fraud or want of jurisdiction (*Ry. v. Stockey, 119 Ill., 182*) —grounds upon which the court of equity could have acted in this case as readily as could the Kentucky tribunal in the case instanced. *Ry. v. Donohoe, 122 Ill., 27; Ry. v. People, ib., 506.*

9. SAME: Same.

Much complaint is made in the abstract and brief of appellant over the fact that having the same mileage in 1885 and 1886, the board nearly doubled the assessment of the former year in the latter. No fraud is charged; and it is notable in this case, as in those of the individuals who complained in the cases reported in *49 Ark., 518*, that the board of equalization had greatly increased their assessment, that there is not even a charge of over-valuatiou of property. The only inference to be deduced from the increase in the assessment, standing alone, as was said in the case of *The Railroad v. The People, 122 Ill., supra*, would be that the assessment for the first year

was too low or that the property had since increased in value, or that both facts existed.

A mere discrepancy in judgment, however, between the members of the board and the Chancellor to whom the application may be made for injunction, would not warrant interference on the part of the latter.

The Chancellor was right in declining to interfere with the collection of the taxes, and the decree is affirmed.

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RUSSELL v. TATE.

1. MUNICIPAL CORPORATIONS: *Illegal appropriation of funds.*

Under the laws of this State the council of a town is without power to appropriate money to aid in the building of a court house for the county, to be located in such town.

2. SAME: *Same: Remedy: Parties.*

The tax-payers of a town may maintain a suit in equity to prevent the misapplication of its funds. And chancery has power in such case to grant affirmative as well as injunctive relief. (*Mansf. Dig., sec. 929.*)

3. SAME: *Same.*

After the commencement of an action brought to obtain the cancellation not only of a warrant issued pursuant to such illegal appropriation, but also of the appropriation itself, and to recover a sum paid out thereon, the jurisdiction of the court cannot be ousted by the act of the defendants in recalling and cancelling the warrant.

4. SAME: *Same.*

The aldermen of an incorporated town, having with others executed a bond binding themselves to build within the corporate limits, a court house to be given to the county, appropriated the sum of $1000 out of the municipal funds to aid in such building. Part of the sum thus appropriated was immediately paid by the Treasurer on the order of the Mayor, and a warrant was issued for the residue. In an action brought by tax-payers of the town against the Mayor, Aldermen and Treasurer, to cancel the outstanding warrant, etc., and to recover the sum paid out, HELD: That the taking of such money by the defendants was the conversion of a trust fund, and they were liable therefor.

APPEAL from *Pope* Circuit Court in Chancery.

ROBERT TOOMER, Special Judge.

Suit in equity by certain inhabitants and tax-payers of the Town of Russellville, against appellants, the Mayor, Aldermen and Treasurer of that place, to enjoin the payment of a certain order upon the Treasurer, and to have restitution of certain moneys paid out. A temporary restraining order was granted. Defendants, after the institution of the suit, called in and cancelled the outstanding warrant, and moved to dissolve the injunction; moved to dismiss the complaint so far as it sought a recovery of the money paid out, upon the ground that equity had no jurisdiction of that; demurred, first, for want of parties; second, because complaint does not state a cause of action in favor of plaintiffs; third, because the court had no jurisdiction of the subject matter of the complaint; 4th, because there was no equity in complaint as to the restitution of the money paid out. All these were overruled, and defendants answered, setting forth at great length the matters raised by the demurrer, and in addition thereto that defendants had submitted the propriety of their conduct to the citizens of the town at the next ensuing municipal election, and had been re-elected upon that issue by a large majority. The facts were about these: A proposition to change the county seat of Pope County from Dover was submitted to the people of that county in this form:

1st. Shall the county seat be changed?

2d. Shall it be changed to Russellville?

3d. Shall it be changed to Atkins?

As an inducement to the people to vote for a change to Russellville, certain citizens agreed, and gave bond in the sum of $50,000, to build a court house, jail, etc., and give them to the county free of cost. By the vote, Russellville was selected as the county seat, and the obligation to build the court house, etc., devolved upon the subscribers to the contract. *The five aldermen of the town*, with others, *were signers of the bond.* While this court house was being constructed by the individuals who agreed to build it and give it to the county, a meet-

ing of the City Council was called and there were present the Mayor, five Aldermen, and City Treasurer. A resolution was offered that $1000 be appropriated to help build the court house, and that the Mayor draw his warrant on the Treasurer for that sum in favor of the chairman of the building committee, who was one of the bondsmen and an Alderman. This was adopted. The Treasurer was called upon to state what amount of money he had. He answered $675. The Mayor drew two warrants in favor of the chairman of the building committee, one for $675, which was paid about 10 o'clock that same night; the other for $325, which was not paid for want of funds.

The bill, as before stated, sought a cancellation of the outstanding warrant, and appropriation, and the restitution of the $675 paid to the building committee.

Decree conformably to the prayer of the bill, and appeal by defendants.

Wilson & Granger and *G. W. Shinn*, for appellants.

1. The court erred in refusing to dismiss the injunction branch of the case. There was no *necessity* for the injunction proceedings, and that part of the complaint was a mere pretext for getting into court on the equity side. A bare allegation of threatened injury is not sufficient. Facts must be stated, to show the apprehension of injury is well founded. *22 Cent. L. J., 39, and note.*

2. The claim to recover the $675 was a purely legal one, and to give a court of equity jurisdiction it must appear that there is no remedy at law. *2 Story Eq., 156.* A mandatory injunction will not be granted when the thing is accomplished, and there is a remedy at law. *2 Green (N. J.) Chy., 379; 20 Cent. L. J., 236, 244, notes 21, 23, 24.* Nor will equity, because it has jurisdiction of one cause of action, retain the case to decide one purely legal. *11 N. E., 839; 15 id., 740–1; Pom. Eq. Jur., sec. 178; 10 Atl. Rep., 884; 1 Ark., 42.*

3. The *real* parties in interest must be plaintiffs. *Mansf. Dig., sec. 4933; Newm. Pl. and Pr., 60, 61, 77.* The money belonged to the town, and the right of action was in it, and not in private citizens. *2 Dill. Mun. Corp., sec. 729, note 1, and 3, sec. 730, note 1; ib., 730 a and 730 b, and note 1; 4 Pac. Rep., 1017; 20 Cent. L. J., 235, par. 17; 2 Dill. Mun. Corp., secs. 732, 735, note 1, 736; 14 N. Y., 371; 25 Ark., 301; 2 N. E., 736; 4 id., 10; 9 id., 407.*

This was not an "illegal exaction" under section 13, article 16, Constitution. *Bouv. Dic., 490; 34 Ark., 603; 39 id., 412.*

J. G. Wallace, for appellees.

1. Appellants, as the Town Council, had no power to appropriate and use the revenues and moneys of the town to build a court house for the county. *Mansf. Dig., sec. 764; 31 Ark., 462; 45 id., 337; 108 U. S., 110; 20 Wall., 655; art. 1, sec. 5, Const.; 34 Ark., 246; 33 id., 704.*

2. When a court of chancery acquires jurisdiction for one purpose, it will dispose of the whole case. *37 Ark., 287; 1 id., 85; 34 id., 410; 29 id., 612; 14 id., 50.* The right to injunction was within the letter of the statute. *Mansf. Dig., sec. 929.*

The remedy for the recovery of the $675 is purely of equitable jurisdiction. *Const., art. 16, sec. 13; Mansf. Dig., secs. 929, 3731; 34 Ark., 607.*

Equity always takes cognizance of breaches of trust. *18 How., 331; Bisp. Eq., sec. 49; 1 Sto. Eq., secs. 60 and 534.* If the money has been paid, courts of chancery will decree restitution. *2 Story Eq., sec. 1252; Dill. Mun. Corp., sec. 729–30; 6 Allen, 152.*

3. Any person owning taxable property may bring his bill in chancery. *Mansf. Dig., sec. 929; 33 Ark. 704; 6 Allen, 52; Cooley Torts, 518; 18 How., 331; Story Eq., sec. 1252 (a); Dillon Mun. Corp., sec. 730 and notes.*

SANDELS, J. An analysis of the case shows six questions for decision:

1. MUNICIPAL CORPORATIONS: Illegal appropriation of funds.

First—Has equity jurisdiction as to the matters stated in the bill?

Second—Are residents and tax-payers proper parties plaintiff?

Third—May affirmative as well as injunctive relief be had in such a proceeding?

Fourth—Was the appropriation of the $1000 by the council valid or void?

Fifth—Are Aldermen, as such, liable to an action for votes given upon measures before them?

Sixth—What liability, if any, did the Mayor, ordering, the Treasurer making, and the council receiving the payment, incur by reason of this transaction?

The so-called appropriation was a nullity. *Jacksonport v. Watson, 33 Ark., 704; Sykes v. Mayor, 55 Miss., 115; sec. 5, art, 12, Const.; Minot v. West Roxbury, 112 Mass., 1.*

2. SAME: Remedy: Parties.

The officers of the city are trustees in the management and application of the funds and property of the people of the city. *2d Dill Mun. Corp., 915.* The application of municipal funds to illegal purposes by them is a breach of trust. *2d Dill. Mun. Corp., 919,* and notes. Equity has jurisdiction to prevent the misapplication or waste of trust property. *2 Story Eq. Jur., 1252,* and note. The fact that after the suit was brought the City Council recalled and cancelled the unpaid warrant did not oust the jurisdiction of the court. That was but part of the purely equitable relief demanded. It was desired to prevent its reissue and cancel the appropriation. Besides, under our chancery system had the cancellation of the warrant been the only original ground of equity jurisdiction, it was not lost. *Price v. State Bank, 14 Ark., 50.*

Suits by tax-payers against towns and their officers to prevent or remedy misapplication of town funds are not only allowed by statute but it is the prevailing doctrine in America,

that tax-payers may maintain them, in the absence of statute. Their relations to the municipality are analogous to those of stockholders to a private corporation. *Mansf. Dig., sec. 929; Jacksonport v. Watson, 33 Ark., 704; Crampton v. Zabriski, 101 U. S., 601; 2 Dill. Mun. Corp., 914–915; Blakie v. Staples, 13 Grant (Canada), 67*, cited in note on *p. 902; 2 Dill. Mun. Corp.*

3. SAME: Same.

There is no foundation in the authorities for the claim that the power of chancery is only injunctive. It would be a reproach to justice if it were true. In the present case the appropriation was made, the warrant was drawn, and the money paid, by the Treasurer before an attorney could have comprehended the situation and have written the caption of a complaint. Chancery has ample power to prevent further wrong and require reparation for that which has been done. *2 Story Eq. Jur., 1252*, and notes; *Frost v. Belmont, 6 Allen, 152; Citizens' Loan Assn. v. Lyon, 29 N. J. Eq., 110; Attorney Genl. v. Poole, 1 Craig & Ph., 17; People v. Fields, 58 N. Y., 491; Attorney Genl. v. Boston, 123 Mass., 460; Atty. Genl. v. Dublin, 1 Bligh. 312; 2 Dill. Mun. Corp., 909–912.*

4. SAME: Same.

As against the liability of these defendants, it is contended that a City Council being in some sort a legislative body, its members are not liable for the erroneous exercise of their discretion in voting upon measures before them. This is true. *Jones v. Loving, 55 Miss., 109; Freeport v. Marks, 59 Pa. St., 253.*

But where, after exercising their discretion in voting $1000 of the money of the town, to pay an obligation which they and a few others had bound themselves to discharge, they or their building committee *took the money*, it was a conversion of trust funds, for which each of them, as also the Mayor who ordered, and the Treasurer who made, the payment, are liable. *Frost v. Belmont, 6 Allen. 152; Citizens' Loan Assn. v. Lyon, 29 N. J. Eq., 110; Atty. Genl. v. Poole, 1 Craig & Ph., 17; Atty. Genl. v. Wilson, 1 Craig & Ph., 1; Blakie v. Staples, 13 Grant (Canada), 67.*

The vote of confidence given appellants at the next ensuing city election does not effect their liability to repay the money which they took from the city treasury.

Affirmed.

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BLYTHE V. JETT.

1. EXEMPTION: *Of personal property.*

Prima facie all the personal property of a judgment debtor is subject to execution, and if he claims that part of it is exempt, his right to such exemption must be shown affirmatively.

2. SAME: *Same: Burden of proof.*

Where a sale of such property by the debtor is attacked for fraud, and the vendee claims that the property would not have been subject to execution if the sale had not been made, the burden is upon him to establish that fact. [Upon this point Erb v. Cole, 31 Ark., 554, is over-ruled.]

APPEAL from *Johnson* Circuit Court.

GEORGE S. CUNNINGHAM, Judge.

A. S. McKennon, for appellant.

1. Mrs. Harris, a married woman, was entitled to her chattel exemption of $500. *Sec. 2. art. 9, Const., 46 Ark., 159.*

2. It was incumbent on appellee, who attacks the sale, as made to defraud creditors, to show that if it had not been made, the goods would have been subject to seizure and sale on execution, for if not, Harris' creditors were not injured or defrauded. *Erb v. Cole & Dow, 31 Ark., 554.*

The appellee, pro se.

The evidence clearly shows that the personal property of Mrs. Harris was worth more than $500.

HUGHES, J. Appellant purchased of Mrs. O. J. Harris, a married woman, doing business as a merchant in Clarksville, Johnson County, Arkansas, the property in controversy in the suit. Mrs. Harris being indebted and insolvent, at the date of the sale, an execution was levied by the appellee, as Sheriff of

Johnson County, upon the property, to recover which Mrs. Blythe, the appellant, brought an action of replevin before a Justice of the Peace, and recovered judgment, from which appellee appealed to the Circuit Court, where judgment was rendered in his favor, from which appellant appealed to this court. No instructions appear in the record. Appellant's motion for a new trial in the Circuit Court was upon the grounds, that the verdict was contrary to the law; that the verdict was contrary to the evidence too.

Appellee, in his answer to the complaint of appellant, states that the sale by Mrs. Harris to appellant, was made for the purpose of hindering and delaying the creditors of the said Mrs. O. J. Harris. Appellant contends that the property was exempt from execution for Mrs. Harris' debts before the sale, and that as the execution creditors could not have taken it while owned by her, it is exempt in the hands of her vendee; that the burden of proof was upon the execution creditors to show that the property was subject to execution before the sale.

There was evidence tending to show that the property of Mrs. Harris at the date of the sale, was near $600 in value, and upon the other side the evidence tended to show that its value was less than $500. It appeared that she owed $221.66, and that she reserved from sale $125 worth of her property; that the appellee purchased the property in controversy through J. N. Brown-acting under the employment and direction of her husband and general agent, E. D. W. Blythe, for $273.66; that Brown at the time of the purchase knew of Mrs. Harris' embarrassed financial condition, and that E. D. W. Blythe knew that R. C. Redding had been employed to recover the goods for Mrs. Harris' creditors from E. D. W. Blythe, who had levied an execution upon them. There was testimony upon which the jury might have found the sale by Mrs. Harris to be fraudulent. Notice to appellant's agent was notice to her. There was no evidence that Mrs. Harris was a resident of the State at the

date of the sale; therefore, under the proof in the case, had she not sold the property, the claim that it was exempt from execution could not have been maintained by Mrs. Harris herself, as only a resident of the State can claim the exemption. *Guise v. State, 41 Ark., 249.*

It is settled in the decisions of this court that as to property exempt from execution there are no creditors; that as they cannot sell it under execution, they are not injured by a sale of it by the owner, and are not concerned with the motives which may prompt the sale. *Clark & Wife v. Anthony & Wife, 31 Ark., 546; Erb v. Cole & Dow, 31 Ark., 557; Stanley et al. v. Snyder, 43 Ark., 434; Bogan v. Cleveland, ante.*

When property seized under an execution is claimed as exempt, upon whom does the burden of proof rest?

EXEMPTION: Burden of proof.

In *Erb v. Cole & Dow, 31 Ark., 554,* this court decided that it is incumbent on a party who attacks a sale on the ground that it was made to hinder, delay or defraud creditors, "to show that if it had not been made the goods would have been subject to seizure and sale upon execution." But after careful examination and consideration, we cannot approve this decision, and are constrained to overrule the same as to the principle announced in the quotation made above.

Under our statute a debtor, claiming property to be exempt from execution, is required to make a schedule of all his or her property, including moneys, rights, credits and choses in action, specifying the particular property claimed as exempt under article 9 of the Constitution of 1874, and file the same with the officer issuing the execution, after having given five days' notice in writing to the opposite party. *Sec. 3006 Mansf. Dig.*

"*Prima facie* all the personal property of a judgment debtor is liable to levy and sale upon execution. If he would claim exemption for any of said property, he must bring himself and his property within the exceptions of some statute by proper proof." *Dains v. Prosser, 32 Barb., 290; 14 Johnson*

432; 22 Vt., 431; 41 Barb., 417; 9 Iowa, 320; 36 Cal., 542; sec. 585, Smith's Homesteads and Exemptions; sec 879, Thomson on Homesteads and Exemptions; 10 Cal. 393; 4 Lansing, 264; 57 Barb., 640; 3d Sneed, 659; 5 Hump., 56; 7 J. J. Marshall, 322; 9 Hunn., 42.

It devolved upon the appellant claiming that the property which she bought of Mrs. Harris was exempt from execution for Mrs. Harris' debts before the sale, to affirmatively show this fact. To have shown this, it would have been necessary to prove, in addition to other matters, that Mrs. Harris, at the date of the sale, was a resident of the State; and this was not done. *Art. 9, sec. 1, Const. 1874; sec. 3006 Mansfield's Digest; Guise v. State, 41 Ark.*

The judgment of the Johnson Circuit Court is affirmed.

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NUNNALLY V. BECKER.

1. WITNESSES: *Competency of parties: Transaction with intestate.*

In a proceeding against an administrator to obtain the allowance of a claim against the estate of his intestate, for money alleged to have been converted by the latter, testimony of the plaintiff to the effect that he delivered to the decedent a box containing the money, to be deposited in his safe, is not admissible for the reason that it relates to a "transaction" with the intestate within the meaning of the Constitution, which provides that "in actions by or against * * * administrators, * * * neither party shall be allowed to testify against the other, as to any transactions with or statements of the * * * intestate. * * * (*Sched. Const., sec. 2.*)

2. SAME: *Same.*

Nor is the plaintiff in such case a competent witness to prove that the box was in the safe, if his knowledge of that fact was derived solely from the transaction between himself and the defendant's intestate.

APPEAL from *Lee* Circuit Court.

M. T. SANDERS, Judge.

Becker, as administrator of M. Kohn, deceased, appealed from a judgment of the Probate Court, allowing a claim

against the estate of his intestate in favor of Nunnally. The claim was for money alleged to have been deposited with the deceased and converted by him to his own use. On the trial in the Circuit Court, Nunnally, after showing that he was postmaster at Marianna on the 8th day of February, 1886, and kept his office in the store-house of the deceased, testified as follows:

"On the evening of that day, after business hours, as was my usual custom, I took the postoffice funds on hand, amounting to $183, in a small wooden box in which I always kept the funds, and carried them to defendant's intestate to be locked up for safe keeping during the night in his iron safe; and I was standing within a few feet of said intestate when I saw him place said box of funds in said iron safe. The box containing the funds was locked, and I kept the key. The safe was an old-fashioned one, and was locked by means of a key which said intestate always carried with him. There was no other key to the safe that I know of. After the funds were placed in the safe I went home. The next morning before breakfast said Kohn came to my house and informed me that his safe had been burglarized the night before, and its contents stolen. I immediately went to the postoffice, and on my arrival there found quite a crowd of citizens who had gathered on the announcement of the alleged burglary. I found on the counter in the store the wooden box in which the funds were kept, and the box was open and the funds were missing; and Kohn stated that he found the box on the sidewalk that morning while on the way from his residence to the store. The iron safe showed no signs whatever of violence. Neither door nor windows of the storehouse showed any signs of a forcible entry. Kohn kept the postoffice funds in his safe at night without charge therefor. A few days after said alleged burglary, said intestate bought from me a postoffice money order, and in paying for it I instantly recognized some peculiarly marked silver money which was a part of the $183 deposited

in the safe on the night of the alleged burglary, and I called said intestate's attention to it at the time. He answered me evasively and in a somewhat offended manner, and went back down the store." This testimony having been objected to by the defendant, was excluded from the jury, and no other evidence having been offered in support of the claim, the verdict was for the defendant. The plaintiff appealed.

Section 2 of the schedule to the Constitution is as follows:

"In civil actions no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. *Provided*, That in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party." * * *

James P. Brown, for appellant.

The *personal knowledge* of appellant, that on the night of the burglary, he had funds to the amount of $183.57 in the safe of appellee's intestate, is not a "transaction" with said intestate, within the meaning of the proviso to sec. 2, schedule to Constitution, 1874. *26 Ark., 476; 37 id., 195; 46 id., 306; 27 N. W. Rep., 356; 26 Wis., 686; 43 id., 221; 26 N. W. Rep., 58; 25 id., 467; 1 Gr. Ev., secs. 348, 350; 96 U. S., 37.*

McCulloch & McCulloch, for appellee.

The court properly excluded the testimony. *Sec. 2, schedule Const.; 26 Ark., 476; 46 id., 306; 32 id., 337; 51 id., 401; 22 Fla., 501; 35 Hun., 198; 18 N. E. Rep., 373; 63 N. H., 344; 44 id., 370; 47 id., 462; 12 S. W. Rep., 684; 3 N. W. Rep., 392; 6 Fed. Rep., 119; 11 S. W. Rep., 428; 12 id., 606; 2 Pickle, 161; 34 Mich., 523; 4 N. W. Rep., 628; 15 id., 259; 39 id., 103; 5 S. W. Rep., 749.*

WITNESSES: Competency of parties: "Transaction" with intestate.

PER CURIAM. The proffered testimony of the appellant to the effect that he had delivered to the defendant's intestate a box of money to be deposited in his safe, was a "transaction" with the intestate, within the meaning of the proviso to sec. 2 of the schedule to the Constitution and inadmissible for that reason. The witness' knowledge that the box was in the safe was not competent evidence because it was derived solely from the transaction between the parties.

The distinction contended for by the appellant's counsel seems to be sustained by the case of *Tisdale v. Maxwell, 58 Ala., 40,* where a witness who was incompetent to prove the delivery of a horse to a person who had since died, was held to be competent to prove the fact of the possession of the horse subsequent to the delivery; but the facts of this case prevent the application of that rule for the reason stated, viz.: the knowledge of the witness to the effect that the box was in the safe was a part of the transaction with the deceased.

It may be admitted that the appellant was a competent witness to prove the contents of the box under the common law rule announced in *U. S. v. Clark, 96 U. S., 37;* but the testimony was incompetent until the foundation was laid by competent evidence tending to prove that the deceased had received the box and converted its contents. There was no testimony offered outside of the incompetent testimony of the appellant, to prove these facts, and he was not, therefore, prejudiced by the exclusion of the testimonv.

Affirm.

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DAVIES v. NICHOLS.

1. APPEALS: *May be prosecuted by administrator.*

An administrator may take an appeal from a judgment of the Probate Court rejecting a claim presented by his intestate for allowance against an estate, and may prosecute such appeal to the same extent the intestate might have done.

2. BILL OF EXCEPTIONS: *Order giving time to file.*

Under Mansf. Dig., sec. 5157, providing that time may be given to reduce exceptions to writing, but not beyond the succeeding term of the court, an order giving until a day of such term to file a bill of exceptions, passes beyond the control of the court on the expiration of the term at which it is made; and the court has no authority to shorten or extend the time at a subsequent term.

APPEAL from *Garland* Circuit Court.

J. B. WOOD, Judge.

J. H. Nichols having filed in the Probate Court his claim against the estate of J. H. Law, deceased, died before it was heard and determined. It was disallowed after his death, and at a subsequent term of the court J. H. Nichols, Jr., who had been appointed administrator of his estate before the judgment of disallowance was rendered, took an appeal therefrom to the Circuit Court, where a trial at the March term, 1887, resulted in a judgment in favor of Nichol's estate. From the latter judgment Davies, the administrator of Law, prosecutes this appeal. On over-ruling Davies' motion for a new trial, the Circuit Court gave him until the second day of the next term to file his bill of exceptions. The next term began on the 26th of September, and on the 27th day of that month the court allowed him ten days further time. On the 8th day of October the time was extended until the 16th of January, and the bill was not signed or filed until the day last mentioned.

Section 5157 Mansf. Dig. provides that the party objecting to a decision "must except at the time the decision is made, and time may be given to reduce the exceptions to writing, but not beyond the succeeding term."

R. G. Davies and *U. M. & G. B. Rose*, for appellant.

By statute time may be granted not later than the end of

the next term. *Mansf. Dig., sec. 5157.* If time is granted and is suffered to elapse without action, the court loses control over the proceedings. But by granting leave to a day of the next term, it retains possession of the case, and may give a further extension, not exceeding the statutory limit. *Wells on Questions of Law and Fact, 640.*

L. Leatherman, for appellee.

The bill of exceptions is no part of the record. *34 Ark., 342; 38 id., 280; 42 id., 448; 39 id., 558.*

There being no bill of exceptions, it will be presumed that the verdict was sustained by the evidence. *41 Ark., 225; 47 id., 230.*

The legal representative of an estate may prosecute an appeal without the case being revived. *47 Ark., 411; Mansf. Dig., sec. 1289.*

APPEALS.

PER CURIAM. The administrator of Nichols had the right to take the appeal from the judgment of the Probate Court in this case, and prosecute it to the same extent his intestate might have done. *Trapnell, ex parte, 29 Ark., 60.*

EXCEPTIONS.

There is no bill of exceptions in the record. The paper purporting to be a bill of exceptions was not signed by the Judge and filed within the time first given by the court. The order fixing the time within which the bill of exceptions might be signed by the Judge and filed became final, and passed beyond the control of the court, when the term at which it was made expired, and the court had no authority to shorten or extend the time at a subsequent term. *Mansf. Dig., sec. 5157; Carroll v. Saunders, 38 Ark., 216; St. L., I. M. & S. Ry. v. Rapp, 39 Ark., 558; Adler v. Conway County, 42 Ark., 488; St. L., I. M. & S. Ry. v. Holman, 45 Ark., 102; Myrick v. Alexander Merrett, 21 Fla., 799.*

Inasmuch as the bill of exceptions, in this case, cannot be regarded as any part of the record, the questions presented by appellant cannot be considered.

Judgment affirmed.

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FEUCHT v. EVANS.

1. PARTNERS: *Power to dispose of partnership effects.*

A partner has no authority to dispose of the partnership effects in the payment of his individual debt, except by the consent, express or implied, of his co-partner.

2. SAME: *Same.*

One of the members of a firm, without the knowledge or consent of his co-partners, sold all the partnership property to satisfy a debt due to the purchaser for money loaned. Part of the money was loaned to the firm and was used in paying partnership debts; but the greater part was loaned to the partner making the sale, to aid him in buying his interest in the business. HELD: That the sale was void as against the firm creditors, although it was not made with any intent, in fact, to hinder, delay or defraud them.

APPEAL from St. Francis Circuit Court in Chancery.
M. T. SAUNDERS, Judge.

J. J. Evans, of the firm of Collins & Evans, sold the drug store of said firm to his father, H. Evans. Feucht and others who had obtained judgments against the firm, brought this suit to set aside the sale on the ground that it was made to defraud creditors. J. J. and H. Evans filed separate answers, denying the alleged fraud. It was shown that Collins had removed from the State at the time of the sale and that the firm was then largely in debt and unable to satisfy the demands against it. The Circuit Court dismissed the cause for want of equity, and the plaintiffs appealed.

N. W. Norton, for appellant.

Contends, from the evidence, that H. Evans was not a *bona fide* purchaser. He did not bargain for them; had no desire to buy them; did not know what they were worth. *7 S. W. Rep., 258.* Delivery of a bill of sale does not pass title. *47 Ark., 210; 1 S. W. Rep., 707.*

Good faith is necessary as well as a consideration. *Bump. Fr. Conv., p. 199.*

A partner cannot pay his individual debts with firm property, even if he is acting in good faith; being insolvent it would

be a fraud on creditors. *16 Fed. Rep., 317; 7 Atl. Rep., 237; 23 N. W., 336; 2 So. Rep., 735.*

See on the general principle, *11 Fed. Rep., 569.*

Sanders & Watkins, for appellee.

While the style of the firm was Collins & Evans, J. J. Evans was the only partner in the business; he owed all the debts of the concern, and had as much right to pay his father's debts from his assets as the debt of any other creditor.

The evidence shows that it was a *bona fide* transaction, and the consideration was commendable.

Fraud must be proven; ciscumstances of mere suspicion leading to no certain results are not sufficient to establish fraud. *31 Ark., 556; Wait Fr. Conv., p. 382.*

HEMINGWAY, J. Upon an examination of the evidence, we cannot find that the sale was made with intent, in fact, to hinder, delay or defraud the creditors of Collins & Evans. On the contrary, we think it was made by a son, unsuccessful in business ventures, to repay in part, loans from an indulgent father. The purpose that prompted it was commendable.

But did J. J. Evans have the authority to make the sale? Or was it a transaction from which the law implies fraud?

It appears by the recitals of the bill of sale, that the property in controversy belonged to a firm composed of J. J. Evans and Marcus Collins; and J. J. Evans claimed to have bought only a two-third's interest in the business. We therefore find that the property belonged to a firm of which he was a member. It was sold to satisfy a debt due to H. Evans for money loaned. A part of the loan was made to the firm and went to pay firm debts; but a part, and it would seem the greater part, was made to J. J. Evans to aid him in buying his interest in the business.

1. PARTNERS: Power to dispose of partnership effects.

It is a general rule in commercial matters, that, with respect to all articles kept by a partnership to be sold, for the benefit of the concern, each partner has, in the course of trade, the

right to dispose of any part or the whole. This authority is general and implied from the relation, because it is necessary to the expeditious and successful prosecution of the business, but being founded upon this reason, it is subject to the condition, that it must be exercised in the course of the partnership business. The satisfaction of the individual liabilities of one partner is not within the scope of the partnership; therefore, no partner has any authority, implied from the relation, to dispose of partnership effects to satisfy his individual indebtedness. This may be done by the consent of his co-partner, and such consent is sometimes implied from the past dealings between the partners. But consent, either express or implied, is necessary to authorize it. *Parsons on Part., 202–13.*

2. Same.

The sale was made by one partner without the knowledge or consent of his co-partner; it was made to satisfy an individual liability, and not in the course of business, and this was known to the purchaser.

Although no wrong was intended, the partnership effects were illegally delivered to the purchaser, to be by him disposed of for his own benefit. The effect was improperly to hinder and delay the partnership creditors, and from this the law presumes fraud.

This case does not involve the question of the right of one partner to dispose of the partnership effects and business, to satisfy or secure firm debts. That we have not felt called to consider or decide.

The plaintiffs were entitled to a decree canceling the bill of sale, in order that they might sell the property for the satisfaction of their claims.

It does not appear that they caused the property to be impounded, but they are now entitled to have such of it sold as can be seized.

The judgment will be reversed and the cause remanded with directions to enter a judgment in accordance with the law as herein announced.

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ACCOMPLICE.

See EVIDENCE, 7.

ADMINISTRATION.

See also, DOWER, 5; SUBROGATION, 1.

1. *Relinquishment of land to vendor of decedent: Void order, etc.*

Section 4 of Chapter 3, of the so-called "Chapters of the Digest," adopted by the General Assembly in 1869, which provided that when lands of a decedent had not been paid for, the Probate Court might order the same to be relinquished to his vendor on the most advantageous terms that could be agreed upon, not having received legislative sanction, did not become a law. An order made pursuant to said section in 1871, authorizing an administrator to relinquish his intestate's interest in certain lands was void; and not being in itself a sale, nothing was added to its validity by the act of 1873, providing that all sales previously made in pursuance of such "chapters," should be binding. Nor could that act impart any validity to a deed executed by the administrator after its passage. Bender v. Bean, 132.

2. *Same.*

An order of the Probate Court, made on the *ex parte* petition of an administrator, authorizing him to relinquish certain lands conveyed to his intestate, to the vendor thereof on the surrender of the notes given for the purchase money, does not bind the vendor, and if valid in other respects, could not be executed by the administrator after his removal. Nor could a conveyance for the purpose of such relinquishment, executed by the administrator after his discharge, be made effectual by an order confirming it, made by the court after its jurisdiction over the land had ceased by the close of the administration. Ib.

3. *Sale of lands: Execution of order made on appeal.*

Where on appeal from a judgment refusing to sell the lands of a decedent for the payment of his debts, an order of sale is made by the Circuit Court and certified to the Probate Court, it becomes the judgment of the latter by its entry there. And although a subsequent appeal from the judgment of the Circuit

Court will suspend the power of the Probate Court to execute such order, its jurisdiction to execute it will be restored from the time when the Circuit Court on the affirmance of its judgment, and in accordance with the mandate of this court, enters a new order directing the sale. Burgett v. Apperson, 213.

4. *Same.*

A sale of the lands before the new order is certified to the Probate Court for execution, although made pursuant thereto, is irregular, and it is error to approve it. But such sale, being supported by a valid judgment, is not void after confirmation. Ib.

5. *Same.*

Where the lands of an estate, offered for sale under a valid order of the Probate Court, are not sold for the want of a bid equal to two-thirds of their appraised value, no new order condemning them to sale is required by section 184, Mansfield's Digest. But under that statute it is only necessary for the court to provide for the execution of the judgment previously entered by directing that the lands shall be offered for sale to the highest bidder at the end of twelve months after the first offering and on a day fixed for that purpose. A sale made without such new direction is irregular, but where it takes place after the expiration of the year, it is not void when confirmed. Ib.

6. *Sale of lands: Expenses of administration.*

It is error to grant an application for the sale of a decedent's lands for the sole purpose of paying the expenses of administering on his estate, unless it appears that such expenses were incurred in the course of administering the estate to pay debts due personally by the decedent. [*Mansf. Digest, secs. 170, 171.*] Mays v. Rogers, 320.

7. *Private sale of lands.*

A private sale of the lands of a decedent, made under an order of the Probate Court for the payment of his debts, is not void when confirmed. Apel v. Kelsey, 341.

8. *Settlement of administrator's accounts.*

The settlement of a deceased administrator's accounts, made by the Probate Court before the appointment of an administrator on his estate, is not binding upon the sureties on his bond, and cannot be made the basis of an action against them. State v. Drake, 350.

9. *Action to surcharge accounts: Parties.*

A judgment rendered against the administrator *de bonis non* of an estate, in a suit to surcharge the accounts of the administrator in chief, is not binding upon the sureties of the latter, where neither he, nor his personal representative in

case of his death, nor either of the sureties, was a party to the action. Crouch v. Edwards, 499.

10. *Settlement of accounts: Liability of sureties.*

Where the accounts of an administrator, showing that nothing is due from him to the estate, are, in the absence of exceptions thereto, confirmed by the Probate Court, no liability will rest upon his sureties, until the settlement thus made is impeached in a court of equity. Ib.

ADMINISTRATORS.

See APPEALS, 7; DOWER, 1–4; STATUTE OF LIMITATIONS, 5; SUBROGATION, 1; WITNESSES, 3, 4.

ADVANCEMENT.

1. *Purchase by father in name of son.*

A purchase of land by a father in the name of his son, is presumed to be an advancement. And this presumption will not be overcome by proof that the father took possession of the land, and after making improvements held it for the period of seven years, enjoying the rents and profits, paying the taxes, and claiming it as his own, with the knowledge of the son, and without objection or claim of ownership on his part, where it is also shown that the son was a minor at the date of the purchase, and during nearly all the time of the father's possession resided with the latter as a member of his family; and that the father, at the time of the purchase, declared that it was made for the son. White v. White, 188.

2. *Statute of Limitations: Relation of parties.*

In such a case in view of the relation between the parties, the father cannot avail himself of the statute of limitations to defeat an action brought by the son for the recovery of the land. Ib.

AGENCY.

See AGENT; LIQUORS, 1, 7, 9.

AGENT.

See EVIDENCE, 1; INSURANCE, 1–4; LIQUORS, 1, 7, 9; PLEADING AND PRACTICE, 10.

AFFIDAVIT.

See APPEALS, 4; JUDGMENTS, 6.

APPEALS.

See also PRACTICE IN SUPREME COURT, 1; SPECIAL JUDGES, 1; CERTIORARI, 2, 3; COUNTY WARRANTS, 1; CRIMINAL PROCEDURE, 6, 7; EXECUTIONS, 3; LIQUORS, 2, 3; SUPREME COURT, 1.

1. *From what decrees allowed.*

Where a decree determines the right to property, and directs it to be delivered up, or directs its sale, and the plaintiff is entitled to have the decree carried into immediate execution, it is to that extent final and may be appealed from although a further decree may be necessary to adjust an account between the parties. In such cases the appeal is allowed to prevent irreparable injury pending the suit. It is also allowed from a decree, which, without ending the suit, finally determines a distinct and severable branch of the cause. But although a decree is in the form of a final order, and adjudicates the proportionate interests of the parties in certain lands, an appeal therefrom is premature where the decree does not direct its execution, but looks to further judicial action, on the coming in of a master's report, to determine what sums shall be charged as liens upon the several interests, and whether some of them shall be sold to satisfy the same. Davie v. Davie, 224.

2. *Same: Interlocutory orders.*

The first subdivision of section 1265 Mansfield's Digest does not grant an appeal from an introductory order, but provides only for the review of such an order, on appeal from the final judgment. Ib.

3. *From Probate Court: Allotment of dower.*

In a proceeding in the Probate Court for the allotment of dower, an order confirming the report of commissioners appointed to make the allotment, is the final judgment of the court, and an appeal therefrom carries the whole case to the Circuit Court for trial *de novo*. Hilliard v. Hilliard, 283.

4. *From justice's court: Affidavit: Waiver.*

Where no motion is made in the Circuit Court to dismiss an appeal from a justice's court for want of an affidavit for appeal, the objection cannot be raised in the Supreme Court. Crenshaw v. Bradley, 318.

5. *Dismissal for want of prosecution.*

The dismissal of an appeal to the Supreme Court for want of prosecution, does not bar a second appeal. Sanders v. Moore, 376.

6. *Decree not final.*

In a suit to redeem mortgaged lands, a demurrer was sustained to all the paragraphs of the answer, with the exception of one, in which a claim is set up for improvements made and taxes paid on the mortgaged premises. The defendant, electing to stand on his answer, the court referred the cause to a commissioner, with directions to state an account showing the amount of the mortgage debt, the value of the defendant's improvements, the amount of his tax payments, and the value of the rents. The defendant appealed. HELD: That the decree was not final, and the appeal is premature. [*Davie v. Davie, ante, p. 224.*] Cohn v. Huffman, 436.

7. *May be prosecuted by administrator.*

An administrator may take an appeal from a judgment of the Probate Court rejecting a claim presented by his intestate for allowance against an estate, and may prosecute such appeal to the same extent the intestate might have done. Davies v. Nichols, 554.

ASSAULT.

See INDICTMENT, 3.

ASSESSMENTS.

See TAXES, 2–13.

ASSIGNMENTS.

See INSURANCE, 6, 7; LANDLORD AND TENANT, 1, 2; PROMISSORY NOTES, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. *Statutory regulations.*

The statute of this State respecting assignments for the benefit of creditors (*Mansf. Dig., secs. 305–309*) regulates the execution of the trust created by the debtor's conveyance, but does not undertake to control the form of his deed except that it must not direct a mode of executing the trust different from that enjoined by the law. Richmond v. Mississippi Mills, 30.

2. *Same: Form of instrument: Intention of parties.*

A conveyance made directly to a creditor by way of paying or securing his own debt, is not ordinarily an assignment. But a mortgage in form may constitute an assignment by reason of the intention of the parties and the operation of the instrument. And such intention may be shown by parol evidence of facts collateral to those stated in the instrument. Ib.

3. *Same.*

An instrument executed by a debtor with the intention that it shall operate as an assignment, and that the property thereby conveyed shall pass absolutely to a trustee for the purpose of raising a fund to pay debts, is an assignment for the benefit of creditors within the meaning of the statute of assignments, whatever may be its form or name. Ib.

4. *Same.*

The defendant, a merchant, failed in business, and on the day of his failure executed the following instruments, covering his entire property: (1) A mortgage on a stock of merchandise and store furniture to T. and twelve other creditors named; (2) an assignment "in pledge" of all his notes, accounts, etc., to the same parties as further security for the same debts; (3) a deed of trust in the

nature of a mortgage upon other personal property and some land, to H. for the benefit of the same creditors; (4) a mortgage to M. to secure a debt due to him; (5) a mortgage to B. & J. to secure a sum due to them. It was provided in these conveyances that the property should be sold immediately at private sale for cash and the proceeds applied to the payment of the debts secured, which were then past due. Possession of the goods, etc., was immediately given to T. for himself and other beneficiaries, and he on the same day delivered them to W. H., who, it was agreed, should dispose of them under T.'s directions. The defendant on the same day sent orders on T. to each of his non-preferred creditors for the sums due them, respectively, directing their payment out of the surplus proceeds of the property. These orders were accompanied by a circular letter from the defendant, informing his unsecured creditors of the conveyances he had executed, and saying: "I regret the necessity, but it protects all from complications." HELD: That the transactions between the defendant and T. constituted a general assignment which was void as to other creditors because of the provisions requiring the trust to be executed in a manner prohibited by law. Ib.

5. *Same: Instrument constituting.*

A deed without defeasance and which conveys absolutely to a person named therein as trustee, a stock of merchandise, directing him to take immediate possession of the goods and to sell them at private sale for cash, and out of the proceeds to pay the debts of certain creditors of the grantor mentioned in the deed, reserving the surplus for the grantor, is by its terms an assignment for the benefit of creditors, and as it directs the execution of the trust in a manner prohibited by the statute of assignments (*Mansf. Dig., secs. 305–309*) it is fraudulent and void as to attaching creditors. State v. Dupuy, 48.

ATTACHMENTS.

See also GARNISHMENT, 1; LANDLORD AND TENANT, 4; REPLEVIN, 3; VENDOR AND VENDEE, 3–6.

1. *Sale of property: Confirmation.*

The sale of attached property is not complete until it is confirmed by the court. [*Mansf. Dig., sec. 350.*] An action to recover the purchase money, brought before such confirmation, is therefore premature and cannot be maintained. Freeman v. Watkins, 446.

2. *Attachment sales: Redemption.*

A sale under the judgment of a court of law sustaining an attachment, is not a judicial sale, and where real property is thus sold the right to redeem it within one year thereafter is given by section 3067, Mansfield's Digest, as in case of technical execution sales. Beard v. Wilson, 290.

ATTORNEY AND CLIENT.

See STATUTE OF LIMITATIONS, 1.

BAILMENTS.

See INN-KEEPERS, 1.

Negligence: Delivery of goods to third person.

Where the gratuitous bailee of a chattel delivers it to a stranger, without effort to verify the latter's claim thereto, and without inquiring as to its ownership, he is guilty of such negligence as will make him liable for the value of the property, if the delivery is to the wrong party. Wear v. Gleason, 364.

BILL OF EXCEPTIONS.

Order giving time to file.

Under Mansf. Dig., sec. 5157, providing that time may be given to reduce exceptions to writing, but not beyond the succeeding term of the court, an order giving until a day of such term to file a bill of exceptions, passes beyond the control of the court on the expiration of the term at which it is made; and the court has no authority to shorten or extend the time at a subsequent term. Davies v. Nichols, 554.

BURDEN OF PROOF.

See EVIDENCE, 12; EXEMPTION, 4, 5.

CERTIORARI.

See also HOMESTEAD, 2; JUDGMENTS, 2.

1. *When Granted.*

The writ of *certiorari* may be used not only to correct a want of jurisdiction, but also the erroneous proceedings of an inferior tribunal. But it will not lie to review mere errors at the instance of one who has lost the right of appeal by his own fault or who neglects to apply for the writ as soon as possible after the necessity of resorting to it arises. It is not a writ of right, but one of discretion, and will not be granted except to do substantial justice. Burgett v. Apperson, 213.

2. *As a substitute for appeal.*

Certiorari cannot be used as a substitute for appeal where the latter is provided, except by a party who could have appealed. But one who, without fault or neglect on his part, loses the opportunity of becoming a party to a proceeding, in, the nature of a suit *in rem*, and of thereby acquiring the right of appeal, may, within proper time, resort to the writ of *certiorari*. Ib.

3. *Same: Limitation.*

The period within which the writ of *certiorari* may be granted is not limited by statute. Where, however, it is sought as a substitute for appeal, the time within which an appeal might have been prosecuted is adopted by analogy. But this is not like a statutory rule, binding upon the courts, and the writ is awarded where the ends of justice demand it. Ib.

4. *To quash order confirming sale.*

On *certiorari* issued at the instance of the heir-at-law of a decedent, it is error to refuse to quash an order confirming a sale of the latter's lands where it appears that the sale was made on the application of the only creditor of the estate, and that a body of land comprising 1634 acres, and appraised at $79 340, was sold in bulk to pay a debt amounting to only $10,000; that the creditor was the purchaser, but has paid no money and received no deed; that all the proceedings with reference to the sale except the order directing it, were marked by such irregularities as tended to prevent other persons from bidding; that the heir was an infant of tender years at the time of such proceedings, and that the administrator in whose name the sale was conducted, and who was also the guardian of the heir, was at the time the sale was made and confirmed an imbecile, incapable of attending to any business; that the right of appeal from the order of confirmation was lost through an erroneous act of the Probate Court, and that the heir applied for the writ without delay after arriving at years of discretion. Ib.

CHANGE OF VENUE.

Payment of Clerk's fee: Presumption on appeal.

On appeal where the record shows only that an order for a change of venue was made, and that thereafter the parties voluntarily submitted to trial in the court in which the action was brought, it will be presumed that the order became inoperative under sec. 6483 Mansf. Dig., which provides that it shall be void if the Clerk's fee for transmitting the papers is not paid within fifteen days from the granting of the order. Duncan v. Tufts, 404.

CIRCUIT COURTS.

See PLEADING AND PRACTICE, 7.

COMMON CARRIERS.

See RAILROADS, 1.

COMMON LAW.

Presumption as to.

The courts of this State will not presume that the common law is in force in the Indian Territory, where no system of laws has been adopted. Garner v. Wright, 385.

CONSIDERATION.

See also PROMISSORY NOTES, 3, 4, 5.

Payment of legal debt.

The payment of a sum of money by one who is already legally bound to pay it is not a valid consideration for a contract. Killough v. Payne, 174.

CONSPIRATORS.

Acts of, see EVIDENCE, 4.

CONSTRUCTION.

Of written instruments, see CONTRACTS, 1-4.

CONTRACTS.

See also CONSIDERATION, 1; COUNTY PRISONERS, 1; DAMAGES, 1; EVIDENCE, 3; FRAUD, 1, 2; HUSBAND AND WIFE, 1; INSURANCE, 5-9; LIENS, 1, 2; MARRIED WOMEN, 1-3; MORTGAGES, 5, 6; SCHOOL DIRECTORS, 3; SPECIFIC PERFORMANCE, 1; WARRANTY, 1-3.

1. *Construction: Parol evidence to explain writing.*

Where the provisions of a written contract are apparently conflicting, parol evidence is admissible to show the subject matter of the agreement, the circumstances surrounding the parties at the time it was made, and their subsequent conduct under it, as a means of correctly interpreting the language employed. In such case it is also admissible to prove changes or modifications in the phraseology of the contract made at the time it was being reduced to writing, to better express the intention of the parties. But attorneys who prepared the instrument cannot be permitted to give in evidence their construction of its language. Watkins v. Greer, 65.

2. *Same.*

The defendant having purchased the plaintiffs' lands at a judicial sale, entered into a written contract with them by which he agreed to sell the lands and after paying out of the proceeds certain debts due to himself and others, to pay over any balance remaining to one of the plaintiffs. After stipulations to the effect that the plaintiffs should actively aid the defendant in effecting a sale, and that he should not sell for less than a sum named without their consent, the contract contained the following clause which was inserted by the defendant for the avowed purpose of limiting the trust to one year: "And it is further agreed and understood * * * that the sale of said lands by the said Greer shall not be impeded by the said Watkins and wife, or either of them, but that the sale of said land shall be had within a reasonable time, not exceeding one year from the date hereof, except by mutual agreement of the parties." The parties failed

to make a sale and at the end of twelve months the defendant procured a deed from the commissioner who sold the lands, and proceeded to treat them as his own, making thereon lasting and valuable improvements. The plaintiffs, with notice of his outlays, made no claim to the land, or effort to redeem it for nearly seven years. HELD: That although the agreement was not a gratuity on the part of the defendant, it created a trust limited to one year, and became inoperative at the expiration of that time. Ib.

3. *Construction of written instrument.*

Where the language of a written contract is capable of more than one interpretation the court will look to the subject matter of the agreement, the circumstances surrounding the parties at the time it was made, and their subsequent acts under it, for the purpose of giving to their written language the meaning they intended it should have. Railway v. Shinn, 95.

4. *Same.*

The defendant company, owning and operating a railway between the town of R. and a point on the Arkansas River opposite the town of D., ran a line of wagons from the terminus of its track for the transportation of freights across the river to its warehouse at D., and sold passenger tickets and signed bills of lading for freight to and from that place. While thus engaged the company entered into a written contract with the plaintiff, by which the latter agreed "to ferry all passengers, freight, baggage, mail * * * and express matter * *" presented for ferriage by the defendant, together with such conveyances as might be necessary to transfer the same across the river; and in consideration of such ferriage the company agreed to pay the plaintiff "one-fifth of the actual gross earnings of the railway * * * on all passengers, freight, mail and express matter * * * carried across the river." Under this agreement the defendant transported all freights, mail and express matter across the ferry at its own cost, and accounted to the plaintiff for one-fifth of the gross amount thus earned. But it let the contract for hauling passengers between the terminus of the track and D. to a transfer company, the vehicles of which were ferried by the plaintiff without charge, under the impression that they were part of the defendant's line. The fare on the railway proper between D. and R. was fifty cents, to which was added twenty-five cents for a hack ticket, making the entire fare between the two towns seventy-five cents. The defendant sold the hack tickets, and out of the proceeds paid the transfer company twenty cents for their services, and retained five cents as commission and ferriage. It accounted to the plaintiff for ten cents on each passenger, but refused to account for more of the amount received for hack fare than one-fiith of the five cents retained on the sale of each ticket. HELD: That the term "gross earnings of the railway," as used in the contract, included the whole amount earned by the transfer company. Ib.

CONVERSION.

See DOWER, 2, 3; JUDGMENTS, 3; JURISDICTION, 1; MUNICIPAL CORPORATIONS, 8.

CONVEYANCES.

See also ASSIGNMENT FOR BENEFIT OF CREDITORS, 1–5; DEEDS, 1, 2; FRAUDULENT CONVEYANCES, 1–4; HOMESTEAD, 1, 3, 4.

1. *For benefit of creditors: Parol evidence to prove condition.*

An insolvent debtor and his creditors, including several persons who had sued out attachments against him, signed an insrument unconditional in its terms, whereby his property was conveyed to a trustee and by which it was stipulated that the attachments should be discharged, and that the trustee should dispose of the property for the benefit of the creditors. After the execution of the instrument, the attaching creditors released the property, which, together with the instrument, was delivered to the trustee, who accepted the trust. HELD: That parol evidence is not admissible to show that one of the creditors signed the instrument under an oral agreement that he was not to be bound by it, except upon the condition that another should be substituted for the person named in the conveyance as trustee. Martin v. Taylor, 389.

2. *Same: Title of trustee.*

Such instrument having been signed and delivered to the trustee, together with the property it conveyed, the title to the property vested in him and his right thereto could not be impaired by the act of one of the creditors in causing his name to be erased from the instrument, although such erasure was made without objection by the trustee, with the assent of some of the other creditors, and pursuant to a parol agreement made with some of the creditors, that the party whose name was erased should not be bound by the instrument except upon a condition not expressed therein. Ib.

3. *Same: Parol agreement as to: Fraud.*

An oral agreement between some of the creditors made before the execution of such instrument, to the effect that one of the trustees named therein should be removed and another person put in his place, was no part of the contract, and the failure to perform it does not constitute a fraud, and furnishes no ground on which a person thereby induced to sign the instrument may avoid it. Ib.

4. *Same: Estoppel.*

The parties to such instrument are concluded from attacking it on the ground that it was executed to defraud creditors. Ib.

CORONER'S INQUEST.

1. *When to be held.*

The statute (Mansf. Dig., sec. 692) requires no inquisition on the body of a per-

son dying from apoplexy or other disease. And it is not the duty of the Coroner to inquire of sudden deaths unless he has reasonable ground for believing that they have resulted from violent or unnatural causes. Clark County v. Calloway, 361.

2. *Claim for expenses of.*

It is the province of the County Court to determine whether a Coroner's inquest was one for the expenses of which the county is liable. And a claim for such expenses should be rejected where it does not appear that any ground existed for suspectingt hat the death inquired of was not a natural one. Ib.

COSTS.

1. *Meaning of term: Power to tax.*

The term "costs," means expenses pending the suit, as allowed or taxed by the court; and a court without jurisdiction of the subject matter of an action cannot "allow or tax" costs therein. Cary v. Ducker, 103

2. *Action on bond for: Defenses.*

A bond was given under section 1036 Mansfield's Digest, for the payment of the costs of a suit brought in the Circuit Court by a non-resident. A judgment obtained by the plaintiff in such suit having been reversed on appeal, the defendant therein brought an action on the bond to recover a sum alleged to have been paid by him as costs. The defendant in the latter action filed an answer, by the second paragraph of which he alleged that he had no knowledge or information sufficient to form a belief as to whether any costs had been adjudged to plaintiff. By the third paragraph he alleged that he had no knowledge or information sufficient to form a belief as to whether the costs alleged to have been paid by the plaintiff were authorized by law, or as to whether the same, or any part thereof had been paid. The fourth paragraph alleged that the court which tried the cause in which said bond was given had no jurisdiction thereof, and that all its proceedings with reference to said bond were void. HELD, That the second and third paragraphs of the answer presented valid defenses, but a demurrer was properly sustained to the fourth, since the Supreme Court had jurisdiction to determine the cause on appeal, and to give judgment for costs incurred there. Ib.

3. *Same: Instructions.*

In such suit to recover costs, it was error to refuse to instruct the jury that it devolves on the plaintiff to prove that the costs which he sought to recover, were adjudged to him in the action in which they were incurred by a court having jurisdiction of the subject matter of that action. But a request to instruct that the plaintiff must show "that the bond was executed by the defendant in manner and form as charged" in the complaint; "that the court had jurisdiction of the subject matter of the action, and that the costs paid by plaintiff, were costs allowed by law for such services as were rendered," was properly refused. Ib.

4. *Counties: Liability for costs upon acquittal for misdemeanor, in justice's court.*

Harvey v. Crawford County, 192.

COUNTIES.

See also COSTS, 4.

1. *Claims against under special statutes.*

Under a special statute providing that a county which has received territory detached by a previous act from another county, shall be liable to the latter for a just proportion of its debt, existing at the date of the segregating act, to be allowed on a claim presented to the County Court, it is not necessary to authenticate such claim in the manner required by the general statute, in case of ordinary demands against counties, if the special statute does not require it. Perry County v. Conway County, 430.

2. *Detaching territory of: Apportionment of debt.*

A county, by receiving territory detached by an act of the General Assembly from that of another county, is placed under a moral obligation to pay a just and equitable proportion of the latter's debt, existing at the time the act is passed; and where the act segregating the territory is silent as to such payment the Legislature has power to provide for enforcing it by a subsequent enactment. Ib.

COUNTY COLLECTORS.

See STATUTE OF LIMITATIONS, 13.

COUNTY COURTS.

See CORONER'S INQUEST, 2.

COUNTY PRISONERS.

Contract for labor of.

Sections 1213, 1214, Mansfield's Digest, provide that persons convicted of misdemeanors may be hired out by the Sheriff for a period not exceeding one day for each seventy-five cents of the fine and costs until the same are paid. Under this statute the Sheriff entered into a contract with a person, to whom he hired a convict, by which the latter was required to labor twenty-four months in satisfaction of a fine and costs amounting to $283.90. HELD: That such contract was contrary to public policy, and void. State v. Stanley, 178.

COUNTY WARRANTS.

Jurisdiction to cancel or reissue.

On appeal from the judgment of a County Court rejecting warrants of the county

presented for reissuance, the Circuit Court can render only such judgment as the County Court should have rendered. It may examine witnesses and ascertain from the evidence whether the warrants are just and legal demands; but it can exercise no equity power, such as directing a reference to a master to state an account between the holder of the warrants and the county, on the claim by the latter of an equitable set-off. Pride v. State, 502.

CRIMINAL EVIDENCE.

See EVIDENCE, 4–11, 13.

CRIMINAL LAW.

See also CRIMINAL PROCEDURE, 1–9; DENTISTRY, 1; LIQUORS, 1, 4, 6–9; ROADS AND HIGHWAYS, 1, 2; TRESPASS, 1, 2.

Homicide: Self-defense: Retreat of adversary.

One who kills his adversary while the latter is manifestly seeking to retire from the combat is guilty of murder, or manslaughter, according to the circumstances; but where one is defending himself from an unlawful attempt to shoot him, it is not incumbent upon him to suspend his defense because his assailant is withdrawing himself from the immediate locality of the attempt, if such withdrawal is apparently for the purpose of securing a position from which to renew the combat with more efficiency. Luckinbill v. State, 45.

CRIMINAL PROCEDURE.

See also EVIDENCE, 4–11, 13; INDICTMENT, 1–4; INSTRUCTIONS, 1, 4; LIQUORS, 7; TRESPASS, 1.

1. *Instructions: Assumption of guilt.*

A clause in an instruction by which the jury are told that a witness for the State is an accomplice, will not be construed to assume that the defendant is guilty, where it appears from the whole charge that no assumption is warranted to the effect that the court intended to interfere with the jury's right to believe the testimony of the witness, but only to inform them that if they believed it, other evidence connecting the defendant with the commission of the offense charged, would still be required to authorize his conviction. Fort v. State, 180.

2. *Same. Refusal of unnecessary charge.*

Where a charge to the jury fairly covers every matter pertaining to a defendant's guilt or innocence, it is not error to refuse prayers for other instructions. Ib.

3. *Trial for murder: Instruction as to lower offense.*

On a trial for murder in the first degree it is not error to instruct the jury as to the law of manslaughter if there is any evidence to justify a conviction of the latter offense. Crumpton v. State, 273.

4. *Trial for felony: Presence of defendant.*

Section 2213 Mansfield's Digest which provides that if a defendant on trial for a felony, escapes from custody after his trial has commenced, "or if on bail, shall absent himself during the trial, the trial * * * may progress to a verdict," is not unconstitutional. The guaranty of the Constitution (Art. 2, Sec. 10), that the defendant shall have the right to be confronted with the witnesses against him, does not include the right to abscond and then complain of his own absence. Gore v. State, 285.

5. *Instruction as to degrees of homicide.*

On a trial for murder in the first degree where all the evidence is to the effect that the killing was assassination of the deceeased, at night, by his fireside, committed by some one who shot him through a crack in his house, the failure of the court to charge the jury as to the lower degrees of homicide is not error. Hemingway and Hughes, J. J., dissenting. Jones v. State, 345.

6. *Appeals: Taxing attorney's fee.*

Sec. 2649 Mansf. Dig., providing that upon the affirmance of a judgment on the appeal of a defendant in a misdemeonor case, an attorney's fee of $20, to be paid to the Prosecuting Attorney, shall be taxed as part of the costs of the appeal, has not been repealed; and the taxation of such fee is proper. Wellington v. State, 447.

7. *Same: Awarding damages.*

Sec. 2471 Mans. Dig., imposing 10 per cent. damages on the affirmance of judgments appealed from in cases of misdemeanor, is not unconstitutional. Ib.

8. *Tax on conviction.*

The tax on each criminal conviction in courts of record, levied by sec. 5595 Mansf. Dig., is a valid exaction. Ib.

9. *Cost of printing brief: Rule 23.*

On the affirmance of a judgment of conviction in a misdemeanor case, the cost of the appellee's brief is properly taxed against the appellant, under rule 23 of the Supreme Court. Ib.

CURTESY.

Right of subject to execution.

A husband's right of curtesy in the statutory separate estate of his deceased wife is subject to execution for the payment of his debts. Stanley v. Bonham, 354.

DAMAGES.

See also CRIMINAL PROCEDURE, 7; EVIDENCE, 3; FERRIES, 1; INJUNCTION, 1; INSTRUCTOINS, 2; JUDGMENTS, 4; MORTGAGES, 6; PRACTICE IN SUPREME COURT, 2; WARRANTY, 2.

Breach of contract to pay a specific sum for work.

When a mechanic employed to perform specific work for a stipulated price, is wrongfully prevented by his employer from completing the contract, he may recover for such breach thereof, damages equal to the difference between the cost of the work and the price agreed to be paid for it, the cost being the market value of material on hand for the work, the amount that would have been paid for labor and material in completing it, and what the mechanic gained, or might have gained, by the saving of his time not employed in completing the contract. Gibney v. Turner, 117.

DECREES.

See APPEALS, 1, 2; JUDGMENTS, 1-10; TAX SALES, 6.

DEEDS.

See also ASSIGNMENT FOR BENEFIT OF CREDITORS, 1-5; COVNEYANCES, 1-4; HOMESTEAD, 4.

1. *Delivery of: Escrow.*

A deed cannot be an escrow when it is delivered directly to the grantee. Campbell v. Jones, 493.

2. *Same: Cancellation of.*

On the execution and delivery of a deed for the conveyance of land, the title vests in the grantee, and he cannot divest himself of it by merely cancelling the deed and surrendering it to the grantor. Ib.

DENTISTRY.

Act regulating practice of, constitutional.

The act of April 4, 1887, which provides that every person engaged in the practice of dentistry in this State at that date shall cause his name to be registered with a board of examiners, and making it a misdemeanor to engage in such practice after the expiration of three months from the passage of the act without a certificate from said board, does not deprive the citizen of the right to follow a lawful vocation by requiring him to do so upon a condition with which he cannot comply, and is not unconstitutional. Gosnell v. State, 228.

DESCENT.

Title by: New acquisition.

Where under the statute found in English's Digest, chap. 97, art. 1, and the act of Dec. 12, 1850, amendatory thereof, land was donated by the State to a minor, it was a new acquisition by him within the meaning of the statute of descents (*Mansf. Dig., sec. 2522*) although his father paid the fees necessary to obtain the deed; and on his dying intestate and without issue, it descended first to his

father and then to h's mother for life. In such case no interest in the land can be devised by the father, and on his death the sister of the deceased cannot maintain ejectment for it without proving the death of the mother. Hogan v. Finley, 55.

DESCENT AND DISTRIBUTION.

See DESCENT, 1.

DIVORCE.

Marriage under duress.

Where a man arrested on probable cause and without malice, for seduction, marries the woman to procure his discharge, he cannot have the marriage avoided on the ground of duress. The fact that he subsequently discovers that he could not have been convicted, will not alter the case. Marvin v. Marvin, 425.

DOMICILE.

See EXEMPTION, 1.

DOWER.

See also APPEALS, 3.

1. *In choses in action: Judgment assigning.*

The act of March 8, 1867, changing the law as to dower in choses in action, so as to make the right thereto superior to the claims of creditors, applied only to the estates of persons dying after its passage. But where the Circuit Court on appeal, and in a proceeding to which an administrator, whose intestate died in 1863, was a party defendant, assigned dower according to the provisions of that act in promissory notes belonging to the estate of the decedent, on the petition of his widow, the judgment though erroneous cannot be questioned collaterally, and not having been reversed or set aside, is conclusive of the widow's right to such dower, in an action brought by her on the administrator's bond to recover her interest in the proceeds of the notes. Crowley v. Mellon, 1.

2. *Same.*

In such case, an attorney employed to collect the notes, having converted and misapplied the proceeds thereof before the judgment assigning dower was rendered, the action on the administrator's bond cannot be defended by showing that the person who effected the collection for the administrator was also the attorney for the widow. That defense should have been made to the suit for dower, and if it was, the judgment there is conclusive that the question was determined against the administrator. And so, the administrator having defended the applicatiou for dower, on the ground that the widow had accepted a conveyance in fee simple from the sole devisee of her husbamd's lands, in

full of all her dower in the estate, and the question having been adjudicated against him in that suit, he cannot raise it in the action on his bond. Ib.

3. *Conversion of widow's interest in notes.*

Where the attorney of an administrator, employed to collect notes due the estate, receives money thereon and converts it to his own use, the administrator, in his official capacity, is liable to the widow of his intestate to the extent of her dower in the sum converted. Ib.

4. *Same.*

Where the widow of a decedent is entitled to dower in promissory notes payable to him, and a judgment recovered thereon by his administrator, is assigned in the latter's name by his attorney to a creditor of the deceased, in payment of a probated claim, the administrator makes the assignment his own act by reporting it to the Probate Court and obtaining its approval by that court. The title to the judgment being thus vested in the creditor, the widow cannot procure the assignment of her dower therein, and the administrator is liable to her on his bond for its value. Ib.

5. *Widow's right not affected by probate proceedings.*

Although the final settlement of an administrator showed that a judgment in which the widow of his intestate was entitled to dower had been assigned to a creditor of the estate, in satisfaction of a probated claim, an order of the Probate Court, approving such settlement and discharging the administrator from the trust, will not bar a suit by the widow on his bond, to recover the amount of her dower in the judgment assigned. Not being a party to the probate proceedings for the settlement of her husband's estate, her rights were not affected by the administrator's account, and she was not bound by the order confirming it. Ib.

6. *Provision in lieu of: Widow's election.*

Sections 2583, 2584, Mansf. Dig., providing "that if land be devised to a woman, or a pecuniary or other provision be made for her by will in lieu of dower, 'she shall be deemed to have elected to take such devise or provision, unless within one year after the death of her husband she shall enter on the lands to be assigned for dower, or commence proceedings for the recovery or assignment thereof,'" apply to all cases where a settlement upon the wife is made by the husband other than by will, whether of lands or personalty, or where personalty is bequeathed by him in lieu of dower, or where land is devised, or a jointure or other provision in lieu of dower is made for the wife by another than the husband. In either of such contingencies, the widow's intention to renounce the provision made for her in lieu of dower, must be evinced within twelve months after the husband's death and in the manner required by section 2584. Pumphrey v. Pumphrey, 193.

7. *Same.*

But where lands of which the husband dies seized are devised by him to the wife, or where he devises lands to her and also bequeaths to her personal property, she may in either of such cases make her election between the testamentary provision and dower, and by a deed of release executed to the heirs, renounce the benefits of the will, at any time within eighteen months after the husband's death, as provided in sections 2594–2598. Ib.

8. *In personalty: Subrogation.*

When an administrator applies the personal property of the estate to the payment of debts, leaving the widow's claim for dower thereon unpaid, she is equitably entitled to be subrogated to the rights of creditors whose claims have been thus discharged, and to be reimbursed out of the real estate. Crouch v. Edwards, 499.

DURESS.

See DIVORCE, 1.

DYING DECLARATION.

See EVIDENCE, 13.

EJECTMENT.

See also DESCENT, 1; FRAUDULENT CONVEYANCES, 2; JUDGMENTS, 5.

1. *Pleadings in.*

Where, under Mansfield's Digest, section 2632, a complaint in ejectment states facts sufficient to show a *prima facie* title in the plaintiff, an answer thereto which merely denies the plaintiff's title and states no facts showing a defect therein or a superior title in the defendant or in some third person, is insufficient. Beard v. Wilson, 290.

2. *Same.*

To a complaint in ejectment setting out the evidences of title relied on by the plaintiff, the defendant filed an answer containing a general denial of the plaintiff's title and claiming title in himself derived from the same source as that of the plaintiff. Exceptions were sustained to the evidence of title exhibited with the answer and the defendant declined to amend. HELD: That as the answer contained nothing after the exceptions were sustained except a mere denial of the plaintiff's title, it was not sufficient, and a demurrer thereto was properly sustained. Ib.

EQUITY.

See also FRAUDULENT CONVEYANCES, 4; LIENS, 1, 2; MORTGAGES, 12; PATENTS, 3; PROMISSORY NOTES, 4; TAXES, 1.

1. *Stating accounts; Declaring trusts: Set-offs, etc.*

Under an order made in 1887, calling in the outstanding warrants of a county, the defendant presented for re-issuance, warrants amounting to the sum of $65,000, which the County Court rejected, and he appealed from its judgment. At a subsequent term during the same year, the court rendered judgment against the defendant for the sum of $118,000, found to be due from him to the county for moneys received by him as Collector of revenue, in 1864. He also appealed from the latter judgment, and while both appeals were pending, the State, for the use of the county, filed a complaint in equity against him, alleging that he received the warrants as part of the revenue of the county, for the year 1864, and converted them to his own use; that he was insolvent and his bond as Collector had been lost, and praying that he be restrained from collecting the warrants, or, if he was entitled to have them re-issued, that an equal amount of his indebtedness to the county be set off against them. HELD: (1.) That whether the warrants were part of the county revenue, or legally belonged to the defendant, and he was found to be indebted to the county, in either case a court of equity only could afford the plaintiff proper relief. (2.) That the equitable action to obtain such relief is not barred by the pendency of the causes originating in the County Court, since, although they relate to the same matters set out in the complaint in equity, they seek a different object. (Following *Garibaldi v. Wright, ante, 416.*) Pride v. State, 502.

2. *Staleness of demand.*

On the facts alleged in such complaint, the defendant cannot resist the relief it seeks, on the ground that the demand of the county is stale. *Ib.*

ESCROW.

See DEEDS, 1.

ESTOPPEL.

See also CONVEYANCES, 4; INSURANCE, 2; MARRIED WOMEN, 3; MORTGAGES, 4.

1. *To claim house as part of realty.*

The plaintiff and defendants with other citizens of a town—of the council of which the plaintiff was a member—having subscribed to a fund for building a city jail, located it on school land adjoining the town, and agreed that whenever the State sold the land they would move the building to a lot to be provided by the town. The land was subsequently sold by the Sheriff, who, in making the sale, announced that the jail building did not go with it, and the plaintiff bought the land with that understanding. HELD: That the plaintiff was es-

topped to treat the building otherwise than as personalty belonging to the town. Harmon v. Kline, 251.

2. *To contest payment of judgment.*

In an action by an attaching creditor against an insolvent debtor and certain of his creditors who have been preferred by the confession of judgments in their favor, the plaintiff will be estopped from contesting the payment of one of the judgments, where it appears from the record that he has consented to an order of distribution in which such judgment is specified as one to be paid *pari passu*, with certain others. Bryan-Brown Shoe Co. v. Block, 458.

EVICTION.

Constructive, see WARRANTY, 1.

EVIDENCE.

See also EXEMPTION, 4, 5; CONTRACTS, 1, 3; CONVEYANCES, 1; EJECTMENT, 2 FRAUDULENT CONVEYANCES, 3; LANDLORD AND TENANT, 3; WITNESSES, 1–4.

1. *Declarations of agent.*

In an action against a railway company, to recover damages for an injury to the plaintiff sustained by falling into a hole in the defendant's platform, a statement of the depot agent made at the time the injury was received, that the hole "ought to have been fixed," is not admissible to prove unreasonable delay, on the part of the company, in repairing the platform after the defect became known. Railway v. Barger, 78.

2. *To prove matters of record.*

The rendition of a judgment by the Circuit Court, an appeal therefrom, the reversal of the judgment by the Supreme Court, and the taxation of costs in the cause by the Clerk, are all matters which must be proved by the record of such proceedings, unless it has been destroyed. Cary v. Ducker, 103.

3. *As to value of labor.*

In an action to recover damages for the breach of a contract, to pay a specific sum for work, testimony as to the value of the work is inadmissible. Gibney v. Turner, 117.

4. *Acts of co-conspirators.*

On the separate trial of one of two defendants jointly indicted for a burglary alleged to have been committed by breaking into a building with intent to steal the funds of a county, evidence that his co-defendant in his absence had proposed to the Deputy Treasurer to obtain through the latter moneys from the county treasury, is admissable where there is proof that the defendants together renewed the offer at another time, and where there is also proof tending to

show that their conduct on both occasions was part of a conspiracy to induce the deputy to aid them in committing the offense. Fort v. State, 180.

5. *Appearances: Stating conclusion of fact.*

On a trial for burglary, a witness who had examined the door of a vault, and an ordinary lock which fastened it, was permitted to state that force had been applied from the outside to break the lock. HELD: That as the statement was only a conclusion of fact, drawn from appearances which could not be produced to the jury, it was not reversible error to admit it. Ib.

6. *Opinion of witness.*

But where on such a trial a witness who had also examined the broken lock and door, and testified fully to the conditions he observed, was asked the question: "Do you think the inner vault door was opened first and the lock broken afterwards," it was not error to refuse to allow him to answer, as the question called for a speculative opinion not necessarily based on what he had observed. Ib.

7. *Corroborating testimony of accomplice.*

The defendants were charged with a burglary committed with intent to rob the county treasury. A witness for the State who had been the Deputy Treasurer, testified that after agreeing to aid the defendants in obtaining access to the public money his "nerve" failed him, a few days before the burglary, and at the request of the defendants, he then gave them the combination to the safe in which the money was kept, and they declared their intention to commit the crime without further assistance. By other testimony it was shown that the offense was committed by some one who had the combination to the safe. One of the defendants admitted that he had entertained a proposition from the deputy to take the combination and commit the burglary. Several witnesses testified to the other defendant's confession that he had joined a conspiracy and obtained the combination for the same purpose. It was also proved that both defendants, who resided three miles from the county seat, where the Treasurer's funds were kept, came to town without ostensible business, on the night the burglary was committed; that they left before daylight, and afterwards denied having been in town during that night. HELD: That the evidence of the accomplice was sufficiently corroborated to sustain a conviction. Ib.

8. CRIMINAL EVIDENCE: *Trial for homicide: Bruises on body of deceased.*

On a trial for murder where there was evidence to show that during the day of the killing the conduct of the defendant and deceased toward each other was rough and insulting, and that the deceased was the aggressor in such conduct, proof on the part of the State that the body of deceased was exhumed a few days after his death, and that certain bruises were found upon it, which, on being explained to the jury, tended to elucidate the question as to who had been the aggressor in the altercation which preceded the killing, was admissible Billings v. State, 303.

9. *Same: Threats.*

On such trial the State was permitted to prove that two years before the killing, the defendant, in conversation with the wife of the deceased, wanted to buy her interest in certain lands and that on her refusal to sell on credit, he stated that he would have the land "or some man's hide." HELD: That such threat being ambiguous and too remote, both in circumstance and time, to afford any reasonable presumption of connection with the crime charged, was inadmissible. Ib.

10. *Same: Facts proving offense not charged.*

Facts which go to prove the commission of an offense distinct from that charged in an indictment are not admissible on the trial of the latter unless, in view of all the circumstances of the cause, there appears to be a connection between such facts and the offense charged, or they tend to prove some fact which it includes. Ib.

11. SAME: *Same.*

On a trial for murder the State proved that about two and a half years before the killing, the deceased and one W. had a fight; that a few minutes after the fight the deceased said to one B. that he had knocked his (B.'s) brother-in-law down; that defendant, hearing the remark, ran up with a drawn knife and, saying with curses, "if its brothers in-law you are after, I'm here," struck at the deceased with the knife. There was no proof that any subsequent altercation occurred between the parties, who were neighbors, or that their relations were thereafter and prior to the day of the killing, unfriendly. HELD: That evidence of the previous assault could only have been competent to show malice, and as there was no reasonable inference that it had that tendency, it was error to admit it. Ib.

12. *Burden of proof.*

In replevin where the defendant, without denying the plaintiff's title to the property sued for, claims the right to its possession under an agreement with the plaintiff that he should sell it and out of the proceeds pay an account which the plaintiff owed him, the burden is on him to establish the defense thus alleged. Crenshaw v. Bradley, 318.

13. *Dying declarations.*

A mere expression of opinion is not admissible as a dying declaration; and it is immaterial whether the fact that a declaration *is* mere opinion, appears from the statement itself, or from other undisputed evidence showing that it was a physical impossibility for the declarant to have known the facts stated. Jones v. State, 345.

EXCEPTIONS.

See BILL OF EXCEPTIONS, 1; PLEADING AND PRACTICE, 11.

EXECUTIONS.

See CURTESY, 1; EXEMPTION, 1–5; STATUTES, 1.

1. *On justice's judgment.*

Under section 4103 Mansfield's Digest, no execution can be issued on the judgment of a justice of the peace after five years from the date of its rendition. After that time the power of the justice to issue execution expires and cannot be revived by *scire facias*, or in any other way peculiar to courts of superior jurisdiction. Trammell v. Anderson, 176.

2. *Motion to quash*

Questions of fact arising on a motion to quash an execution, should be tried by the court, and not by a jury. Woolum v. Kelton, 445.

3. *Same: Appeal.*

On appeal from the judgment of a justice refusing to quash an execution, the Circuit Court, on finding against the execution debtor, should render judgment against him and the sureties on his appeal bond for the costs only (including that of both courts), and it is error in such case to permit a recovery for the amount of the justice's judgment on which the execution issues. Ib.

EXEMPTION.

See also HOMESTEAD, 3, 4.

1. *Of personal property: Domicile: Residence.*

One who has a domicile in Arkansas may claim his exemption of personal property, from sale under process, as provided for in Art. 9, Sec. 1, of the Constitution, although at the time of asserting such claim, he is temporarily residing in another State. Birdsong v. Tuttle, 91.

2. *Garnishment, etc., of wages.*

The act of November 27, 1875 [Mansf. Dig., Sec. 3422], providing, with certain limitations as to time and amount, for the exemption of the wages of laborers and mechanics, from seizure by garnishment or other legal process, is constitutional. Ib.

3. *Of wages.*

The right to claim the exemption provided for in Sec. 3244 Mansf. Dig., of laborers' wages from seizure by garnishment, is limited to persons entitled to exemption under the Constitution, and does not extend to non residents. The sworn statement by which the statute requires a defendant to claim such exemption of wages, is therefore defective if it fails to show that he is a resident of this State. Porter v. Navin, 352.

4. *Of personal property.*

Prima facie all the personal property of a judgment debtor is subject to execution, and if he claims that part of it is exempt, his right to such exemption must be shown affirmatively. Blythe v. Jett, 547.

5. *Same: Burden of proof.*

Where a sale of such property by the debtor is attacked for fraud, and the vendee claims that the property would not have been subject to execution if the sale had not been made, the burden is upon him to establish that fact. [Upon this point Erb v. Cole, 31 Ark., 554, is over-ruled.] Ib.

FERRIES.

1. *License to keep: Damages to right.*

In a suit to recover damages to a ferry right, resulting as alleged, from the conduct of defendant in permitting persons and property to pass for hire over his bridge, and thus diverting traffic from the plaintiff's ferry, the complaint states no cause of action where it fails to show that the plaintiff was at the time of the alleged injury licensed to keep a ferry within limits embracing the site of the bridge. Without such license the plaintiff could not, under the statute [Mansf. Dig., Sec. 3311], lawfully collect toll, and would not therefore be damaged by the diversion of business from his ferry. To be sufficient the complaint should also aver that the defendant collected toll without lawful authority, since the plaintiff could not recover for losses sustained from a competition that was legal. Hanger v. Little Rock Junction Railway, 61.

2. *Penalty for running without license.*

The penalty imposed by Mansf. Dig., Sec. 3335, for keeping a ferry and charging therefor any money or other valuable thing, without obtaining a license, is not recoverable against one who runs a free skiff as an inducement to persons to trade at his store, when it appears that the persons carried did not agree to buy anything from the defendant, and that he made no charge, in money or otherwise, for ferriage. Shinn v. Cotton, 90.

FRAUD.

See also ASSIGNMENT FOR BENEFIT OF CREDITORS, 4, 5; CONVEYANCES, 3, 4; FRAUDULENT CONVEYANCES, 1, 2.

1. *In purchase of goods.*

Where goods are purchased through fraudulent misrepresentations, the vendor may repudiate the contract of sale and sue to recover possession of the goods. Richmond v. Mississippi Mills, 30.

2. *Same: Right to rescind contract.*

Where the vendor of goods knowing that fraudulent representations were made by the vendee to obtain them, sues for the purchase money and prosecutes his suit to judgment, he thereby ratifies the contract and loses his right of rescission. Bryan-Brown Shoe Co. v. Block, 458.

FRAUDULENT CONVEYANCES.

See also ASSIGNMENT FOR BENEFIT OF CREDITORS, 4, 5; HOMESTEAD, 1; CONVEYANCES, 4.

1. *Who may avoid.*

A conveyance to defraud creditors is good between the parties, and against all persons except creditors of the grantor, who are in position to assail it. Bell v. Wilson, 171.

2. *Same.*

In ejectment, where both parties claim title derived from a common source, the plaintiff cannot avoid the conveyance under which the defendant claims by showing that it has been adjudged a fraud upon the rights of creditors in a suit to which he (the plaintiff) was not a party. Ib.

3. *Evidence of.*

In a suit brought by the creditors of an insolvent debtor to vacate his conveyance of certain land made about the time of his failure in business, the vendee testified that he had never been in the actual possession of the land; that he had never seen it; that he did not know how much of it was cleared and how much in the woods; that he did not know how much of it was hill and how much bottom land, and that after the sale the vendor collected the rents and assisted him in disposing of the land. HELD: That these facts in connection with a relationship existing between the parties to the conveyance, were sufficient to justify a finding that it was fraudulent. Bryan-Brown Shoe Co. v. Block, 458.

4. *Same.*

The grantee in such conveyance being a party to the suit to avoid it, and it appearing that he had exchanged the land thus obtained for other land, and sold the latter, taking a note for the unpaid purchase money, the court on setting aside the conveyance properly required the surrender of the notes, and held the maker thereof as an equitable garnishee. Ib.

GARNISHMENT.

Of Wages, see EXEMPTION, 2, 3; See also FRAUDULENT CONVEYANCES, 4.

Order to pay garnished debt: Effect of: Action against garnishee.

An order to pay over money made upon a garnishee in an attachment proceeding:

after his failure to appear therein, is not a judgment against him, and does not determine his liability to pay. The only effect of such order is to confer upon the attaching creditor the same right to collect whatever the garnishee owes the attached debtor that the latter himself had against the garnishee, and in an action brought by the plaintiff in the attachment to recover the garnished debt, the garnishee is not precluded from any defense he might have made before the garnishment. Penyan v. Berry, 130.

HOMESTEAD.

1. *Conveyance of, not fraudulent.*

The homestead of a debtor not being subject to the lien of a judgment, or to sale under execution, his conveyrnce of it, although executed with a bad motive, deprives his creditors of no right, and is therefore not fraudulent. Bogan v. Cleveland, 101.

2. *Sale of: Certiorari: Practice.*

The Probate Court has no jurisdiction to sell the homestead of a decedent during the minority of his children. But where the lands of an estate are sold in a body for the payment of debts, it is not error on *certiorari* to refuse to quash an order confirming the sale on the ground that part of the lands constituted the homestead of the deceased, and that the sale was made during the minority of his child. In such case the Circuit Court, having in the proceeding by *certiorari* no guide enabling it to separate the lands which the Probate Court had power to sell from those constituting the homestead, the heir will be left to his action at law for the possession of the latter. Burgett v. Apperson, 213.

3. *Conveyance and exchange of: Exemption.*

A creditor cannot complain that the conveyance of a homestead is fraudulent as to a debt for the payment of which it is not subject to execution. But where the debtor exchanges his homestead for other real estate, the latter will not be exempt except as a homestead, and to the extent allowed by the Constitution. Campbell v. Jones, 493.

4. *Same.*

The appellee being the owner of a homestead situated in another State, and not subject to execution there, exchanged it in 1877 for 1600 acres of unimproved lands lying in this State, taking the deed to the latter in his own name, but with the understanding that when he had divided the lands between himself and his children, the deed received should be cancelled and deeds executed according to such division. He subsequently cancelled the deed by a writing across its face, and surrendered it to the grantor, who then executed to him a deed for 160 acres of land, and conveyed the residue to his children. The conveyance to the children was without consideration on their part, and they had no knowl-

edge of it until 1882. On a bill filed in 1886 to subject the lands to the payment of a judgment recovered against the appellee in 1885, for a debt existing prior to the exchange of lands, held: (1.) That the title to the 1600 acres having vested in the appellee on the delivery of the original deed to him, the whole of said lands, except such part thereof as he might be entitled to claim as a homestead, became *eo instanti*, subject to execution for the payment of his debts. (2.) That the cancellation of such deed being ineffectual to divest the appellee's title, his children acquired no title by the conveyance which he caused to be made to them. (3.) That no title having ever vested in the children, and the lands conveyed to them being wild and unimproved, the plaintiff's action was not barred as to them by the statute of limitations. (4.) That the appellee having before the recovery of the plaintiff's judgment, fixed his homestead on the 160 acres of land conveyed by the second deed to him, he was entitled to claim its exemption. (5.) That the rest of the lands should be subjected to the payment of the plaintiff's judgment. Ib.

HOMICIDE.

See CRIMINAL LAW, 1; CRIMINAL PROCEDURE, 3, 5.

HUSBAND AND WIFE.

See also CURTESY, 1; MARRIED WOMEN, 2, 3; SPECIFIC PERFORMANCE, 1.

1. *Action on contract between: Practice.*

Whether a note given by a husband to his wife for borrowed money constitutes a legal liability or not, it is clearly a claim which equity will enforce against him; and where the wife's administrator sues the husband at law upon such note, the error, if any, in the form of the proceeding, will be waived by the defendant's failure to move a transfer to the proper docket. Munday v. Collier, 126.

2. *Payment to husband on wife's note.*

Although a husband is expressly authorized to collect a note payable to his wife and belonging to her separate estate, he cannot accept in its payment the satisfaction of his own debt, unless it is shown that she has either expressly or impliedly assented to such use of her funds. Arnett v. Glenn, 253.

INDIAN TERRITORY.

See also COMMON LAW, 1.

Adjudication as to right accruing in.

When the aid of our courts is invoked as to a right accruing in the Indian Territory, in the absence of evidence showing the laws in force there, the laws of this State will be applied and justice administered according thereto. Garner v. Wright, 385.

INDICTMENT.

See ROADS AND HIGHWAYS, 2.

1. *For keeping dramshop open on Sunday.*

An indictment under section 1887, Mansfield's Digest, which alleges that the defendant, "on the first day of May, 1889, * * * unlawfully did keep open his dram shop on Sunday," is sufficient, although the day of the month is not correctly stated. The gist of the offense being that the shop was kept open on Sunday, the allegation of the time is not material. Marquardt v. State, 269.

2. *Signature to indorsement.*

The statutory provision that the indorsement, "a true bill," on indictments, shall be signed by the foreman of the grand jury, is directory, and where such signature is omitted, objection to the irregularity is waived unless made before pleading. State v. Agnew, 275.

3. *For assault with intent to kill.*

In an indictment for an assault with intent to kill and murder, it is sufficient to allege that the assault was committed in the manner and with the intent necessary to constitute the offense charged, without expressly averring "the present ability" necessary under the statute to constitute the assault. [*Mansf. Dig., sec. 1562.*] The word "assault," when used in such connection, means all the statute defines an assault to be. Russell v. State, 276.

4. *Presumption as to returning.*

Where an indictment recites that it was found in the Circuit Court of a county embracing two judicial districts, without specifying in which district it was found, and it appears from the term at which the indictment was found and the date of the Clerk's indorsement upon it when it was received from the grand jury, that it was returned at a time when the court for one of the districts alone could legally be in session, it will be presumed from the indictment itself that it was returned by a grand jury legally empaneled in that district. Helt v. State, 279.

INFANCY.

See STATUTE OF LIMITATIONS, 3, 4; TAX SALES, 1-5.

INJUNCTION.

See also JUDGMENTS, 1; TAXES, 13.

Damages on dissolution of.

Sections 3763, 3765, Mansf. Dig., providing for the assessment of damages on "the dissolution of an injunction * * * to stay proceedings upon a judgmeet," apply only to cases where the enforcement of the judgment is enjoined.

An injunction to prevent the sale of particular property is not within the meaning of the statute, and it is error to award damages on dissolving it. Stanley v. Bonham, 354.

INN-KEEPERS.

Liability for baggage.

A guest severs his personal connection with a hotel by surrendering his room and paying his bill. And as to baggage which he subsequently delivers to the proprietor, to be held either as a pledge for money borrowed or for accommodation, the extraordinary liability incident to the relation of inn-keeper and guest does not arise. Wear v. Gleason, 364.

INSTRUCTIONS.

See also COSTS, 3; CRIMINAL PROCEDURE, 1-3, 5; PLEADINGS AND PRACTICE, 1; PROMISSORY NOTES, 5; RAILROAD COMPANIES, 13; TRESPASS, 1.

1. *Should be applicable to opposing theories.*

Instructions to the jury should declare the law as applicable to any view of the facts which upon the evidence may be taken by either of the parties to the cause on trial. Luckinbill v. State, 45.

2. *As to exemplary damages.*

In an action to recover damages for an assault, where the verdict is for the defendant, the plaintiff was not prejudiced by the court's refusal to instruct the jury that if they found that the assault was malicious, they might return a verdict for punitive damages. Brown v. St. L., I. M. & S. Ry., 120.

3. *Not responsive to cause of action*

It is not error to refuse a plaintiff's request for an instruction not responsive to the cause of action stated in his complaint. Ib.

4. *Invading province of jury.*

An instruction that if the jury believe a witness "has any bias or leaning to one side or the other * * * they should find that leaning or bias against the party in whose favor the witness leant" invades the province of the jury and is therefore erroneous. Bing v. State, 263.

5. *In civil cases.*

In charging the jury in civil cases the word "satisfy" should not be used in an instruction, in such connection that it may be taken to mean that a verdict cannot be given on a preponderance of the evidence. Arkansas Midland Railway v. Canman, 517.

INSURANCE.

1. *Avoiding policy: Waiver.*

The issue of a policy of insurance with a full knowledge or notice of all the facts affecting its validity, is equivalent to an assertion that it is valid at the time of its delivery, and is a waiver of any ground for avoiding it, then known to the insurer. And as to such ground the knowledge of an agent who receives the application on which the policy is issued, is regarded as the knowledge of the company for which he acts, and notice to him is notice to his principal. Insurance Co. v Brodie, 11.

2. *Same: Estoppel.*

Where the agent of a company authorized to fill up a blank application for insurance against fire, does so by writing therein answers as to the condition of the property to be insured, which he knows to be false, the company will be estopped from setting up the falsity of such answers to avoid a policy issued on the application, although the latter contains a clause warranting the answers to be true. Ib.

3. *Action on policy: Time of bringing: Limitation: Waiver.*

A stipulation in a policy of fire insurance that an action thereon shall be brought within a limited time, is valid, but may be waived. Such waiver may be the act of an authorized agent, and notwithstanding a declaration in the policy to the contrary, may be proved by oral evidence. Ib.

4. *Same.*

Although a policy of fire insurance stipulates that no action upon it shall be maintained unless brought within six months after the loss or damage occurs, an action brought after the expiration of that time is maintainable where it is shown that the plaintiff did not sue within the time prescribed, because an agent of the insurer authorized to settle the plaintiff's loss, by representations on which he relied, led him to believe that it would be paid without a suit. Ib.

5. *Life insurance: Right to, fixed by contract.*

Whether a policy of life insurance be issued by a mutual benefit society created for benevolent purposes, or by a company the organization of which is financial and contemplates gain, the rights of one claiming insurance under it must be ascertained by the contract itself without regard to the character of the company to be made liable. Block v. Valley Mutual Insurance Association, 201.

6. *Same: Assignment of policy.*

A clause in a policy of life insurance providing that it "may be assigned, transferred, or set over, by and with the consent" of the company issuing it, authorizes an assignment by the beneficiary only, and not by the insured. Ib.

7. *Same.*

A policy of insurance issued by a company organized, as declared in its by-laws, "for the purpose of mutually associating together a number of individuals into an agreement whereby the survivors mutually contribute for the relief of the representatives, legal heirs, or assignees of those of their number whom death may strike down," and whereby the company undertakes to pay to a person named therein as a beneficiary a stipulated sum within ninety days after the death of the person to whom it is issued, upon condition that certain payments therein provided for are promptly made to the company on maturity, and providing that a failure to make any of such payments for thirty days after call, shall have the effect to cancel the contract, is an ordinary insurance policy. And the party obtaining it has no power to change the beneficiary it names unless he is expressly authorized to do so by the policy itself, or by the company's articles of association or by-laws, where these are by the terms of the policy made a part of it. Ib.

8. *Insurance against fire: When contract entire.*

When a gross sum is paid as the premium for an insurance against fire, the policy constitutes an entire contract, although the amount for which it issues is apportioned to distinct items. McQueeny v. Phœnix Insurance Co., 257.

9. *Same: "Premises" insured.*

Two houses situated thirty feet apart but in the same inclosure, were insured for separate sums in consideration of the payment of a gross premium. The policy contained the following clause: "If, during this insurance, the above mentioned premises shall become vacant or unoccupied, * * * then and from thenceforth, so long as the same shall continue vacant or unoccupied * * * this policy shall cease and be of no force. * * *" HELD: That the two houses comprised the "premises" insured, within the meaning of the policy, and so long as either of them was occupied the policy was not suspended. Ib.

INTEREST.

See WARRANTY, 3; PARTITION, 1.

JUDGMENTS.

See also ADMINISTRATION, 1–5; APPEALS, 1, 2, 3; ESTOPPEL, 2; EVIDENCE, 2; PLEADING AND PRACTICE, 2, 7;

1. *Without notice: Complaint to enjoin.*

A bill to enjoin a judgment on the ground that it was rendered without notice, states no cause of action where it fails to allege the existence of a defense to the claim on which such judgment was based. Rotan v. Springer, 80.

2. *Probate Court: Judgment against guardian: Jurisdiction: Certiorari.*

A judgment of the Probate Court, rendered against a guardian in a proceeding to recover the value of goods furnished to his ward, is void for the want of jurisdiction over the subject of the action, and may be quashed on *certiorari.* Cresswell v. Matthews, 87.

3. *For conversion of chattel: Pleading.*

In an action of replevin an interplea claiming the chattel sued for on the ground that the plaintiff has recovered judgment against the interpleader for its conversion, is bad if it fails to allege a satisfaction of the judgment. Dow v. King, 282.

4. *For injury to chattel: Title under.*

A judgment for damages recovered for injuring a chattel can confer upon the defendant no right to the property. Ib.

5. *Rendered on constructive notice.*

Sections 4339, 4341, Mansf. Dig., provide that in a suit to enforce a vendor's lien on land sold by the State, where the return upon process issued against the defendant shows that he is dead, or upon other proof thereof, the Clerk shall make and enter on the record an order which shall contain the title of the suit, the amount of the note or bond proceeded upon and a description of the land upon which the lien is sought to be enforced, and shall warn generally, the heirs and personal representatives of the defendant to appear and make defense thereto on the first day of the next term of the court, commencing more than sixty days from the date of such order. Section 4340 ib. requires the order to designate the month and day of the month on which such term of the court will commence, and provides that its publication once in each week for four successive weeks, in an authorized newspaper, as provided by law, shall be equivalent to a personal service. In an action of ejectment the plaintiff claimed title under a decree rendered in a proceeding under said statute, and based, as shown by the record, on a warning order, which, after giving the style of the court and title of the cause, is in the following form:

"The defendants, the legal representatives of J. E. B. and J. N. C., are warned to appear in this court within thirty days and answer the complaint of the plaintiff, the State of Arkansas, for use of school fund.

"D. P. U., Clerk."

HELD: That such order does not state material facts required by the statute, and the decree based on it is therefore void. Cross v. Wilson, 312.

6. *Same: Proof of publication.*

An affidavit stating that a warning order, required to be published once a week for four successive weeks, was published four times in a certain newspaper, naming it, and giving the date of the first and last insertion, but without stating

that the newspaper was one authorized by statute to publish legal notices, or that the affiant was its editor, publisher, proprietor or principal accountant, is fatally defective as a proof of publication under Mansf. Dig., Sec. 4599. Ib.

7. *Vacating after close of term.*

A judgment of the Circuit Court cannot be vacated therein after the expiration of the term at which it is rendered, except upon complaint filed in accordance with the provisions of Sec. 3909 Mansf. Dig. And where a petition to set aside a decree is presented only by way of exceptions to the report of a sale, it should be rejected. Johnson v. Campbell, 316.

8. PROBATE COURT: *Judgment of, cannot be attacked collaterally.*

The doctrine established by previous decisions of this court, that the Probate Court is one of superior jurisdiction, and that its judgment in the exercise of a jurisdiction, rightfully acquired, cannot be attacked collaterally, has become a rule of property and is adhered to Apel v. Kelsey, 341.

9. *Judgment by confession in justice's court.*

Where the entry of a judgment by confession in the docket of a justice of the peace does not show, except by inference, that the defendant personally appeared in the justice's court as provided by the statute [Mansf. Dig., sec. 5185] governing confessions of judgment, and it is shown by parol testimony that he did not in fact appear, the judgment will be held void. Smith v. Finley, 373.

10. *Confession of judgment: Mistake.*

A judgment by confession will not be set aside because it is for an amount in excess of the debt for which it is given, where the excess was not due to a fraudulent purpose, but was the result of mistake and was afterwards remitted. Bryan-Brown Shoe Co. v. Block, 458.

JUDICIAL SALES.

See ATTACHMENTS, 2.

1. *On credit not directed by order.*

Where land was sold on a credit of *three* months under a decree which fixed the term of the credit at *four* months, it was not an abuse of the court's discretion, to confirm the sale on being satisfied that no injury had resulted from the irregularity. Johnson v. Campbell, 316.

2. *Receiver's sale: Correction of mistake.*

The court ordered the sale of a stock of merchandise at not less than 70 per cent. of the invoice price of the goods, and they were advertised to be thus sold. A party to the action bid 70 per cent. for the goods and became the purchaser as appears from the report of the receiver who made the sale. In

computing the 70 per cent. the receiver by mistake extended a lot of the goods at $2129 less than the correct amount. HELD: That the contract actually made being for the purchase of the goods at 70 per cent. of their invoice price, and the error being apparent upon the face of the record, the court properly corrected it by charging the purchaser with the true amount. Bryan-Brown Shoe Co. v. Block, 458.

JURISDICTION.

See also EQUITY, 1; COUNTY WARRANTS, 1, JUDGMENTS, 2; PARTNERS, 2; PLEADING AND PRACTICE, 7.

1. *Conflict of: Action for conversion.*

An action at law will lie for the conversion of property, although it is in the custody of a chancery court, in a suit between the same parties, as such action does not interfere with the possession of the property. Garabaldi v. Wright, 416.

2. *Same.*

After property belonging to the defendant in an action at law has been seized under an order of attachment issued by the Circuit Court, the exercise of that court's jurisdiction over it cannot be interfered with by the order of a court of chancery appointing a receiver, and directing the transfer of the property to his possession. Ford v. Judsonia Mercantile Co., 426.

JURY.

Province of, see INSTRUCTIONS, 4. Trial by, see EXECUTION, 2; RAILROAD COMPANIES, 11. See also, VERDICTS, 1.

JUSTICE'S COURT.

See APPEALS, 4; EXECUTIONS, 1; JUDGMENTS, 9.

LANDLORD AND TENANT.

See also REPLEVIN, 4.

1. *Landlord's lien: Assignment of rent note.*

Where a landlord after assigning a rent note as collateral security for a debt redeems it, his lien on the tenant's crop which was suspended by the assignment is revived; and his right to enforce the lien will not be defeated by a sale of the crop made before the redemption of the note, if the purchaser buys with notice that the rent remains unpaid. Dickinson v. Harris, 58.

2. *Same: Liability of tenant's vendee; Practice on bill to enforce lien.*

In such case the vendee of the tenant having disposed of the crop and made a payment of the note before it was redeemed, he will be liable to the landlord

on account of the proceeds of the crop, and the landlord will be entitled to recover of him the amount of such proceeds, less the sum paid on the note, if that amount be due on the rent. And where the note was given in part for the use of horses and farming implements, it will be proper on a bill to enforce the landlord's lien, to refer the cause to a master for the purpose of ascertaining what proportion of the note was given for rent and the balance due thereon. Ib.

3. *Same: Bill to enforce against tenant's vendee.*

On a bill against a tenant's vendees to enforce a landlord's lien on the proceeds of certain cotton alleged to have been purchased with notice of the lien, there was no evidence to show that the defendants knew that the cotton was produced on land belonging to or rented from the plaintiff, and they testified that they purchased without notice of the tenancy, or that the rent was unpaid. The only evidence tending to prove that defendants bought with notice of a lien of any kind was that of one witness, who testified that he told them that he thought the plaintiff had a mortgage or lien on all the tenant owned, but that he did not tell them there was any claim on the cotton for rent. HELD: That the evidence was not sufficient to show notice to defendant's of the plaintiff's lien. Bledsoe v. Mitchell, 158.

4. *Same: Attachment to enforce.*

Where a tenant, by the consent of his landlord, removes part of the crop from the premises where it was grown, to sell it for the purpose of paying a debt to a third person, the failure to apply to the payment of the rent the excess of the proceeds after the satisfaction of the debt, is no ground for attachment. Webb v. Arnold, 358.

LIENS.

See also LANDLORD AND TENANT, 1–4; REPLEVIN, 4; TAXES, 1; VENDOR AND VENDEE, 3.

1. *On future property: Contract for.*

When the parties to a written instrument intend thereby to create a positive lien upon property, although it be personal property not then in existance, such lien will attach in equity as a charge upon the particular property as against the contractor, and all persons claiming it under him, either voluntarily or with notice by record, as soon as his title to it is acquired. Williams v. Cunningham, 439.

2. *Same.*

A written agreement for the sale of a tract of land, after describing the land and stating the terms of the sale, recites that the plaintiff, who was the vendor, to secure the payment of a note given for the purchase money, "reserves to himself a lien on all crops to be grown on said premises" during the year in which

the note was payable. The agreement was acknowledged and recorded. Subsequently the vendee of the land mortgaged a crop produced on it during the year specified in the contract to the defendant, who converted it to his own use. HELD: That the plaintiff had an equitable lien on the crop, and the defendant was liable to him for its value to the extent of his debt. Ib.

LIQUORS.

See also INDICTMENT, 1.

1. *Sale to minor: Agency.*

Although a minor acts as the agent of his parent in purchasing liquor, if that fact be not disclosed to the seller at the time of the purchase, and the sale is made without the parent's written consent or order, it is unlawful, and a subsequent disclosure of the agency will not avoid a conviction. Siceluff v. State, 56.

2. *Appeal from order prohibiting sale of.*

An order of the County Court prohibiting the sale of liquors under the three-mile law, is not an allowance against the county within the meaning of sec. 51, art. 7, of the Constitution, which provides that in all cases of allowance against a county, an appeal shall lie to the Circuit Court "at the instance * * * * of any citizen or resident and tax-payer" of the county. Holmes v. Morgan, 99.

3. *Same.*

An appeal from an order of the County Court, prohibiting the sale of liquors under the three-mile law, cannot be taken by one who did not become, or make any effort to become, a party to the proceeding in which the order was made. Ib.

4. *Unlawful dealing in: Drag-net proviso of license law.*

The liquor provisions of the revenue act of 1883 [*Mansf. Dig., secs. 5592, 5596*] making it a crime to carry on the business of a liquor dealer without a license, created a new offense against the general license law, of which the statute known as the "drag-net proviso" [*Mansf. Dig., sec. 4522*] is a part. And under such proviso, which in effect declares that the license law shall be enforced in every part of the State, irrespective of other acts, a conviction may be had for engaging in the business of a liquor seller without a license, in a local option district, where no license can issue. [*Mazzia v. State, 51 Ark., 177.*] Baird v. State, 326.

5. *Same: 'Drag-net proviso" not unconstitutional.*

The "drag-net proviso" of the license law [*Mansf. Dig., sec. 4522*] does not extend the provisions of that law by reference merely, and it is not, therefore, repugnant to section 23, article 5, of the Constitution, which forbids the extension of the provisions of a prior law by reference to its title only. Ib.

6. *Same: License provisions of revenue act.*

It was not the intention of the act making it a crime to be a common seller of liquors without a license [*Mansf. Dig., sec. 5594*], to limit prosecutions for that offense to territory not covered by other acts. And aside from the effect of the "drag-net proviso," a conviction for such offense may be had in districts where the local option law and other prohibitory statutes are in force. Ib.

7. *Same: Sale by agent.*

Proof that a defendant sold liquors as the agent of an unlicensed dealer, will sustain a conviction for engaging in the business of selling liquors without a license. Ib.

8. *Sales by manufacturers of wine.*

By section 15 of the license act of March 8, 1879, "one who manufactures and sells wines from grapes, berries or other fruits, and who sells no other liquors," is exempted from all the provisions of said act, and is, therefore, liable neither to the penalty fixed by section 5 for selling without a license, nor to that imposed by section 14 for keeping a drinking saloon or dram-shop without a license. Jeffries v. State, 420.

9. *Same.*

Such manufacturer may sell as well through clerks or agents as by contracts made with himself personally. Ib.

MANSLAUGHTER.

See CRIMINAL LAW, 1; CRIMINAL PROCEDURE, 3.

MARRIAGE.

Under duress, see DIVORCE, 1.

MARRIED WOMEN.

1. *May engage in farming: Liability in respect to separate business.*

The statute (Mansfield's Digest, section 4625), which empowers a married woman to "carry on any trade or business * * * on her sole and separate account," uses the term "business" in the sense of employment, and confers upon a married woman the right to engage in farming on her separate account. While thus engaged she may purchase property and supplies to be used in her business of farming, and will be liable therefor to the same extent as if she were unmarried. Hickey vs. Thompson, 234.

2. *Same.*

While the defendant, a married woman, was engaged in farming on lands belonging to herself and on her separate account, her husband, acting as her agent, bought goods to be used in her business of farming from the plaintiff, who,

believing that the husband was the owner of the farm and cultivated it on his own account, charged the goods to him. HELD: That the wife was liable for the goods. Ib.

3. *Same: Estoppel.*

Where a wife gives her note for the amount of an account for goods purchased by her husband as her agent, and to be used in her separate business, she is not thereby estopped from showing that any part of the account was for a debt which she could not legally contract, and for which her husband was solely liable. But the execution of the note raises a presumption that it was given only for such articles as the wife was liable for; and in an action on the note the burden is upon the wife to prove that it embraces an amount for which she is not liable. Ib.

MARSHALLING ASSETS.

See also MORTGAGES, 12.

Collateral securities.

In an action between the contesting creditors of an insolvent debtor, the court having found that one of them held notes, mortgages and commercial paper as collateral securities, ordered him to show what disposition he had made of the collaterals, and enjoined him from sharing in the assets of the debtor until the order was complied with. HELD: That this was not error. Bryan-Brown Shoe Co. v. Block, 458.

MISTAKE.

As to boundaries, see TRESPASS, 1; See also JUDGMENTS, 10; JUDICIAL SALES, 2.

MORTGAGES.

See also ASSIGNMENT FOR BENEFIT OF CREDITORS, 2; REPLEVIN, 4; VENDOR AND VENDEE, 2.

1. *Filing for record.*

The placing of a mortgage in the hands of the Recorder with verbal instructions to file but not to record it, is not a filing for record. And where a mortgage thus left with the Recorder was filed and registered under directions given on a subsequent day, the mortgagee acquired no lien by its filing prior to the time when the instruction to record it was given. In such case it was of no effect to mark the instrument filed as of the day on which it was handed to the Recorder. Dedman v. Earle, 164.

2. *Filing without recording.*

In order that a mortgage may become a lien on personal property against strangers, without being filed for record, as provided for in Mansf. Dig., sec. 4750, the words, "this instrument is to be filed but not recorded," or words of similar import, must be endorsed upon it, and signed by the mortgagee, his agent or attorney; and it must then be filed with the Recorder. Ib.

3. *Redemption: Condition of.*

Where a debtor executes two mortgages to his creditor, one upon lands and the other upon chattels, to secure different debts, and afterwards procures satisfaction of both by a parol release to the mortgage creditor of his equitable interest in the land, and is thus enabled to place the chattels beyond the reach of the mortgagee, equity will not permit him to redeem from the land mortgage without requiring payment of all he owes upon both accounts. Bazemore v. Mullins, 207.

4. *Equity of redemption: Statute of frauds: Estoppel.*

A mortgagee may purchase from his mortgagor, the equity of redemption in the mortgaged lands; and where a creditor holding two mortgages from the same debtor—one being a conveyance of land by deed absolute in form, and the other upon chattels—gives his debtor upon a fair settlement, a release of all indebtedness in consideration of a parol release to him of the equitable interest in the land; and the mortgage debtor thereafter places the chattels beyond the reach of the mortgagee, equity will not aid the mortgagor to avoid the parol release of his interest in the lands by reason of the statute of frauds, but will permit the equitable title to vest in the mortgagee by estoppel. Ib.

5. *To secure future advances: Recoupment.*

Where a mortgage is executed to secure the price of goods to be thereafter furnished by the mortgagee upon the demand of the mortgagor, and the mortgagee, after furnishing part of the goods stipulated for, refuses to supply the residue, he may recover the value of the goods actually advanced. But his right to such recovery is subject to the right of the mortgagor to have the amount thereof reduced to the extent of any loss directly traceable to the mortgagee's breach of the contract, and fairly within the contemplation of the contracting parties, as a natural result of such breach, and which could not have been avoided by reasonable effort on the part of the mortgagor. Levy v. Sayle, 246.

6. *Same.*

In an action by such mortgagee to recover for the goods furnished, an answer setting up a counter-claim, arising out of the plaintiff's breach of the contract, but which fails to allege any substantial loss, or state any fact entitling the defendant to recoup more than nominal damages, is insufficient on demurrer where the contract itself contains no guide for the measurement of damages. Ib.

7. *Description of property.*

A mortgage of "one black mare mule six years old in the mortgagor's possession in White County, Arkansas," states facts by which third persons can identify the property, and is a sufficient description. Lightle v. Castleman, 278.

8. *Description of property, etc.*

The mortgage of a crop which designates it as "my entire crops of cotton and corn, to be raised by me the present year, or contracted by me," and which recites the names of the grantees as "Henderson, Echols & Co.," sufficiently describes both the property conveyed and the mortgagees, and is not invalid as to third parties for uncertainty. Henderson v. Gates, 371.

9. MORTGAGEES: *Compensation for improvements: Liability for rent.*

A mortgagee who himself occupies the mortgaged premises, consisting of a farm, is not entitled to pay for permanent improvements made without the owner's consent, and is chargeable with such rent only as the land would have yielded without the improvements. Robertson v. Read, 381.

10. CHATTEL MORTGAGE: *Possession under: Mortgagee's title.*

Where a mortgaged chattel is delivered to the mortgagee before the right or lien of any third party attaches, his title is good against all persons, if the mortgage was previously valid between the parties, although it is not acknowledged and recorded. Garner v. Wright, 385.

11. SAME: *Same.*

While the mortgaged chattel is in the custody of the mortgagee, he may lend it to the mortgagor for occasional, temporary use, without prejudice to his security. Ib.

12. *Marshalling assets, etc.*

The mortgagee of certain lands and other creditors of the mortgagor, sued out executions against the latter, which were levied on all his property including the mortgaged lands. All the property was subsequently attached by other creditors, who filed a complaint in equity to vacate the judgments on which the execution issued on the ground that they were fraudulent. The lands were sold and the proceeds pro-rated among the judgment creditors, thereby reducing, to the advantage of the plaintiffs, the amount to be paid out of the personal property. The mortgaged lands were not sold subject to the mortgage, and the mortgagee conveyed to the purchaser her legal title. HELD: That she could not be excluded from sharing with the other creditors in a fund derived from the sale of the personal property on the ground that her debt was secured by the mortgage and that she ought to have been required first to foreclose it. Bryan-Brown Shoe Co. v. Block, 458.

MUNICIPAL CORPORATIONS.

Power as to "local improvements," see TAXES, 2, 3.

1. *Nuisance: Power to punish bee-keeping.*

Although bees may become a nuisance in a city, an ordinance which makes the owning, keeping or raising them within the city limits a nuisance, whether it is

in fact so or not, is too broad and is not valid. Town of Arkadelphia v. Clark, 23.

2. *Failure to repair streets: Liability, etc.*

Under the statute [*Mansf. Dig., sec. 737*] the duty of a municipal corporation to repair a street is no greater than its duty to put the street in good condition originally. Both are duties which the corporation owes to the public, but it is not liable to an individual for an injury resulting from a failure to perform either. [*Arkadelphia v. Windham, 49 Ark., 139, approved*]. Fort Smith v. York, 84.

3. *Power to regulate "drumming" for hotels: Amount of license fee.*

Though the power to regulate "drumming" for hotels and boarding houses, granted by section 751, Mansf. Dig., is conferred solely for police purposes, and municipal corporations cannot use it as a means of increasing their revenue, they may require persons engaging in such occupation to pay for a license to do so, a fee sufficient not only to cover the expense of issuing the license, but sufficient also to meet the expenses of the police supervision made necessary by the business in the city or town where it is licensed. City of Fayetteville v. Carter, 301.

4. *Same: Presumption as to fee.*

As the amount of fee which it is necessary for municipal corporations to require for licensing hotel and boarding house "drummers" cannot in all cases be ascertained in advance, the courts will not interfere with the discretion exercised by a city or town council in fixing the fee, unless it is plainly unreasonable. And it will be presumed to be reasonable unless the contrary appears on the face of the ordinance or is established by proper evidence. Ib.

5. *Illegal appropriation of funds.*

Under the laws of this State the council of a town is without power to appropriate money to aid in the building of a court house for the county, to be located in such town. Russell v. Tate, 541.

6. *Same: Remedy: Parties.*

The tax-payers of a town may maintain a suit in equity to prevent the misapplication of its funds. And chancery has power in such case to grant affirmative as well as injunctive relief. [*Mansf. Dig., sec. 929.*] Ib.

7. *Same.*

After the commencement of an action brought to obtain the cancellation not only of a warrant issued pursuant to such illegal appropriation, but also of the appropriation itself, and to recover a sum paid out thereon, the jurisdiction of the court cannot be ousted by the act of the defendants in recalling and cancelling the warrant. Ib.

8. *Same.*

The Aldermen of an incorporated town, having with others executed a bond binding themselves to build within the corporate limits, a court house to be given to the county, appropriated the sum of $1000 out of the municipal funds to aid in such building. Part of the sum thus appropriated was immediately paid by the Treasurer on the order of the Mayor, and a warrant was issued for the residue. In an action brought by tax-payers of the town against the Mayor, Aldermen and Treasurer, to cancel the outstanding warrant, etc., and to recover the sum paid out, HELD: That the taking of such money by the defendants was the conversion of a trust fund, and they were liable therefor. Ib.

MURDER.

See CRIMINAL LAW, 1; CRIMINAL PROCEDURE, 3, 5; EVIDENCE, 8, 9, 11.

NEGLIGENCE.

See RAILROAD COMPANIES, 1–3, 7–9, 13.

NEW TRIAL.

1. *Prejudice of juror.*

Where a party does not avail himself of the opportunity to examine a juror on the *voir dire*, and is not misled or deceived with reference to the juror's prejudice, it is too late after verdict to raise an objection thereto. Brown v. St. L., I. M. & S. Ry., 120.

2. *Newly discovered evidence.*

It is not error to refuse a new trial on the ground of newly discovered evidence, where such evidence is cumulative only. Ib.

NOTICE.

See ROADS AND HIGHWAYS, 3–5; JUDGMENTS, 5; SCHOOL DIRECTORS, 1–2.

NUISANCE.

See MUNICIPAL CORPORATIONS, 1; STATUTE OF LIMITATIONS, 6, 7.

OFFICIAL OATHS.

See SCHOOL DIRECTORS, 3, 4; TAXES, 4.

PARTIES.

See ADMINISTRATION, 9; MUNICIPAL CORPORATIONS, 6; PLEADING AND PRACTICE, 4, 9, 10; WITNESSES, 3, 4.

PARTITION.

See also PLEADING AND PRACTICE, 11.

1 *Allowance of interest in suit for.*

The plaintiff brought an action for the partition of lands which she and the defendants had long treated as belonging exclusively to the latter, and part of which had been sold by one of the defendants, and the proceeds used with the tacit consent of the plaintiff. All the parties having acted under the impression that the plaintiff had no interest in the property until just before the suit was commenced, no share in the rents and profits, or in the proceeds of sales, was paid to or demanded by her. HELD: That under the circumstances of the case no interest ought to be allowed to the plaintiff on the sums due to her out of such rents, etc., except from the commencement of her suit. Clark v. Hershey, 473.

2. *Decree for lien on partition, etc.*

In such action on rendering judgment for the plaintiff, it is error to decree a lien in her favor on the defendant's shares in the unsold lands, to secure the payment of rents and profits. Ib.

PARTNERS.

See also PLEADING AND PRACTICE, 8.

1. *Authority of co-partner: Pleading: Evidence.*

A due bill executed by one of two partners is the liability of both where it is executed in the name of the partnership business, and as evidence of a partnership debt. And where in an action thereon against both partners, commenced in a justice's court, without other pleading than the filing of the due bill, the authority of the party executing the instrument is denied by his co-defendant, no amended or further pleading by the plaintiff is necessary to the admission of evidence competent to establish the partnership. Vaughan v. McGannon, 244.

2. *Suits between: Jurisdiction.*

An action at law may be maintained by a partner against his co-partner, for injury done to the partnership property. A court of equity may also take cognizance of such an injury, in a suit for the final settlement of the partnership accounts. Harris v. Townsend, 411.

3. *Power to dispose of partnership effects.*

A partner has no authority to dispose of the partnership effects in the payment of his individual debt, except by the consent, express or implied, of his co-partner. Feucht v. Evans, 556.

4. *Same.*

One of the members of a firm, without the knowledge or consent of his co-partners sold all the partnership property to satisfy a debt due to the purchaser for

money loaned. Part of the money was loaned to the firm and was used in paying partnership debts; but the greater part was loaned to the partner making the sale, to aid him in buying his interest in the business. HELD: That the sale was void as against the firm creditors, although it was not made with any intent, in fact, to hinder, delay or defraud them. Ib.

PATENTS.

1. *Collateral attack upon.*

A patent of the State absolutely void on its face, as for instance, where it is for land reserved by statute from sale, or is executed by officers not charged with that duty, may be assailed in any controversy. But where a patent for lands of the State subject to sale is executed by officers empowered by law to issue it, their decision that the facts necessary to its issuance existed, is conclusive against collateral attack. State v. Morgan, 150.

2. *Same.*

Gantt's Digest, section 5571, having made it the duty of the Governor and Secretary of State to execute patents for the school lands to purchasers thereof on payment of the purchase money, a patent executed by those officers in the manner provided by the statute, although issued pursuant to a sale made without any warrant of law, cannot be assailed in an action of ejectment, and can be avoided only by a direct proceeding in chancery for that purpose. Ib.

3. *Proceeding to annul: Complaint.*

A complaint in equity by which the State seeks to cancel its patent and recover the possession of lands held thereunder, is insufficient unless it offers to restore to the defendant the purchase money and taxes received from him, and to pay the value of his improvements, less the rents and profits with which he ought to be charged. Ib.

PAROL EVIDENCE.

See CONVEYANCES, 1; EVIDENCE, 2.

PLEADING AND PRACTICE.

See also, ADMINISTRATION, 9; APPEALS, 4, 5; CHANGE OF VENUE, 1; EJECTMENT, 1, 2; EXECUTIONS, 2, 3; FERRIES, 1; HOMESTEAD, 2; HUSBAND AND WIFE, 1; INSTRUCTIONS, 1–5; JUDGMENTS, 1, 3, 7; JUDICIAL SALES, 1; JURISDICTION, 1, 2; LANDLORD AND TENANT, 2; MORTGAGES, 6; MUNICIPAL CORPORATIONS, 6; NEW TRIALS, 1, 2; PARTNERS, 1; PATENTS, 3; REPLEVIN, 1, 2.

1. *Cause of action: Instructions.*

In an action against a railroad company to recover damages for the killing of the plaintiff's son, the complaint alleged that the deceased being a passenger on the defendant's freight train, was by its employes "assaulted and wilfully thrown from said train," and thereby sustained injuries from which he died.

There was evidence tending to show that he received the wounds which caused his death by being struck or run over by a passenger train, and the court instructed the jury to find for the defendant if they believed from the evidence that the deceased was killed by being thus struck or run over. HELD: That this was not error, as the plaintiff could not recover without proving that the deceased was thrown from defendant's train, nor could he, without an amendment alleging negligence on the part of the defendant in running another train over the deceased, recover for that cause. Brown v. St. L., I. M. & S. Ry., 120.

2. *Action on foreign judgment.*

In an action on a foreign judgment an answer alleging merely that the court which rendered the judgment had no jurisdiction to render it, because it was rendered upon a complaint which on its face disclosed that the plaintiff had no cause of action, shows no want of jurisdiction of the person or subject matter of the controversy, but only an error in the exercise of jurisdiction, and is therefore insufficient. Williams v. Renwick, 160.

3. *Practice: Suit on note not due: Waiver.*

Where a suit ts brought on a note before its maturity, that fact, if available as a defense, is waived by a failure to take advantage of it on the trial. Hickey v. Thompson, 234.

4. *Parties: Action by heir to recover debt.*

The sole heir of one who died in 1867, may maintain an action commenced in 1885, to enforce the payment of a debt due the decedent's estate, where it appears that administration on the estate ceased in 1882 by the administrator's death, and that the creditors (if there are any) have made no effort to renew it. Sanders v. Moore, 376.

5. *Pleading: Ambiguity in, corrected by motion.*

Although the material allegations of a pleading are ambiguous and uncertain, if the inference may be drawn therefrom by a fair intendment, that facts exist sufficient to constitute a cause of action or ground of defense, the defect must be corrected by a motion to make more definite and certain, and not by demurrer. Bush v. Cella, 378.

6. *Form of proceeding: Mode of trial.*

The substantial difference between law and equity under the code, is that where the case, stated in the complaint, would, under the former practice, have been an action at law, either party is entitled to a trial by jury; but if the cause would, under the old system, have been distinctly equitable, then it is triable according to the method formerly observed in chancery. Harris v. Townsend, 411.

7. *Same.*

The Circuit Court having power to try causes both at law and in equity, it is not under the code error to try a common law case accordiag to equity practice or a case in equity according to the common law practice, where no objection is made to the form of the trial; and where such objection is made, the application of the wrong form of trial is only an error, and does not affect the validity of a judgment pronounced in the cause in which it is committed. Ib.

8. *Res adjudicata.*

In an action brought by a partner against his co-partner for an injury done to the partnership property, the defendant relied upon the plea of *res adjudicata*, and the court below sitting as a jury, found that in a former suit brought by the plaintiff against the defendant, for an injunction to prevent unlawful interference with the partnership property, the defendant filed a cross-complaint praying for a dissolution and settlement of the partnership, and the plaintiff in answer thereto, among other defenses, set up by way of counter-claim the same cause of action which is stated in his complaint in this suit; that no motion having been made to transfer said counter-claim to the common law docket, the court, by a final decree rendered in said cause, settled all the matters properly at issue therein. HELD: That, on such finding, the judgment should have been for the defendant, sustaining his plea. Ib.

9. *Two actions between the same parties.*

Where two suits are for different objects, they may progress at the same time, althuogh they are between the same parties, and the thing with reference to which they are prosecuted is the same in each case. Garabaldi v. Wright, 416.

10. *Parties: Action in name of agent.*

Altough a mortgage is executed under the direction of an agent, and is the result of a negotiation conducted by him, if it is made to and in the name of his principal alone, and the agent is not a party thereto, he cannot sue upon it in his own name. In such case the mortgage contract is not made with the agent within the meaning of sec. 4936, Mansf. Dig., which provides that a "person with whom * * * a contract is made for the benefit of another," may sue thereon without joining the person for whose benefit the action is prosecuted. Ferguson v. McMahon, 433.

11. *Matters of record. Exceptions.*

On a bill seeking a partition of lands, and an account of the rents thereof, where the facts upon which the several interests of the parties depend appear on the face of the pleadings and are undisputed, no report from a master is necessary to bring them before the court; and no exceptions to such report is necessary in order to present the questions of law arising upon the facts. Clark v. Hershy, 473.

PRACTICE IN SUPREME COURT.

See also APPEALS, 4, 5; CRIMINAL PROCEDURE, 6, 7, 9; CHANGE OF VENUE, 1; SPECIAL JUDGES, 1; SUPREME COURT, 1.

1. *Dismissal of appeal for non-compliance with rules.*

Hathway v. Werner, 171.

2. *Evidence favorable to appellant.*

Where evidence is favorable to the party against whom it is introduced, or is not objected to by him in the court below, its admission cannot be assigned as error. Fort v. State, 180.

3. *Award of damages on affirmance of judgment.*

Where no judgment for the recovery of money is rendered against an appellant either in the Circuit Court or in the Supreme Court, the sureties on his *supersedeas* bond are not liable to pay the 10 per centum damages which sections 1311, 1312 Mansf. Dig. provide for assessing in certain cases on the affirmance of a judgment. Block v. Insurance Co., 340.

PROBATE COURT.

See ADMINISTRATION, 1-8; APPEALS, 3; JUDGMENTS, 2, 8.

PROMISSORY NOTES.

See also HUSBAND AND WIFE, 1, 2; MARRIED WOMEN, 3.

1. *Held as collateral security: Collection.*

A sum of money colleced by a creditor on a promissory note placed in his hands by his debtor as collateral security, cannot be recovered from him while the debt secured remains unpaid. Jenkins v. Neal, 418.

2. *Assignment: Set-off.*

After the payee of a promissory note has assigned it, he cannot plead it as a set-off in an action brought against him by the maker of the note, unless he has, by payment or otherwise, recovered it from the holder. Ib.

3. *Consideration.*

A justice of the peace having fraudulently collected and converted to his own use the amount of a judgment recovered before him by the plaintiff, falsely represented to the latter, and to the defendant, that it had been converted by the constable, and induced the defendant to sign with him a forged note, purporting to have been executed by the constable, and induced the plaintiff to accept it in settlement of the pretended defalcation. Neither the justice nor the constable was indebted to the plaintiff in any sum, nor had the plaintiff ratified the act of the justice in collecting the judgment. HELD: That the note was

without consideration, and that the plaintiff does not stand in the attitude of a purchaser thereof. Talbot v. Wilkins, 437.

4. *Failure of consideration.*

The payees of a promissory note claimed to be the owners of certain mining claims which were to constitute the capital stock of a company they proposed to organize for mining purposes; and the note was given for shares in such stock taken by the maker. In an action on the note there was evidence tending to show thow that the claims were conveyed to a company formed, but not legally organized. HELD: That the equitable right acquired by the defendant in such interest as the payees had in the mining claims, constituted a valuable consideration for the execution of the note, and the right to recover some amount thereon was not defeated by the failure to incorporate the mining company. Smith v. Gillen, 442.

5. *Same: Instructions.*

In such action, in the absence of evidence tending to show that the consideration of the note was illegal, it was error to instruct the jury that any illegality of consideration as to one of the payees, might be pleaded against the other. And the failure to incorporate the mining company being only a partial failure of the consideration of the note, it was also error to instruct the jury that no recovery could be had upon it, if the company had not been legally organized. Ib.

RAILROADS.

See RAILROAD COMPANIES.

RAILROAD COMPANIES.

See also ROADS AND HIGHWAYS, 1; TAXES, 5-13.

1. *Liability for loss of goods by fire.*

Where a railway company carries a car-load of goods, under a bill of lading stipulating that it shall not be liable for their loss by fire, and they are destroyed by the burning of the car containing them after it reaches its place of destination, the company cannot be made liable either as common carrier or warehouseman, except by showing that its negligence contributed to the loss. St. L., I. M. & S. Ry. v. Bone, 26.

2. *Liability for injury to trespasser.*

Where a person is injured by a train while he is trespassing on a railroad track, the company is not liable for the negligence of its employes in failing to discover him on the track, but only for their failure to use proper care to avoid the injury after his presence is known. (St. L., I. M. & S. Ry. v. Monday, 49 Ark., 257.) Brown v. St. L., I. M. & S. Ry., 120.

3. *Duty as to stock straying upon track.*

The extent of a railroad company's duty to the owner of stock which has strayed upon its track, is that the engineer in charge of the train at the time, shall use ordinary or reasonable care after he discovers the stock, to avoid injuring it; and it is not negligence for a railroad company to fail to keep a lookout for stock. M. & L. R. R. R. v. Kerr, 162.

4. *Condemning right of way: Securing compensation to land-owner.*

Section 9, article 12, of the Constitution provides that "no property or right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money, which compensation * * * shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law." HELD: That the provision as to trial by jury refers only to the final assessment of compensation, and does not prohibit the Legislature from prescribing a different method for ascertaining the amount to be deposited as security for compensation pending proceedings to condemn a right of way, as provided for in sections 5464, 5466 Mansfield's Digest. Reynolds ex parte, 330.

5. *Same.*

The act of 1873 [Mansfield's Digest, sections 5464, 5466], which provides that where a proceeding to condemn land to the use of a railway company is likely to retard the work, or business of such company, the court, or judge, in vacation, shall, on application, designate an amount of money to be deposited by the company, subject to the order of the court, for the purpose of compensating the landowner, and that on such deposit being made, the company may enter upon the land and proceed with its work, prior to the assessment and payment of damages, is not unconstitutional. Ib.

6. *Same.*

The order of the judge designating the amount of such deposit, is a step taken in the suit to condemn, and the landowner is entitled to notice of the time and place of that proceeding as of any other had in the cause in vacation. But his right to notice will be waived by appearance. Ib.

7. *Defective crossings: Contributory negligence.*

In an action against a railway company for personal injuries sustained by the plaintiff while attempting to drive a loaded wagon over the defendant's track at the crossing of a highway, the fact that when such attempt was made the plaintiff knew that the crossing was defective is not of itself conclusive proof of contributory negligence where it appears that the defect in the roadway was not necessarily dangerous. St. L., I. M. & S. Ry. v. Box, 368.

8. *Same.*

In such case it is a question for the jury to determine whether, under the circumstances, the plaintiff was justified in attempting to cross the track, and whether he used due care in doing so. Ib.

9. *Negligence: Killing stock.*

Where a railway company permits cotton-seed to accumulate on or about its track, it is under obligation to maintain reasonable care to prevent injury to stock attracted thereby. And where an animal while feeding on such seed, is killed by a train, the burden is upon the company to show that its servants used proper care to avoid the injury. Railway v. Dick, 402.

10. *Regulation as to flag stations.*

The refusal of a railway company to designate as a flag station for its through trains, an unincorporated town, containing only a few houses, and situated within three miles of a regular station, is not an unreasonable regulation. Railway v. Adcock, 406.

11. *Same:*

The facts as to such regulation not being controverted, it is the province of the court to declare it reasonable, and it is error, under such circumstances, to submit the question of its reasonableness to a jury. Ib.

12. *Failure to stop for passenger.*

Where the custom of trains to stop at a place misleads a person, without fault on his part, into the belief that it is a flag station, and relying upon that custom, he buys a ticket to and from such place from an agent of the railway company, who knows that it is his intention to use it in returning on a train which does not stop at the point of his destination, and yet fails to inform him of that fact, the company will be liable for the failure of the train to stop when properly flagged. Ib.

13. *Negligence: Instructions.*

In an action against a railway company for injuries to a passenger caused by the derailment of a car, the court instructed the jury that if they found "there was a spread or bent rail at the time and place of derailment," they might "infer negligence from that fact," and that the burden of disproving it was on the defendant. HELD: That the instruction was erroneous, as it assumed that any spread or bend in a rail is negligence, without regard to its sufficiency to cause the derailment of a car, or otherwise impair the safety of a train. Arkansas Midland Railway v. Canman, 517.

14. *Care required for safety of passengers.*

Railway companies are required to provide for the safety of passengers all such

things as are reasonably consistent with their business and appropriate to the means of conveyance they employ, but they are not required in order to make their roads perfectly safe to incur such expenses as would render the business of carrying passengers wholly impracticable. Ib.

15. *Same: Separate trains for passengers.*

It is not the duty of a railway company to run separate passenger trains where its business is not sufficient to warrant it in doing so. But if the business of the company is sufficiently large and profitable to warrant such trains, and the safety of passengers is endangered by having the passenger coaches mixed in the same train with freight cars, then it is the duty of the company to run separate trains. Ib.

16. *Same.*

Where it is not the duty of a railway company to run separate passenger trains, the statute (Mansf. Dig. sec. 5477) requires it, in forming mixed trains, to place the baggage and freight cars in front of the passenger coaches; and if the use of bell-pulls and air-brakes on trains thus formed is impracticable, the law will not require it. But if the use of such appliances on mixed trains is practicable, and is necessary to the safety of passengers then the law will demand it. Ib.

RECOUPMENT.

See MORTGAGES, 5, 6.

REDEMPTION.

See ATTACHMENTS, 2; MORTGAGES, 3, 4; STATUTES, 1; TAX SALES, 1–5.

REPLEVIN.

See also EVIDENCE, 12.

1. *Description of property: Variance.*

In replevin for a mare claimed by the plaintiff under a mortgage, where the complaint describes the animal as "a cream-colored, blazed-face mare, eight or nine years old, described in the mortgage * * * * as being a cream-colored mare seven years old," the variance between the mortgage and complaint is immaterial and constitutes no ground of demurrer.

2. *Same: Practice.*

If such variance were material and existing between the mortgage and a proper description of the animal taken under the order of delivery, it could be availed of only at the trial and not by motion to quash the order. King v. Connevy, 115.

3. *For property seized under attachment.*

The owner of personal property seized under an attachment against the property

of another, may maintain replevin against the officer having it in possession. Willis v. Reinhardt, 128.

4. *For undivided interest in crop.*

Where a tenant's crop is subject to his landlord's lien for rent, and also to the lien of a mortgage executed to a third party, its purchase by the landlord for a consideration which includes the satisfaction of the rent, extinguishes his lien but gives him an absolute title to an undivided part of the cotton equal in value to the amount for which his lien existed. As to the remaining interest in the crop, the landlord's right is subject to the mortgage. But, as the mortgagee has no superior title to any particular part of the crop, and is only an owner in common with the landlord, he cannot maintain replevin against the latter for his undivided interest. Titsworth v. Frauenthal, 254.

5. *Bond required of plaintiff.*

The solvency of a plaintiff in replevin will not dispense with the surety required of him by section 5575, Mansf. Dig., which provides that an order of delivery "shall not be complied with by the Sheriff until there has been executed in his presence by one or more sufficient sureties of the plaintiff, a bond to the defendant" to the effect prescribed by the statute. And where the officer executes the order without taking such bond he becomes a trespasser, and is liable as such to the party injured. Wilson v. Williams, 360.

ROADS AND HIGHWAYS.

1. *Obstruction of highways by railroads: Statutes punishing, etc.*

The act of March 18, 1887, providing for the recovery by civil proceeding of a penalty against railroad companies for failing to construct or keep in repair railway crossings, does not repeal section 1865 of Mansfield's Digest, which makes it a misdemeanor, punishable by indictment, for any person to obstruct a highway by felling a tree across the same, or placing any other obstruction thereon. And under the latter statute a railway corporation may be indicted for building an embankment across a public highway and failing to keep the same in good condition and repair. St. L., A. & T. Ry. v. State, 51.

2. *Same: Indictment.*

An indictment against a railway corporation which alleges that the defendant on, etc., in, etc., "did unlawfully," etc., "obstruct a public road in the City of Camden, Arkansas, where said railroad crosses the road leading from the City of Camden to Bradley's Ferry, known as the Bradley Ferry road, by building an embankment across said road and failing to keep the same in good condition," etc., charges a misdemeanor under section 1865, Mansfield's Digest, and sufficiently describes the road obstructed. Ib.

3. *Public roads: Notice to attend working.*

A notice given on Saturday to attend a road working on the following Tuesday, Wednesday and Thursday, was not a sufficient warning to work on Tuesday—because three full days did not intervene—but was good as to the other days. Moore v. State, 265.

4. *Same: Warning to work upon.*

Under Mansfield's Digest, sec. 5905, which provides that a warning to work on a public highway "may be given personally or by leaving a written notice at the usual place of abode of the person warned, in some conspicuous place," a service cannot be had by leaving the notice with the wife of the person to be warned, because that mode of service is not within the provisions of the statute. Lowry v. State, 270.

5. *Same.*

Where warning to work on a public highway is served by either of the modes provided for by the statute and its validity is questioned, it must appear that it was given more than three days before the time fixed for the work. Ib.

RULES OF SUPREME COURT.

See CRIMINAL PROCEDURE, 9. PRACTICE IN SUPREME COURT, 1.

SCHOOL DIRECTORS.

1. *Election of: Notice.*

The act of April 4, 1887, amending sec. 6206 Mansf. Dig., and providing that any person chosen to the office of school director, and accepting that position, shall, within ten days after having been notified of his election, take the oath prescribed by the Constitution and file the same in the office of the Clerk of the County Court, does not make it the duty of that court to canvass the vote for directors and certify the result to those elected. School District v. Bennett, 511.

2. *Same.*

It is the duty of the officers holding an election for school directors to give notice of their election to the persons who are chosen. But where a person elected is present and having learned the result, announces that he accepts the office, no further notice to him is necessary. Ib.

3. *Oath of office.*

Under the act of 1887, a school director must qualify by taking and subscribing the official oath and filing it with the County Clerk within ten days after he is notified of his election. Ib.

4. *Same.*

It is not sufficient to take such oath orally; and where the new director fails to qualify within the time and in the manner directed by the statute, the term of his predecessor will continue, as provided in Mansf. Dig., sec. 6205. Ib.

5. *When contracts of, binding.*

Two of the three directors of a school district may bind it by a contract made at a meeting of the directors, attended by the third director, or of which he has had notice. But no contract can be made except at a meeting, and no meeting can be held unless all the directors are present or the absent member has been notified. Notice of a regular meeting is, however, unnecessary where such meetings are held at stated times fixed by the board. Ib.

SCHOOL LANDS.

1. *Statute regulating sale of.*

Section 52, chapter 154, Gould's Digest, required that the school lands should be sold upon a credit, the purchasers to give bonds and pay interest semi-annually, but provided that "any person might pay the amount in cash for which said land was sold." HELD: That the provision as to cash payments applied only to purchasers, and that it was not the purpose of the statute to permit one thus to acquire land which has been sold to another. State v. Morgan, 150.

2. *Same: Authority to sell.*

Sections 5564, 5565, Gantt's Digest, only enlarged the authority elsewhere conferred by statute on County Collectors to sell the school lands; and section 5578, id., merely provided a method by which persons who had purchased lands according to law and complied with the terms of purchase, might acquire patents. Neither of these statutes nor any other authorized the sale of such lands by the Board of Commissioners of the common school fund. Ib.

SCHOOL WARRANTS.

See STATUTE OF LIMITATIONS, 11, 12.

SET OFF.

See EQUITY, 1; PROMISSORY NOTES, 2.

SPECIAL JUDGES.

Record of election: Dismissal of appeal.

An appeal will be dismissed by the Supreme Court where the record fails to show that the special judge who presided at the trial of the cause was elected for that purpose. Wall v. Looney, 113.

SPECIFIC PERFORMANCE.

Of agreement to convey lands.

Where a purchaser of lands causes them to be conveyed to a married woman under an agreement with her husband, who pays the purchase money, that upon the repayment of the amount with interest, he will cause the lands to be conveyed to the purchaser, and the latter enters into possession and makes valuable improvements under the contract, he may enforce it against the wife, who in such case will hold the title as a naked trustee. Bush v. Cella, 378.

STATUTES.

Extending provisions of, by reference.

The act of March 4, 1875 [Mansf. Dig., sec. 3072] declaring that the sections of Gantt's Digest which provide for the redemption of lands sold under execution [Mansf. Dig., secs. 3067–3071] apply to all sales made under decrees in chancery, undertakes to "extend" the provisions of a law "by reference to its title only," in violation of section 23, article 5, of the Constitution, and it is therefore void. Beard v. Wilson, 290.

STATUTE OF FRAUDS.

See also MORTGAGES, 4.

Promise to accept debtor's draft.

An oral agreement by a third party to accept for a creditor his debtor's draft for the amount of his debt, is in effect a promise to pay the debt, and unless it is made upon a new consideration, is void under the statute of frauds. [Chapline v. Atkinson, 45 Ark., 67.] Killough v. Payne, 174.

STATUTE OF LIMITATIONS.

See also ADVANCEMENT, 2; CERTIORARI, 3,

1. *Operation as to trusts: Attorney and client.*

Where land is sold under a decree foreclosing a vendor's lien, and the plaintiff's attorney becomes the purchaser and takes the deed to himself, he holds the land as the trustee of his client, and the statute of limitations will not run in his favor until there is a disclaimer of the trust. Wren v. Followell, 76.

2. *Same.*

Such disclaimer is not established by proof that several years after his purchase, the attorney having received a letter from the client, asking whether the latter could have possession of the land, replied that he (the attorney) had bought i and had a deed to it; that he had made valuable improvements, bought adjoining land, and had put a tenant on the property for the ensuing year, but that he was willing to either buy out his client or to sell to him. Ib.

3. *When infants barred.*

In an action to recover lands the infancy of the plaintiff is no protection against the statute of limitations where it began to run in the lifetime of the ancestor under whom he claims. Bender v. Bean, 132.

4. *Exception in favor of infants: Proof of non-age.*

Where a plaintiff relies upon the fact of his minority to evade the force of the statute of limitations, he must affirmatively show his non-age at such time as will bring him within the exception of the statute. French v. Watson, 168.

5. *As against trusts: Administrators, etc.*

McGaughey v. Brown, 46 Ark., 25, approved as to the running of the statute of limitations against actions for frauds committed by administrators, and as to the operation of that statute against trusts. Ib.

6. *Against action for damages by nuisance.*

Where a nuisance is of a permanent nature, and its erection and continuance are necessarily an injury, the damage it causes may be fully compensated at once, and the statute of limitations runs against an action therefor from the time the nuisance is constructed. But where, although the structure constituting a nuisance is of a permanent character, its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations does not begin to run until the happening of the injury complained of. St. L., I. M. & S. Ry. v. Biggs, 240.

7. *Same.*

In 1873 the defendant railway company built an embankment for its road-bed through the Red river bottom near the land of the plaintiff. The embankment was constructed above the overflow to which that river is subject, and has since been maintained in its original condition. The plaintiff brought this action to recover damages sustained in the year 1885, through the destruction of her levees, fencing and crops by an overflow of her lands, which, as she alleges, resulted from the construction of said embankment without sufficient openings to permit the passage of the water. HELD: That the statute of limitations began to run against the plaintiff from the time the damage sued for was sustained, and not from the time when the road-bed was constructed. Ib.

8. *New promise to avoid.*

Where a new promise relied upon to avoid the statute of limitations is conditional, it must be proved that the contingency contemplated by the promise has occurred. Opp v. Wack, 288.

9. *Same.*

Where a new promise or acknowledgment is relied upon to remove the bar of the statute of limitations, and it is otherwise sufficiently specific, parol evidence is admissible to identify the debt to which the promise attaches by showing that there was but one debt due from the defendant to the plaintiff. But where two or more distinct obligations are due, the written acknowledgment or promise must itself identify the debt to which it refers. Ib.

10. *Same.*

The defendant being indebted to the plaintiff on six distinct obligations, wrote to him saying * * * "rest assured I will do all I can for you. Don't push me, as yours is the only claim on the shop, and I will work it off as soon as possible." HELD: That the writing is insufficient as a new promise to avoid the bar of the statute of limitations, since it fails to designate which one of the obligations the defendant promises to "work off." Ib.

11. *Acknowledgment: New promise.*

The written acknowledgment of a debt will not be sufficient to fix a new period for the statute of limitations to run from, if it embraces a qualification which rebuts the inference of an unconditional promise to pay. School District v. Cromer, 454.

12. *Same: Duplicate school warrants.*

Where, in the place of certain school warrants destroyed by fire, duplicates are issued for the same amount and bearing the same date as the original warrants, with the intention that they shall stand as the evidence of the debt for which the lost warrants were issued, and with like effect, the statute of limitations will run against the new warrants from the date they bear, and not from that on which they are actually issued. Ib.

13. *In actions against Collectors.*

The statute of limitations will not begin to run in favor of a County Collector who converts to his own use the public revenues, until the amount due from him is ascertained by settlement of his accounts. Pride v. State, 502.

SUBROGATION.

See DOWER, 8.

Of administrator to right of creditor.

An administrator who is compelled to refund to the widow of his intestate assets with which he has paid a debt of the estate, will be subrogated to the creditor's rights, and may resort to any remedy which the creditor would have against the assets of the estate remaining unadministered. Crowley v. Mellon, 1.

SUPREME COURT.

Opinion on question not presented.

The rule that a question decided by the Supreme Court is not open to reconsideration in the same case, on a second appeal, does not apply to expressions of opinion in the first decision, on a question not then before the court. Clark v. Hershey, 473.

SURETIES.

See ADMINISTRATION, 8, 10. REPLEVIN, 5.

TAXES.

See also TAX SALES, 1-6.

1. *When equity will enforce lien for.*

Where goods are sold by the person in whose name they are assessed for taxation, after the lien of the State for taxes attaches thereto, and his vendee sells them, the Collector, if he cannot realize the taxes otherwise, may maintain a suit in equity against the vendee to charge the proceeds of such sale with the payment of the taxes. Worthen v. Quinn, 82.

2. *Taxation for local improvements in cities: Constitutional provision.*

Sec. 27, art. 19, of the Constitution, which in effect provides that the Legislature may authorize "assessments on real property for local improvements in towns and cities, under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected * * * ;" applies to any property adjoining or near the improvement, which is physically affected, or the value of which is commercially affected, directly by the improvement to a degree in excess of the effect upon the property in the city generally. Little Rock v. Katzenstein, 107.

3. *Same.*

Under Mansfield's Digest, section 826, empowering the councils of cities of the first class to form and define the boundaries of districts for local improvements, the action of a city council in including property in an improvement district is, except when attacked for fraud or demonstrable mistake—conclusive of the fact that such property is "adjoining the locality to be affected" by the improvement, within the meaning of the Constitution. [Art. 19, sec. 27.] Ib.

4. *Assessor's failure to take official oath.*

Although an Assessor fails to take the general oath of office required by law, he is an officer *de facto* and his acts are valid when questioned collaterally. Murphy v. Shepard, 356.

5. *Valuation of property.*

Under the Constitution of this State (article 16, section 5), the Legislature has power to classify property for purposes of taxation, and to provide for the valuation of different classes by different methods. St. L., I. M. & S. Ry. v. Worthen, 529.

6. *Same.*

Such classification under a statute which operates equally and uniformly upon all property of like kind, is not prohibited by the Federal Constitution. Ib.

7. *Same.*

The power to classify property for taxation, makes it competent for the Legislature to provide the mode of assessing the several classes, and the period for which the assessment of each class shall be made. Ib.

8. *Same: Assessment of railways.*

The separate classification of railway property for taxation, and its assessment by an instrumentality different from that employed in the valuation of other property, are justified by its peculiar nature and uses. Ib.

9. *Same.*

The provisions of the revenue act of 1883, embraced in Mansf. Digest, secs. 5647–5659, are not unconstitutional on the ground that they require the tracks and "rolling stock" of railways to be assessed by a State Board of Commissioners. while the act provides for the valuation of all other property by County Assessors. Ib.

10. *Same.*

It is also competent for the Legislature to require the annual assessment of railway tracks, while other real estate is required to be assessed only once in two years—the distinction thus made being justified by the dissimilarity of such tracks from all other real property. Ib.

11. *Same.*

The revenue act having fixed the time and place for the meeting of the State Board for the valuation of railway tracks, and no obstruction existing under the statute to the appearance of any one before the board to assert his rights, the failure to require that notice of the board's meeting shall be given to the railroad companies, does not render the act obnoxious to the charge of taking property without due process of law. Ib.

12. *Same.*

Nor is said statute unconstitutional because it fails to provide for an appeal from the valuation of railroad property fixed by the State board. Ib.

13. *Same.*

Where no fraud is charged in the assessment of railroad property, a Chancellor will not be warranted in restraining the collection of a tax levied upon it, merely because in his judgment the assessing board has over-valued it Ib.

TAX SALES.

1. *Minor's right of redemption: Compensation for improvements.*

The right granted to minors by the act of 1873 (Gantt's Dig., sec. 5197) to redeem their lands from tax sales at any time within two years from the expiration of their disability, was upon the condition, expressed in the same act (Gantt's Dig., sec. 5216), that the Legislature might regulate the compensation to be paid by them for improvements thereafter placed on their lands by tax purchasers. Bender v. Bean, 132.

2. *Same.*

The provisions of the revenue act of 1883 (Mansf. Dig., sec. 5792), to the effect that occupying tax-claimants of land shall be allowed the full cash value for improvements made after two years from the date of sale, applies to the redemption by minors of lands forfeited in 1876-7, and gives to the tax-purchaser the right to compensation for such improvements without exacting the showing of belief in the integrity of his title which is required by the "betterment act." Ib.

3. *Same: Minor's right not an estate: Rents.*

On the execution of a tax deed the purchaser becomes the owner of the land conveyed, and a minor's right to redeem it is not an estate in the land, but only a statutory privilege to defeat the tax title within a limited time. The purchaser is not, therefore, liable for rents until his fee is terminated by a redemption effected in the manner provided by law. Ib.

4. *Same: Tender of payment: Offer to redeem.*

A minor may terminate the fee of a tax-purchaser of his land by paying or tendering the sum prescribed by the statute as necessary to effect its redemption. And an offer, made in good faith, to redeem, which is refused not because no tender or an insufficient tender is made, but because the right to redeem is denied, is as effective as a tender. But a joint tender by several persons is not good where one of them is not entitled to redeem. Ib.

5. *Same.*

Where on a bill brought by minors against several purchasers, to redeem lands from tax sale, the plaintiffs set out their respective interests and ask to be allowed to redeem as provided by law, there is an implied ofier to pay to each of the purchasers the sum which the law allows him. And if such offer is met

by no objection to its terms, or to the fact that no money is actually tendered, but by a denial of the plaintiff's right to redeem, and by the assertion of an adverse title, the purchasers should be charged with rents from the commencement of the suit where the judgment of the court sustains the right to redeem. Ib.

6. *Decree confirming.*

All inquiry as to the validity of a tax title is cut off by a decree confirming the sale under which the title was acquired. Boehm v. Botsford, 400.

THREATS.

See EVIDENCE, 9.

TRESPASS.

See also REPLEVIN, 5.

1. *Mistake as to boundaries: Instruction.*

A defendant charged with hunting in the inclosed grounds of another without the latter's consent, sought to excuse the act by showing that he had permission to hunt on adjoining land, and got upon that of the prosecuting witness by mistake. The court instructed the jury in effect that it was the duty of the defendant "to ascertain by all means in his power" the boundaries of the inclosure he had permission to hunt within, and that he was not guilty if after thus attempting to ascertain such boundaries, and honestly believing that he was within the same, he trespassed upon the land of the State's witness without intending to do so. HELD: That if the instruction required of the defendant a greater degree of diligence than the law sanctions, it did not prejudice him in the absence of evidence tending to show that he used any diligence at all. Wellington v. State, 266.

2. *Hunting in inclosures: Owner of land.*

One who has the control and possession of land to the exclusion of the real owner and all other persons, is the "owner" of such land within the meaning of the statute, making it a misdemeanor to hunt "in the inclosed grounds of another without the consent of the owner." (Mansf. Digest, sec. 1669.) Ib.

TRUSTEES.

See CONVEYANCES, 2; SPECIFIC PERFORMANCE, 1; TRUSTS, 1.

TRUSTEE'S SALE.

See USURY.

TRUSTS.

See also CONTRACTS, 2; EQUITY, 1; STATUTE OF LIMITATIONS, 1, 2, 5.

Under voluntary conveyance.

The grantee of land will be held to have taken it in trust where it was conveyed to him for the nominal consideration of one dollar on account of the failing health of the grantor, and it is shown that the latter, after his death, his widow and heir, remained in possession of the premises, making improvements and receiving the rents. Clark v. Hershy, 473.

USURY.

Trustee's sale void for.

The sale of property under a power contained in a deed of trust will pass no title where the deed is executed to sscure the payment of a note void for usury. Smith v. Finley, 373.

VARIANCE.

See REPLEVIN, 1, 2.

VENDOR AND VENDEE.

See also FRAUD, 1, 2; SPECIFIC PERFORMANCE, 1; WARRANTY, 1-3.

1. *Conditional sale: Exchange of property by purchaser: Right of vendor.*

The vendee of personal property sold on condition that the title shall remain in the vendor until the purchase money is paid, may before payment exchange the property thus purchased for other property. But such barter will not affect the vendor's title to the property received from him, and confers on him no right to the property for which it is exchanged. Dedman v. Earle, 164.

2. *Bond for title: Rights of parties.*

Where land is sold by a bond for title, the return of the bond to the vendor through the action of a third person, without the knowledge or consent of the vendee, and the destruction of the latter's note for the unpaid purchase money, will not extinguish the equitable title acquired by his purchase. And a subsequent sale of the land by the vendor to such third person, merely subrogates the latter to the vendor's rights, and he will hold not as owner, but as mortgagee. Robertson v. Read, 381.

3. *Lien for purchase money.*

The statute (Mansf. Dig., secs. 4398, 4399) providing that in an action to recover the purchase money of personal property, the plaintiff may obtain an order directing the Sheriff or other officer to take the property "in possession of the vendee" and hold it subject to the orders of the court, does not create a lien in favor of the vendor, but only gives him the privilege of suing out a specific

attachment against the property without imposing up ·n him the conditions on which that remedy is allowed to other creditors. Fox v. Arkansas Industrial Co., 450.

4. *Same.*

Such privilege of the vendor must be exercised while the property is in the possession of the vendee, and cannot take precedence of the right of a prior attaching creditor. Ib.

5. *Same.*

The vendee has possession of the property within the meaning of the statute so long as it is subject to his control and the right of no third party has intervened. But after it has been seized under an attachment sued out by a third person, it is no longer in the power of the vendee, and the vendor by subsequent process against it, can acquire no right beyond that of a second attaching creditor. Ib.

6. *Attachment to secure ptice of goods.*

The vendor of personal property cannot seize it by attachment to enforce the payment of the purchase money, under secs. 4398–4401 Mansf. Dig., after it has been taken by the Sheriff under process against the vendee sued out by a third person. (Fox v. Industrial Co., ante, 450.) Bryan-Brown Shoe Co. v. Block, 458.

VENUE.

See CHANGE OF VENUE.

WAGES.

See EXEMPTION, 2.

VERDICTS.

1. *Special finding of facts.*

Secs. 5142, 5143, Mansf. Dig., provides that the court may require the jury "in any case in which they render a general verdict, to find specially upon particular questions of fact to be stated in writing," and that when the special finding of facts is inconsistent with the general verdict the former controls the latter, and the court may give judgment accordingly. HELD: That where such special finding is required, if the general verdict is sustained by any one of two or more interpretations of the evidence, it cannot be impeached by showing that part of the jury proceeded upon one interpretation and part upon others. But if the jury must necessarily agree upon the answer to a particular question before they can find a verdict, and their reply to such question is that they cannot agree, then the reply and the verdict being irreconcilably in conflict, the latter ought not to be received. Arkansas Midland Railway v. Canman, 517.

WAIVER.

See APPEALS, 4; INSURANCE, 1, 3, 4; RAILROAD COMPANIES, 6; PLEADING AND PRACTICE, 3.

WAREHOUSEMEN.

See RAILROAD COMPANIES, 1.

WARRANTY.

1. *Of real estate: Action for breach of: Eviction.*

A judgment against a convenantee in possession of land, upon the foreclosure of a lien created prior to the covenant, rendered after notice to the warrantor to appear and defend, is conclusive of the existence of an outstanding paramount incumbrance, and is a constructive eviction entitling the convenantee to his action on the convenant. Collier v. Cowger, 322.

2. *Same: Damages.*

Where the convenantee buys in the outstanding incumbrance to protect his estate, he is entitled to recover the sum expended in doing so, provided it does not exceed the amount paid the warrantor for the property, with legal interest on such sum from the date of extinguishing the incumbrance. Ib.

3. *Same.*

In an action for breach of warranty of title to real estate, where paramount title, has been asserted and maintained by a judgment in ejectment, there can be no recovery of interest, prior to eviction, upon the sum paid the warrantor, unless the plaintiff in ejectment has recovered *mesne* profits. Ib.

WILLS.

1. *Estate conveyed: Power of sale.*

A will disposed of the testator's property as follows: "I give * * to my beloved wife all my real and personal estate, notes and accounts, during her natural life, and to dispose of according to her own will and judgment, providing that she never marries a second time; and in the event that she marries then all my property, real and personal estate, notes and accounts, shall go to my children now living, or who may be living at the time of my wife's death or marriage. * * * *" HELD: That the wife took only a life estate and her power to dispose of the lands was limited to her life estate therein. [*Patty v. Goolsby, 51 Ark., 61.*] Douglass v. Sharp, 113.

2. *Election to take under.*

Where an interest in land is devised to one who claims it adversely, her election to take under the will will not be implied from facts occurring before she has any knowledge of her title to the property. Clark v. Hershy, 473.

3. *Same.*

Nor will the devisee's long delay in making inquiry about her rights, and in taking steps to enforce them, in connection with acts tending to show such election, be sufficient to establish it by implication, where the acts relied upon were done in ignorance of her title, and the delay occurred while the civil war was flagrant, the courts closed, business suspended, and her husband a refugee. Ib.

4. *Same.*

Nor will such election be implied from the fact that the devisee's husband brought a suit for trespass on the land devised, in her name jointly with his, and that he had paid taxes on the land, when neither of these things was done with her knowledge or consent, and it is shown that the taxes were paid as the agent of a third person. Ib.

WINES.

Sale by manufacturers of, see LIQUORS, 8, 9.

WITNESSES.

Right to be confronted with, see CRIMINAL PROCEDURE, 4; see also EVIDENCE, 6.

1. *Bias of, not a collateral matter.*

The bias of a witness is not a collateral matter; and where on cross-examination he denies making a statement which, if made, tends to show an interest in behalf of the party introducing him, it is competent for the opposing party to prove that he did in fact make such statement Crumpton v. State, 273.

2. *Impeachment of: Conflicting statements.*

Under Mansf. Dig., secs. 2902, 2903, the right to impeach a witness by showing that he has made statements different from his testimony, does not depend upon his denial of such statements on cross-examination. And where the assumed statement is relevant to the issue, and the witness, on being asked whether he made it, answers that he does not remember, proof that he made it is admissible. Billings v. State, 303.

3. *Competency of parties: Transaction with intestate.*

In a proceeding against an administrator to obtain the allowance of a claim against the estate of his intestate, for money alleged to have been converted by the latter, testimony of the plaintiff to the effect that he delivered to the decedent a box containing the money, to be deposited in his safe, is not admissible for the reason that it relates to a "transaction" with the intestate within the meaning of the Constitution, which provides that "in actions by or against * * * administrators, * * * neither party shall be allowed to testify against the other, as to any transactions with or statements of the * * * intestate. * * * (*Sched. Const., sec. 2.*) Nunnally v. Becker, 550.

4. *Same.*

Nor is the plaintiff in such case a competent witness to prove that the box was in the safe, if his knowledge of that fact was derived solely from the transaction between himself and the defendant's intestate. Ib.

ERRATA.

On page 132, second line, first paragraph of syllabus, for "oader," read "*order*."

On page 133, first line, seventh paragraph of syllabus, for "payments," read "*payment*."

On page 275, first line, second paragraph of statement, for "210" read "*2102*."

On page 276, sixth line of syllabus, for "assult," read "*assault*."

On page 312, for "4599" in last line of syllabus, read "*4359*."

On page 402, third line of syllabus, for "obligations," read "*obligation*."

On page 437, eighth line of syllabus, for "were," read "*was*."

On page 499, third line, third paragraph of syllabus, for "thereon," read "*therein*."

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