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ARKANSAS REPORTS.

VOL. 54.

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

NOVEMBER TERM, 1890, AND THE MAY TERM, 1891.

T. D. CRAWFORD,

REPORTER.

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

STERLING R. COCKRILL,	- -	CHIEF JUSTICE.
BURRILL B. BATTLE,		
WILSON E. HEMINGWAY,	-	ASSOCIATE JUSTICES.
SIMON P. HUGHES,		
WILLIAM W. MANSFIELD,*		

WILLIAM E. ATKINSON,	-	*Attorney General.*
W. P. CAMPBELL,	- - -	*Clerk.*
T. D. CRAWFORD,	- - -	*Reporter.*

*Judge Mansfield was elected to fill the vacancy caused by the death of Judge Sandels, and took the oath of office February 16, 1891.

CHANCELLOR FIRST CHANCERY DISTRICT,

DAVID W. CARROLL.

CHANCELLOR SECOND CHANCERY DISTRICT,

JAMES F. ROBINSON.

JUDGES OF THE CIRCUIT COURTS

DURING THE PERIOD OF THIS VOLUME.

1st Circuit	Grant Green, Jr
2d Circuit	J. E. Riddick
3d Circuit	J. W. Butler
4th Circuit	E. S. McDaniel
5th Circuit	J. G. Wallace
6th Circuit	Robert J. Lea
7th Circuit	A. M. Duffie
8th Circuit	Rufus D. Hearn
9th Circuit	Will P. Feazel
10th Circuit	Carroll D. Wood
11th Circuit	John M. Elliott
12th Circuit	Edgar E. Bryant
13th Circuit	Charles W. Smith
14th Circuit	B. B. Hudgins
15th Circuit	Hugh F. Thomason
16th Circuit	J. B. McCaleb

PROSECUTING ATTORNEYS

DURING THE PERIOD OF THIS VOLUME.

1st Circuit	J. P. Roberts
2d Circuit	J. D. Block
3d Circuit	Jos. M. Stayton
4th Circuit	J. M. Peel
5th Circuit	Jeff Davis
6th Circuit	W. H. Pemberton
7th Circuit	William H. Martin
8th Circuit	J. H. McCollum
9th Circuit	Jas. D. Shaver
10th Circuit	Robert C. Fuller
11th Circuit	S. M. Taylor
12th Circuit	J. B. McDonough
13th Circuit	R. Minor Wallace
14th Circuit	J. C. Floyd
15th Circuit	Oscar L. Miles
16th Circuit	R. B. Maxey

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ERRATA.

On page 81, second line of second syllabus, for "mortgagor" read "mortgagee."

On page 171, top line, for "1851" read "1846"

On same page, fourth line from top, for "Gantt's" read "Gould's."

On page 247, eleventh line from top, for "contended" read "contend."

On page 328, top line, for "191" read "491."

On page 361, fourteenth line from top, for "Black" read "Blackwood."

On page 366, seventeenth line from top, for "matter" read "matters."

On page 412, twelfth line from bottom, for "29 N. Y." read "27 N. Y."

On page 435, twelfth line from top, for "191" read "161."

On page 505, ninth line from top, for "truth" read "trust."

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

NOVEMBER TERM, 1890.

GUESS *v.* AMIS.

Decided November 22, 1890.

Practice—Reinstatement of lost judgment—Defense.

In an action to restore a lost judgment, a court of equity, upon proper application and proof that the judgment was procured by fraud, will restrain its execution. 54 1 57 354

APPEAL from *Cleveland* Circuit Court.

C. D. WOOD, Judge.

D. H. Rousseau for appellant.

Appellant had the right to contest the suit, whether it be called a *scire facias* to revive or a petition to reinstate a lost judgment, and to question its existence, regularity and validity. The statutory remedy is only declaratory of the common law remedy on a lost record or judgment. 98 N. C., 284; *ib.*, 173; 2 Cold. (Tenn.), 318; 3 *id.*, 267; 45 Ala., 204; 101 Ill., 411; 91 N. C., 231.

The right to plead payment or question the existence or validity of a judgment at any stage of the proceedings is expressly recognized in 1st Heisk., 26; 30 Ala., 734; 14 Sm. & M., 208; 28 Conn., 556; 27 Iowa, 381; 1 Head, 229; 31

Iowa, 582. The motion to transfer the case to equity was appropriate. Freeman Judg., par. 495, 498, and cases cited. The judgment was without notice and void.

W. S. McCain for appellee.

BATTLE, J. On March 21, 1889, appellees filed a petition in the Cleveland circuit court, stating that they had, at the March term, 1886, recovered a judgment in that court against appellant, Guess, and one N. V. Barnett, who has since died, for the sum of $870 and 10 per cent. interest thereon from the 15th of March, 1886, upon a promissory note executed by them to appellee, Amis; that the record containing the judgment had been burned; and that no part of it had been paid: and asked that it be restored and reinstated upon the record.

Appellant filed an answer containing three paragraphs. In the first he denied all knowledge of the existence of the judgment sought to be restored and reinstated, and alleged that it was void because he never had any notice, legal or otherwise, of the pendency of any action against him and N. V. Barnett in which such a judgment could have been rendered. And in the second and third paragraphs denied that he, or any one thereunto authorized by him, ever executed an instrument of any kind to Amis, or that he was indebted to N. V. Barnett, S. E. Barnett and Amis, or either of them, or that the firm of Barnett & Guess, of which he was a member, ever was indebted to them, or either of them, in any manner whatever; and alleged that if a note was executed by Barnett in their firm name to Amis, it was long after the dissolution of their partnership, and was without consideration or authority on his part, and as to him was null and void; and alleged that if the judgment in question was rendered, it was obtained against him by fraud and collusion perpetrated by the Barnetts and Amis. He asked that the cause be transferred to the equity docket, and that his answer be taken as a cross-complaint against the plaintiff and his co-defendant, and for process against them, and

that the judgment be declared fraudulent and void, and for other relief.

Appellees filed a demurrer to the answer, but it does not appear in the record here. The record shows that it was sustained, and that Guess refused to answer further "as to the parts of his answer affected by the demurrer." It does not appear that the cause was transferred to the equity docket; but the record does show that, after sustaining the demurrer, the court proceeded to trial and heard the proof, and found only two facts in response to the issues tendered by the pleadings, and they are, that appellees, on the 15th of March, 1886, by the consideration of the Cleveland circuit court, recovered judgment against appellant and N. V. Barnett for $870 on a promissory note, and that the record thereof had been burned, and thereupon reinstated it upon record. From this it is obvious that the court refused to consider the equitable defense and relief asked for by appellant, and overruled his motion to transfer, and sustained the demurrer, except as to the part of the answer that denied the existence of the judgment in question. This being true, the question is, did the court err in sustaining the demurrer?

Reinstatement of lost judgment—Defense.

The answer in this case shows that appellant had a good and valid defense to the action in which the judgment in question was rendered, sufficient, if it had been pleaded and proved, to have defeated the recovery of a judgment against himself; and that he was deprived of the opportunity of asserting it without fault of his. Under such circumstances it is the duty of courts of equity, upon proper application and proof of the defense and its loss, to restrain and prevent the execution of such judgments. *State* v. *Hill*, 50 Ark., 459. So in cases like this the same facts, upon the same principle and for the same reason, constitute a good defense, and make it the duty of courts, in the exercise of their equity jurisdiction, to restrain the execution of the judgment. It would be contrary to the spirit of our code of practice, and its manifest intent, to force a defendant to submit to the

reinstatement of a judgment and then to bring a separate suit in equity to prevent its execution.

The denial in the answer of the existence of the judgment in controversy is insufficient. The remainder of the answer, though it contains redundant matter, constitutes an equitable defense, and but one. The demurrer therefore should have been overruled, and the action transferred to the equity docket.

Reversed and remanded.

FARRIS v. STATE.

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Decided November 29, 1890.

Error in refusal of instruction—Aider by verdict.

An error in rejecting a prayer for an instruction is not prejudicial, if it appears that the jury found a state of facts to which it would have been inapplicable. Thus, where the court charged that defendant could not be convicted of murder in the second degree if he killed deceased in self defense or in a sudden heat of passion upon provocation apparently sufficient to make the passion irresistible, and the jury found him guilty of murder in the second degree, and assessed his punishment at the longest term of imprisonment allowed by law for the offense found, the court's refusal to instruct as to the offense of manslaughter could not have been prejudicial, though there was evidence tending to establish manslaughter.

ERROR to *Little River* Circuit Court.

RUFUS D. HEARN, Judge.

Appeal from a conviction of murder in the second degree. Error is assigned in the court's refusal to instruct the jury as to the crime of voluntary manslaughter.

Dan W. Jones for appellant.

1. The court erred in refusing to give any instructions whatever as to manslaughter, thus compelling the jury to find defendant guilty of murder or to acquit. Nor did the court define what manslaughter was. Mansf. Dig., sec. 1532; 32 Ark., 539.

2. The circumstances of this case only make it manslaughter. 1 Archb. Cr. Pr., 698, note 1, *et seq.;* 2 Bish. Cr. Law, 712; 2 Wheeler, Cr. Cases, 47; 1 Archb., 709.

3. The fifth instruction is copied from 29 Ark., 265, and for instances of such instructions see 61 Me., 56; 36 Tex., 337; 14 Fla., 499; 1 Archb., 703.

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

1. This court will not reverse where the court defines the different degrees of murder, but fails to define the degrees of homicide. 29 Ark., 249. The facts contain none of the elements of manslaughter no evidence of sudden provocation without time for deliberation or premeditation.

HEMINGWAY, J. There was evidence upon the trial, which, if believed by the jury, would have warranted a finding that the homicide charged was committed under a provocation sufficient in law to reduce the offense to manslaughter. The court should therefore, on the prayer of the defendant, have charged the jury on the law applicable to that offense.

Erroneous refusal of instruction not prejudicial, when.

In the charge given the jury were informed that they could not convict the defendant of murder in the second degree if he killed the deceased in self-defense, or in a sudden heat of passion upon a provocation; upon this charge the jury returned a verdict of guilty of murder in the second degree, thereby finding that the homicide was not committed in a sudden heat of passion upon a provocation apparently sufficient to make the passion irresistible. The punishment assessed by the jury gives accent to the finding, for it fixed the highest term of imprisonment allowed by law for the offense found, thereby indicating not only that it found no provocation sufficient to reduce the grade of the offense, but also that it found no circumstances of mitigation to justify an abatement of the extreme punishment allowed by law for the offense found. Since a charge as to the law applicable to the crime of manslaughter would have warranted a conviction thereof only on a state of facts which the jury found, as above indicated, did not exist, it would have been inap-

plicable to the state of facts found by the jury, and could not have induced a milder verdict. In other words, the charge, being conditioned upon a state of facts not in proof, as the jury viewed the case, would have been without influence in the result reached. It follows that, though the court erred in declining to charge the jury as requested, the error was not prejudicial to the rights of the defendant.

Where such error appears, we would not be justified in affirming a judgment upon the ground that we thought the result reached the right one, or that it would have been reached if the error had not occurred; but when it appears from the verdict, in connection with the charge given, that the jury found a state of facts to which a rejected prayer would be inapplicable, it then becomes certain that the same verdict actually would have been rendered, though the prayer had been granted, and that the error was not prejudicial. In that event it is our duty to sustain the judgment.

Affirmed.

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BOX *v.* GOODBAR.

Decided November 29, 1890.

1. *Mortgage—Evidence* aliunde *to explain.*

While an instrument in form a mortgage is presumed to have been intended as such, evidence *aliunde* is admissible to show that it was intended to be an absolute conveyance.

2. *Mortgage—When an absolute conveyance—Assignment for creditors.*

In a deed of trust by an insolvent debtor conveying all his property not exempt, conditioned to be void if the debts secured were paid at maturity, it was provided that upon default the trustee should sell the property and apply the proceeds in payment of the debts, some of which, it appeared, were already due. The trustee took immediate possession under the power to sell.

Held: That there was evidence to sustain a finding that the parties intended an absolute conveyance to a trustee, constituting an assignment for the benefit of creditors; and that such conveyance was void, not being executed in accordance with the statute regulating assignments.

3. *Attachment – Judgment against interpleader.*

A judgment against an interpleader in an attachment suit for the amount of the defendant's indebtedness is erroneous. (See Mansf. Dig., secs. 390-4.)

APPEAL from *Monroe* Circuit Court.

M. T. SANDERS, Judge.

Attachment by Goodbar & Co. against John T. Box. White interpleaded for and retained the property, claiming under a deed of trust, in the nature of a mortgage, from Box. The court trying the case found that the parties intended to make an absolute appropriation of the property for the benefit of creditors, and held the conveyance void. The attachment was sustained, and judgment rendered against the interpleader on his bond for the amount due plaintiff. Inter pleader and defendant appealed. The facts are stated in the opinion.

Dan W. Jones and *T. B. Martin* for appellants.

1. The instrument was a mortgage, and the fact that a trustee was named cannot change the real nature of the instrument. It was not executed for the purpose of making an irrevocable and indefeasible appropriation of property to the payment of debts, and was therefore a deed of trust in its technical sense. But it was given to *secure* the debts named, and certain preferences among creditors. It was acknowledged and recorded. 31 Ark., 429; Mansf. Dig., sec. 4712; 33 Ark., 203; Mansf. Dig., sec. 4759; 39 Ark., 68, citing 1 McCrary; 1 Fed. Rep., 768. A deed of assignment is absolute—a mortgage conditional. 15 Ark., 60; 31 Ark., 437; see the distinction in 16 Oh., 216; 5 *id.*, 130; 21 N. Y., 131; 14 Fed. Rep., 160; 67 Tex., 315; 19 Iowa, 479; 58 Iowa, 589; 47 Ind., 372; 49 Wisc., 486; 62 *id.*, 554.

The deed in this case differs from that in 52 Ark., 31, in form, and there is a marked difference in the *intention* of the parties. See also the test as laid down in 53 Ark., 101; 13 S. W. Rep., 423. By the terms of the deed, no other creditor "can call the grantee to account for the proceeds of the property." *Ib.*

2. The judgment is erroneous on its face, as it was against the interpleader and his sureties, for the amount of appellee's debt. Mansf. Dig., secs. 390, 391, 394; 37 Ark., 531.

N. W. Norton for appellee.

1. The conveyance was an assignment: (1) there was a a trustee; (2) the purpose was to pay debts; (3) it *embraced all his creditors*; (4) the debts were *partly due* and partly not due. Defeasance clauses are no longer the test. 31 N. W. Rep., 386; 4 Oh. St., 602. This case is settled by 52 Ark., 42.

2. The court's finding of fraud was sustained by the evidence.

1. Mortgage —Evidence *aliunde* to explain.

HEMINGWAY, J. In this class of proceedings an inspection of a deed furnishes *prima facie* evidence of its character, but not conclusive; for proof may be made *aliunde* that a deed absolute in form was intended as a mortgage, or that a deed conditional in form was intended to be absolute, and that the condition was inserted to disguise its real character. *Richmond* v. *Miss. Mills*, 52 Ark., 30.

2. When a mortgage in form is an assignment.

The conveyance from Box to White, as trustee, contained a formal clause of defeasance by the terms of which the deed was to be void if Box should pay the debts therein provided for as they matured. The deed provided that, upon default in paying said debts as they matured, White should take possession of the property conveyed and sell the same for cash in due course of business for thirty days, and if at the expiration of that time any of said debts should remain unpaid, he should sell the property at auction for the payment thereof. As a part of the debts were past due when the deed was executed, the condition was, by its terms, broken at the time of execution, and the trustee immediately took possession under the power to sell the property in course of trade. Although it was not expressly so provided, it was clearly implied that the funds should be applied to the extinguishment of the

debts as the goods were sold. Box was heavily indebted, and the conveyance covered all his property not exempt from execution.

Upon the foregoing facts, the court was justified in finding that the parties intended to make an absolute conveyance of property to raise funds to pay debts. Upon that finding it would follow that the instrument was an assignment; for the grantee in it is named as a trustee accountable to various persons for the execution of the trust. *Fecheimer* v. *Robertson*, 53 Ark., 101; *Richmond* v. *Mississippi Mills*, 52 Ark., 30. As it was not executed in accordance with the assignment laws of the State, it was a fraud upon the creditors of Box; and the judgment should have been against White for a return of the property received by him upon the interplea, and against Box sustaining the attachment.

3. Judgment against interpleader in attachment.

The judgment against the interpleader for the amount of plaintiff's judgment was erroneous. The judgment will be reversed, and the cause remanded, with directions to enter judgment as above indicated.

THOMPSON *v.* KING.

Decided November 29, 1890.

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1. *Homestead—Who may claim.*

   Any resident of the State of either sex who is married, or the head of a family, is entitled to the exemption of the homestead.

2. *Curtesy yields to homestead.*

   The husband's right of curtesy in the homestead of his wife, during the minority of her children, yields to their right to occupy the homestead.

3. *Homestead—Tenant in common.*

   One may have a homestead in land held in common with another.

APPEAL from *Monroe* Circuit Court in Chancery.

M. T. SANDERS, Judge.

Action by Maggie Thompson, a minor, against her stepfather, William King, and his children, Romey and Ida

King, for an accounting of her share in the rents and profits accruing from her mother's homestead estate in certain land of which she died seized jointly with another. The court sustained a demurrer to the complaint.

John C. Palmer and *J. S. Thomas* for appellant.

1. The curtesy of King is not superior to the homestead right of the children, but the latter, which is a constitutional right, must prevail. Art. 9, secs. 3, 6, 10, const. 1874. A married woman has a homestead under these sections in her own right, and it descends to her children on her death. See 13 S. W., 924; 8 S. W., 793; 46 Ark., 159.

Stephenson and *Trieber* for appellees.

The curtesy might well prevail over the homestead right of the children. 67 Ill., 55; Thomps on Homest., secs. 592 to 595, 513 *et seq.*; 8 S. W. Rep., 793; 96 Mo., 142; 44 Tex., 179; 47 Ark., 175.

BATTLE J. Mary Thompson was the owner in fee simple of one undivided half of the southwest quarter of section 36, in township 1 north, and in range 3 west. She was the mother of Maggie Thompson. Three years after the birth of Maggie she married William King. Two children, Romey and Ida King, were the issue of this marriage. At the time of her marriage she occupied this land as her homestead, and after her marriage she and her husband and children continued to occupy it in the same manner so long as she lived. She died intestate, leaving her husband surviving, and Maggie Thompson and Romey and Ida King her only heirs. The heirs are minors. Maggie claims that she and the other heirs are entitled to hold the land as a homestead during their minority, it being the homestead of their mother and her husband and children at the time of her death, and her mother having died the owner thereof. On the other hand William King, the husband, claims the right to hold it as tenant by the curtesy. Have the children the right to hold it as the homestead of their mother during their minority?

No dates of marriage, births or deaths are given in the record. It is conceded, however, by all the parties that the right of the children to hold the land in controversy as a homestead depends on the constitution of 1874.

1. Who may claim a homestead.

Section 2 of article 9 of the constitution provides: "The personal property of any resident of this state, who is married or the head of a family, in specific articles to be selected by such resident, not exceeding in value the sum of five hundred dollars in addition to his or her wearing apparel, and that of his or her family, shall be exempt from seizure on attachment, or sale on execution, or other process from any court on debt by contract." In construing this section in *Memphis & Little Rock Ry.* v. *Adams*, 46 Ark., 159, this court held that the expressions, married or the head of a family, "are not synonymous, or mere equivalents the one for the other;" and that all of either sex, who are either married or the heads of families, are entitled to the exemption therein allowed.

The same expression is used in section 3 of the same article. It provides that the homestead of any resident of this state who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court, or sale under execution, or other process thereon, except as therein provided. The expression, "who is married or the head of a family," is used in both sections in the same sense. The objects of both are alike, and there is no good reason why the same class of persons should not be entitled to the benefits of both. The object of the third is to protect the home of the married and the family against seizure or sale, and no reason can be advanced why the land of the wife occupied as the home of the husband and his family should not be protected as well as the land of the husband should be when it is the homestead.

2. Curtesy yields to homestead.

Section 6 provides what disposition shall be made of the homestead when the owner dies. It provides: "If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right,

the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at 21 years of age —each child's right to cease at 21 years of age—and the shares to go to the younger children, and then all to go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate." Its terms, and the reason upon which it is founded, show that the minor children were thereby intended to be provided for during their minority, independently of the widow, or the existence of the widow. For the same section expressly provides that, in case of the death of the widow, all of the homestead shall be vested in the minor children. "If the necessities of the children, with the care and protection of the mother, were the objects of special provision, it is manifest that they must have been much more the subject of provision when deprived of their mother." We think that this section was never intended to make their right to occupy the homestead depend on the owner leaving a widow at the time of his death; and that the minor children of a deceased owner are solely entitled to the homestead, during their minority, in all cases where there is no widow surviving. To prevent a different construction being placed on it, section 10 of the same article expressly provides that the homestead shall inure to the benefit of the minor children after the decease of the parents.

But it may be said that the effect of section 10 is to deny to the minor children the right to the homestead, during the life of the father, in the event the owner of the homestead was their mother, and she died and left them surviving. But this is not true. For if such was its effect, it would be in conflict with the plain and manifest intent of section 6. To avoid such conflicts the two sections should be construed

together, and, construed in this wise, section 10 would be of effect in cases where the father was the owner of the homestead and left minor children, but no widow, at his death, or, having left one, she afterwards died; or the mother was the owner and died leaving minor children, but no husband, surviving, and like cases. In all cases section 6 governs the disposition of the homestead during the life of the widow and the minority of the children.

Under the constitution the wife may be the owner of the homestead. No provision as to the homestead owned by her at her death is made for the husband in the event he survives her. As she cannot leave a widow, her minor children are entitled to such homestead during their minority and the husband is not entitled to take possession of and hold it as a tenant by the curtesy until their homestead right expires. His right to curtesy must yield to the superior right guaranteed to the minor children by the constitution.

3. Homestead in estate in co-tenancy.

Mrs. King had a right to the homestead in the estate in the land in controversy held by her and her co-tenant in common. *Greenwood* v. *Maddox*, 27 Ark., 648; *Sentell* v. *Armor*, 35 Ark., 49. This right descended to her minor children at her death.

Reversed and remanded

LOWENSTEIN *v.* McCADDEN.

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Decided December 6, 1890.

1. *Attachment—Forthcoming bond.*

A bond given for the retention of property attached which is conditioned that the person in possession, *not the defendant,* shall perform the judgment of the court in the action, or that the property, or its value, shall be forthcoming and subject to the orders of the court for the satisfaction of such judgment, cannot be enforced as a statutory forthcoming bond. (Mansf. Dig., sec. 327.)

2. *Judgment on forthcoming bond—Assessment of property.*

Judgment upon a statutory forthcoming bond cannot be rendered unless, at the demand of the plaintiff, an assessment has been made of the value of the property retained by the principal in the bond.

APPEAL from *Desha* Circuit Court.

JOHN A. WILLIAMS, Judge.

B. Lowenstein & Bro. sued H. F. Lennox upon a note, and caused an attachment to be levied upon certain property of the defendant in the hands of P. McCadden & Co., who retained it upon giving a bond conditioned that *they* would perform the judgment or have the property forthcoming. They also interpleaded for the property, but subsequently asked leave to dismiss the interplea without prejudice, which was granted. The attachment was sustained, judgment rendered for plaintiffs, and the sheriff ordered to retake the attached property. So much thereof as he was able to recover proved insufficient to satisfy plaintiffs' judgment. No assessment of the property retained by McCadden & Co. was asked by the plaintiffs. They have appealed, and assign as error the dismissal of the interplea without prejudice.

W. M. Randolph for appellants.

1. The bond called replevin bond in the record was in fact a forthcoming bond or a delivery bond, given under and in accordance with the statute, Mansfield's Digest, section 327; and by giving the same P. McCadden & Co. and the other obligors in the said bond made themselves parties to the said suit, and thereby become bound by the proceedings therein, and by the judgment which might therein be rendered; and the circuit court of Desha county erred in its judgment of the 18th of August, 1887, granting to the said P. McCadden and Co., on their petition, leave to retire from the said suit without having their rights adjudicated therein, and without prejudice. The court should have retained the said suit as to the said P. McCadden & Co., and the other parties to the said bond, for the purpose of giving judgment against them, as provided in Mansfield's

Digest of the statutes, section 355. See Mansf. Dig., secs. 327, 329, 356, 358, 390, 391; 48 Ark., 195; 34 *id.*, 542; Waples, Att., pp. 400–1; 32 Ark., 734; 34 *id.*, 714; 2 Metc. (Ky.), 209; 3 *id.*, 456; 37 Ark., 206; 49 *id.*, 279.

2. The court erred in allowing McCadden & Co. to withdraw from the suit without having their rights adjudicated, thus cutting plaintiffs off from their rights under section 355 Mansfield's Digest.

W. G. Weatherford for appellees.

The bond is not conditioned as required by law, and no judgment can be rendered upon it. No *assessment* of the property was made or *demanded* by the plaintiffs. Mansf. Dig., secs. 327, 355; 49 Ark., 283; 37 *id.*, 531. Unless there was an appraisement, no valid judgment could be had. *Ib.*, 212.

2. Plaintiffs elected to have the sheriff retake the goods, before the appellees were permitted to retire, and the court properly allowed them to withdraw.

1. Attachment—Forthcoming bond.

PER CURIAM. The bond executed by McCadden & Co. was not a statutory bond. It is in the form required by section 327 of Mansfield's Digest, except that it is not conditioned that the defendant in the attachment suit shall perform the judgment of the court. If it be conceded that section 355 of the Digest authorizes summary judgment against a principal other than the defendant in the attachment suit, together with his sureties, still, the bond not having been executed in conformity to the statute, it cannot be enforced as a statutory bond.

2. Judgment on forthcoming bond—Assessment of property.

Moreover, judgment can be rendered upon the bond only when an assessment of the value of the property retained by the principal in the bond is made by the court or jury, and such assessment is made only when the plaintiff in the attachment demands it. Section 355. The plaintiff made no demand for the assessment in this case.

Affirm.

QUERTERMOUS *v.* HATFIELD.

Decided December 6, 1890.

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1. *Sale of land—Lease.*

Where an agreement contemplates an absolute sale of land, the fact that the purchase money was called *rent* would not convert the contract into a lease nor create a lien on the crop raised on the land for its payment.

2. *Vendor and vendee—Suit for purchase money—Tender of bond for title.*

A vendor of land, who agreed to deliver a bond for title upon payment of a certain note, cannot recover a judgment on such note without first making a tender of the bond for title.

3. *Jurisdiction of justice of the peace—Land purchase note.*

Though a justice of the peace has no jurisdiction to enforce a vendor's lien for the purchase money of land, he has jurisdiction to render personal judgment on a note for such purchase money.

4. *Instructions—Exception in mass.*

An exception in mass to a series of propositions, some of which declare the law applicable to the case, will not be considered.

APPEAL from *Arkansas* Circuit Court.

JOHN A. WILLIAMS, Judge.

Plaintiff, F. M. Quertermous, instituted suit against Sarah Frazier in the court of a justice of the peace upon a note for $100, signed by her, which recited that it was given as part payment for rent of the land therein described. He asked the enforcement of his landlord's lien upon the crop raised on the land. Upon the death of defendant the cause was revived in the name of her administrator, Marshall Hatfield. Judgments adverse to plaintiff were rendered in the justice's court and in the circuit court on appeal.

Carroll & Pemberton and *E. S. Johnson* for appellant.

1. The verdict is contrary to the law and evidence. The note shows that the relation of landlord and tenant exists, and it is proven by the evidence. And even if there was a conditional agreement to sell, after default Mrs. Frazier was only the tenant of appellant. 48 Ark., 413; 31 *id.*, 222, 228. If this relation existed, the tenant cannot dispute the title. 36 Ark., 568.

2. A verbal agreement to sell land is void. Mansf. Dig., sec. 3371. There is no proof of part performance. 1 Ark., 418; 8 *id.*, 278; 21 *id.*, 179.

3. If there was an agreement to sell, it was conditional upon *payment* of the note, and was not available after default. 48 Ark., 413; 31 *id.*, 228.

4. If the relation of landlord and tenant existed, the ownership of the land was not the subject of inquiry. 37 Ark., 122.

5. But if the *title* was involved, then the justice had no jurisdiction. 7 Ark., 309.

Gibson & Holt for appellee.

1. The evidence contradicts the idea that the relation of landlord and tenant existed. Appellant's own statements and admissions show that Mrs. Frazier purchased the land from him. The fact that the note recited it was for rent did not prevent appellee from showing what it was for. 51 Ark., 220.

2. There was no agreement to pay rent in case of failure to pay the note, as in 48 Ark., 413.

3. 44 Ark., 446, settles the question as to the statute of frauds. This is not an attempt to enforce specific performance.

4. The title to land is not involved.

COCKRILL, C. J. If the parol agreement between the appellant, who was plaintiff below, and the appellee's intestate was for the sale and purchase of the land, upon the condition that, on default in payment of the first installment of purchase money, the contract of purchase should end *ipso facto*, and the relation of landlord and tenant should subsist as though no sale had been contemplated, then plaintiff was entitled to judgment for the rent agreed upon and to the enforcement of his landlord's lien upon the crop. *Ish* v. *Morgan*, 48 Ark., 413; *Watson* v. *Pugh*, 51 *ib.*, 218; *Cheney* v. *Libbey*, 134 U. S., 68.

Or, if the agreement was in effect a lease of the land with an option to the lessee to purchase and treat the rent money as the first instalment of the purchase price, dependent upon the prompt payment of the amount when due, the failure to pay at the time fixed by the parties terminated the right to purchase, the relation of landlord and tenant remained, and the plaintiff was entitled to his recovery.

1. Sale of land—Lease.

But if the agreement contemplated an absolute sale, the fact that the first instalment of purchase money was called rent by the parties would not import into the contract a condition such as that first mentioned above, and thereby change the relation of vendor and vendee into that of landlord and tenant. Calling the purchase money rent would not make it such, nor create a lien on the crops for its payment. The precise question was so ruled in *Walters* v. *Meyer*, 39 Ark., 560.

The question whether the parties stood to each other in the relation of landlord and tenant, depended upon the terms of the agreement between them. The jury found for the defendant, thereby finding that it did not exist. It is argued that the testimony does not warrant the conclusion. That consideration demands a recapitulation of the facts in evidence.

The husband of the original defendant was the owner of the land which is the origin of the controversy; he established his homestead upon it, and died leaving his widow and minor children in possession. At this juncture the plaintiff set up a claim to the land by virtue of a sale for non-payment of taxes. This claim was the cause of the negotiation between the parties. The plaintiff put the note in evidence and testified as to the transaction. There was no other testimony as to the terms of the agreement, except some admissions in reference thereto which he had previously made. He testified that the note was given for rent; that he did not sell the land but agreed to do so, it being understood that the rent money was to be taken as part of the purchase price, provided it was paid promptly at

maturity. Again he stated that the agreement upon which the note was given was that the maker should have the lands for $300 if the note was paid when due and the residue soon thereafter; and that he agreed to make her a title bond if she paid the note at maturity. It was in proof that he had on several occasions stated that he had sold the land to the maker of the note without mention of a condition or a lease, and on one occasion, in going over the terms of the contract in the presence of the other contracting party, stated that the note in suit was given as one of three annual instalments on the purchase of the land. It was shown also that the maker of the note was unable to read, and signed by mark; and the only subscribing witness who testified stated that the contents of the note were not made known to the maker so far as he knew. Under this state of facts the jury could have reached either of two conclusions: that the parties had entered into a contract for a lease of the land, or a contract to sell without condition. A sale at the time of making the note, upon the condition that the time of payment was of the essence of the contract and that a failure to pay promptly should convert the vendee into a tenant, is not deducible from the evidence. The court was justified therefore in charging the jury, if they found that the contract was for a lease, to find for the plaintiff; and if for a sale, for the defendant.

2. Suit for purchase money—Tender of bond for title.

The plaintiff was entitled to recover nothing in the latter event, because he failed to tender the bond for title that his contract called for when he should receive the first payment. *Rudd* v. *Savelli*, 44 Ark., 145; *Price* v. *Sanders*, 39 Ark., 306.

3. Jurisdiction of justice of the peace.

The cause originated in the court of a justice of the peace, and it is urged that the appeal should be dismissed, upon the ground that the title to land is involved, and the justice's jurisdiction thereby ousted. But it is the status of the parties, and not the title to the land, that is involved. *Mason* v. *Delancy*, 44 Ark., 444; *Benton* v. *Marshall*, 47 *ib.*, 241.

4. Instructions—Exception in mass.

The appellant urges that the court charged the jury upon a state of facts not in evidence. His exception however

was in mass to a series of propositions some of which declare the law applicable to the case, and it cannot be considered.

Finding no error, the judgment will be affirmed.

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SCARBOROUGH v. SCARBOROUGH.

Decided December 6, 1890.

Divorce—Corroboration of plaintiff—Admission of defendant.

In a suit for a divorce the testimony of the plaintiff cannot be sufficiently corroborated by proof of any admission of the defendant, though made to third person.

APPEAL from *Greene* Circuit Court, in Chancery.

J. E. RIDDICK, Judge.

Sam W. Williams for appellant.

Marriage is a status, and not a contract merely; a status in which the public have a vital interest; and a divorce will not be granted upon the testimony of a party, or the admissions in an answer, or the declarations of a defendant proven, as this contravenes the whole policy of the law. 34 Ark., 37; 13 S. W. Rep., 246.

HUGHES, J. The appellee, the wife, sued for and obtained a decree of divorce from the appellant, her husband, from which he appealed to this court.

The appellee testified to cruel and barbarous personal abuse of herself by the appellant, calculated to render her condition intolerable, in consequence of which she fled from her home.

Barker, a witness, testified in substance, that appellant admitted to him that he had slapped appellee, and threatened to strike her with a board, and would have done so, but that he was prevented by his mother's persuasion.

This was in substance all the material testimony in the case. "The statements of a complaint for a divorce shall

not be taken as true because of the defendant's failure to answer, or his or her admission of their truth." Mansf. Dig., sec. 2561.

Divorce—Corroboration.

At common law neither husband nor wife was competent to testify for or against the other, in a suit for divorce. But in this State a different, and perhaps a more beneficent, practice has prevailed for a long time, and has been approved by this court. Without going into a discussion of its origin and history, we are content to leave it undisturbed. In *Rie* v. *Rie*, 34 Ark., 40, Chief Justice ENGLISH said: "The practice now in this state is to admit the depositions of the parties in suits for divorce for what they are worth, but not to grant a divorce upon the uncorroborated testimony of the parties." 1 Wharton, Evidence, 433.

He also said that, "A divorce will not be granted on a demurrer to a bill, or upon failure to answer, or upon admission in an answer, or alone upon declarations or admissions of a defendant, proven by depositions or otherwise, because the public, and not the parties only, are interested in such suits." *Kurtz* v. *Kurtz*, 38 Ark., 119; *Brown* v. *Brown*, *id.*, 324.

The parties to this suit, under the practice and decisions in this State, were competent witnesses. But the testimony of the appellee is without corroboration.

The admissions of the husband could not be taken as corroborative evidence of the truth of her statements.

The decree was based upon the testimony of the wife and the admissions of the husband alone, and for the want of sufficient testimony it is reversed, and the complaint is dismissed.

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MURRELL *v.* PACIFIC EXPRESS CO.

Decided December 6, 1890.

Express Companies—Unreasonable delay—Measure of damages.

For a negligent delay in the transportation of goods an express company is liable for such damages only as are the direct and immediate consequence of the breach, and are deemed to have been contemplated by the parties when they made the contract. Thus, in case of such delay, an express company will be liable for the difference between the market value of the goods at the time and place when they ought to have been delivered and such value when they were delivered; also, for any extra expense incurred in writing or telegraphing for them; but not for the difference between the price for which the consignor had contracted to sell them and their market value when and where they were delivered, unless the company was notified that they were shipped to complete contracts of sale theretofore made.

APPEAL from *Pulaski* Circuit Court.

JOSEPH W. MARTIN, Judge.

Murrell sued the Pacific Express Company for negligent delay in the transportation of some fruit trees. He alleged that, by reason of the carrier's unreasonable delay, he forfeited certain contracts for their sale, to his damage in the sum of $282; and that, in waiting for the trees, he incurred expenses amounting to $21.50. Defendant denied the negligence and the damages. Defendant introduced evidence to show that the delay occurred through the unforeseen refusal of a connecting carrier to transport the goods. The court instructed the jury that the defendant would not be liable for delay occasioned by such unforeseen refusal of the connecting line to receive the goods and transport them. There was a verdict for plaintiff for $16.50 for expenses incurred in waiting for the trees.

Blackwood & Williams for appellant.

1. The court tried the case upon an erroneous theory. It does not fall within the rule laid down in 44 Ark., 441. The liability of an express company is different from that of an ordinary carrier. 117 U. S., 81.

2. While the courts do not allow remote or speculative damages or profits on sales that might have been made, where goods are shipped to fill sales already made, the rule is different. The measure of profits is already fixed, and can be definitely computed. 26 Barb., 565; 54 Ill., 59; 83 Ill., 360; 46 Miss., 458; 9 A. & E. R. Cas., 334; see rule in 3 Suth. Dam., 220, and 9 C. B. N. S., 632, approving and reconciling 9 Exch., 341; 13 Allen, 381.

3. The court erred in refusing the fifth instruction asked by plaintiff; see cases *supra;* 30 L., J. Exch., 11.

4. The negligence of the connecting line was the negligence of defendant; 51 N. Y., 416; Lawson's Cont. of Car., p. 343; Redfield on Car., secs. 190–197. If defendant agreed to transport the goods, nothing would excuse it but the act of God, or the public enemy. Hutch. on Car., sec. 68.

5. It was error to permit defendant to introduce in evidence the printed receipt or bill of lading, 44 Ala, 474; for plaintiff would not have been bound, if he had assented to them. 53 Ark., 443.

6. As to the company's liability for loss beyond its own line, see 38 Ga., 37; 3 Otto, 174; 45 N. Y., 17; 97 Mass., 124; Hutch. Car., secs. 68–71.

J. M. Moore for appellee.

1. Even if the court erred in giving instruction No. 2, and admitting the bill of lading in evidence, appellant was not prejudiced. This court only reviews prejudicial errors. 43 Ark., 221; *ib.*, 542; 27 *ib.*, 311; 50 *id.*, 70; 46 *id*, 487.

But the court was correct in its rulings. 35 Ark., 408; 52 Vt., 355; 6 A. & E. Cas., 447; 104 U. S., 157; 49 N. Y., 494; Schouler, Bailments, sec. 597.

2. As to the measure of damages The carrier having no notice of the facts, special damages could not be recovered. 48 Ark., 504; 9 Exch., 341. No authorities can be found to sustain the contention that there is a difference between the liability of an express and a railroad company. 93 U. S., 177; 97 Mass., 129; 23 N. Y., 337; 15 Minn., 211.

See the rule in 7 A. & E. Enc. of Law, p. 564; Hutch., Car., sec. 772, note 2; 3 Wood on Railways, p. 1606 *et seq.*, 1607.

There must be notice of the facts, or the company must have assented to accept the goods on the terms that they were to be delivered by a certain time, or special losses would result. See 9 Am. & E. R. R. Cas., pp. 31, 35; 3 Suth. on Dam., p. 218; 7 H. & N., 79; 46 Ark., 487; Hutch. on Car., sec. 373.

HEMINGWAY, J. Upon the question of negligence, the jury found against the defendant. It is therefore obvious that the plaintiff was not prejudiced by any error in the admission or exclusion of evidence or in declaring the law to the jury pertinent to that issue.

Measure of damages for delay of express company.

As to the measure of plaintiff's damages the court declared the law that if the defendant had no notice that the trees were shipped for delivery under sales theretofore made, the plaintiff could recover only the difference between their market value at the time and place when they ought to have been delivered and such value when they were delivered, and also any extra expense that he incurred in writing or telegraphing for the trees. This the appellant contends was error. He contends that he was entitled to recover the difference between the price for which he had contracted to sell the trees and their market value when and where they were delivered, although the defendant was not advised that they were shipped to complete contracts of sale theretofore made.

It seems to be conceded that the rule announced by the court is correctly stated as applicable to contracts between natural persons, and to contracts of shipment by railroad companies; but it is contended that a different rule applies to contracts of carriage by express companies. No authority is cited that sustains the distinction contended for, and we should be surprised to know that any existed. That the rule defining the duties of express companies under contracts of carriage differs from that applicable to primitive

means of transportation, is doubtless true; that a delivery by an express company would be negligent for unreasonable delay which would display the greatest diligence of a stage-coach or might be more expeditious than a stage-coach could make by use of such diligence, is also true. But the difference is confined to the determination of the question of diligence or negligence, and does not affect the rule as to the measure of damages when negligence is proved. This rule is not affected by the character of the parties to the contract, but is uniform in its application whether the breach be committed by natural or artificial persons. It requires the party guilty of the breach to compensate the innocent party—to pay the damages which are the direct and immediate consequence of the breach, and are deemed to have been contemplated by the parties when they made the contract. 3 Suth. Dam., p. 216; *W. U. Tel. Co.* v. *Short*, 53 Ark., 443. The fact that the guilty party is a corporation, or that it is a natural person, would neither enlarge nor curtail the scope of damage within the contemplation of the parties as likely to arise from a breach of their contract. It cannot therefore affect the amount of such recovery.

Upon the law and the undisputed facts the judgment was right, and will be affirmed.

RAILWAY COMPANY *v.* TANKERSLEY.

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Decided December 6, 1890.

1. *Railway Company—Duty to stop trains.*

   A railway company is not liable for injuries to a passenger received in attempting to alight at a station from a moving train if, after the station was called in the car, the train stopped long enough to afford an opportunity, by the use of reasonable diligence, to alight from it while stationary.

2. *Alighting from moving train.*

   The failure of a train to stop at the station will not justify a hazardous attempt to alight from it while in motion.

3. *Contributory negligence.*

In an action by a woman to recover damages for injuries received in stepping from a moving train, her age, sex and physical condition should be considered in determining whether she acted prudently or recklessly.

4. *Incompetent evidence—When not prejudicial.*

One who has first introduced incompetent evidence cannot complain of the introduction by his adversary of similar evidence in rebuttal.

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

Mrs. Sarah E. Tankersley, an elderly lady, was a passenger on a train on the Little Rock and Fort Smith Railroad. She complains that when the train arrived at her station, it stopped, but not long enough to enable her to alight in safety; that while she was in the act of alighting, the train was carelessly and negligently started with a jerk, throwing her upon the platform and seriously injuring her. Defendant answered, denying negligence on its part, and alleging contributory negligence on the part of plaintiff. Verdict for plaintiff. Defendant appealed.

Dodge & Johnson for appellant.

1. The verdict is contrary to the facts. Contributory negligence defeats all actions of this character, if it was the proximate cause of the injury. Carriers are not *insurers* of the *lives* and safety of passengers, but are bound to take all precautions which wisdom and foresight can suggest, to protect and safely deliver, at their destination, their passengers. They are liable, therefore, for slight negligence. But this is limited by the duty of all passengers, as reasonable and thoughtful beings, *to protect and take care of themselves;* the passenger must exercise due care, and if he fails to do so, then his own negligence is the cause of the injury. Sher. & Redf. on Negl., secs. 25 to 35, and sec. 265; Whart. on Negl., secs. 300, 626; 26 Ind., 226.

Getting off a vehicle while in motion is almost always fatal to a recovery. Sher. & Redf. on Negl., sec. 283; Whart. Neg., sec. 369; 44 Miss., 486; 26 Ill., 384. The only allowable excuse is, that the party acted under a *controlling*

necessity—a *vis major*, or was deprived of "responsible volition" by the *wrongful acts of the carrier*. Sher. & Redf. Neg., secs. 25, 35, 282, 283; Whart. Neg., 353, 371; 2 Redf. on Rys., sec. 177; 106 Mass., 464; 23 Penn., 149; 32 *id.*, 296; 56 N. Y., 305; 6 Casey, 234; 44 Ill., 463; 44 Miss., 466; 20 Barb., 282; 16 Gray, 502; 54 Ill., 133; 66 N. C., 499; 12 A. & E. Cas., 164; 17 N. E. Rep., 107; 15 Lea, 328.

2. The evidence fails to establish any act of negligence or carelessness on part of defendant or its servants. 45 Ark., 256; 11 S. W. Rep., 212; 47 Ark., 77; 7 S. W. Rep., 88.

3. Evidence that the train did not stop long enough to enable passengers to alight, or did not stop at all at other times or *on other occasions* was inadmissible and prejudicial. 48 Ark., 473; Whart. Ev., sec. 40; 1 Gr. Ev., sec. 52; 115 Mass., 240; 118 *id.*, 422; 10 Allen, 148; 6 Cush., 398; 1 Gray, 511; 89 Mass., 508; 38 Mass., 145; 79 *id.*, 512; 53 *id.*, 482; 73 *id.*, 96. The proof must be confined to the immediate locality of the accident. 4 Md., 242; 70 Mo., 243; 68 *id.*, 470; 38 Mich.; 537; 45 N. Y., 574; 60 Mo., 227; *ib.*, 265. Evidence of other acts are not admissible. 8 Or., 172; 52 Barb., 267; 41 Conn., 61; 59 Iowa, 581; 69 Me., 173; 60 N. Y., 278, 95; 44 N. Y., 465; 4 West. Rep., 48; 15 Neb., 43; 14 N. W. Rep., 541; 45 N. W. Rep., 91.

4. Defendant's first instruction should have been given; likewise the seventh. The eighth is sustained by 91 Mo., 433.

A. S. McKennon and *J. E. Cravens* for appellee.

1. We contend the evidence shows that the train did not stop long enough for appellee to alight; that she acted promptly: that she was thrown from the car by a sudden jerk, and that the train was just starting at the time. These propositions form the issue, and each is dependent on the other. The jury found for plaintiff on these issues, and there was evidence to support the verdict. 27 Ark., 592; 31 *id.*, 163.

2. The court properly modified the first instruction of appellant, in view of the evidence. As to the refusal of the fifth, see 46 Ark., 423. The seventh is objectionable. 49 Ark., 182. The instructions as a whole were ample and as stong as any view of the proof warranted.

It may be the testimony of the witnesses to prove that the trains did stop at Coal Hill was incompetent, but the railway company first introduced incompetent evidence on this line, and this justified the admission of testimony in rebuttal. If this was an error it was not a very grievous one. 45 N. W. Rep., 91; 61 Wis. 457; 23 A. & E. R. Cases, 352.

HEMINGWAY, J. The injury complained of was sustained by the plaintiff, a passenger on defendant's cars, in attempting to alight at the end of her journey, while the cars were in motion. Two questions were therefore involved in the proper determination of the cause: First, was the injury attributable to any misconduct of the defendant? Second, did the plaintiff contribute to it by any negligence on her part? There was evidence tending to maintain a contention on each side of both of the questions stated, and the charge of the court was given with reference to every aspect of the evidence.

1. Duty to stop train.

1. The court properly charged the jury that the defendant would not be liable, if, after the station was called in the car in which plaintiff was traveling, the train stopped long enough to afford the plaintiff an opportunity, by the use of ordinary diligence, to alight from it while stationary. Upon the facts assumed, the defendant had discharged its full duty to plaintiff, and no injury to her could be attributed to it. Although the plaintiff may have been without fault, the defendant was then equally so, and the hurt was attributable to an unforeseen casualty. The charge of the court properly made the defendant's negligence depend upon the fact of its failing to make a sufficient stop at the station.

2. On the law applicable to the negligence of the plaintiff the charge is subject to objection. The eighth instruction, given at the request of the plaintiff, relates exclusively to this question. It states several legal principles; (1) that to jump voluntarily from a train while in rapid motion is negligence; (2) that to step from a car while in motion to a station platform may or may not be negligence: (3) that it is for the jury to determine whether the latter act is or is not negligence; (4) that it is for the jury to determine whether the speed of the train at the time of alighting was or was not such as to make the act hazardous. But the same instruction, which contains no reference to the defendant's negligence, declares that it is for the jury to determine whether there was a sufficient stop of the train, without indicating the proper effect of a negative finding. As the instruction treated only of the negligence of plaintiff that would bar her right of recovery, the inference is that if a sufficient stop was not made, that would excuse a hazardous attempt by plaintiff to alight. 2. Alighting from moving train.

That is not the law. The conduct of the plaintiff must be judged from present conditions, and upon them the past delinquency of another sheds no light. If it would seem to a person of ordinary prudence and caution to be safe to step off, considering the train's speed, the situation of the place of alighting, the opportunity to see where the step was made, and the activity of the person making it, and all other circumstances reasonably affecting the safety of the attempt—it could not be deemed negligence in the plaintiff to do it. But the failure of a train to stop does not justify an attempt to alight that is hazardous, nor is it an element to be considered in determining in any given case whether such attempt was prudent or hazardous.

We think the instruction fairly implied that a failure to make a sufficient stop fixed negligence upon the defendant and excused the negligence of the plaintiff. That was error.

The eighth instruction asked by the defendant should have been given. The act of the plaintiff was to be judged 3. Contributory negligence.

by a comparison with the acts of persons of ordinary prudence under similar circumstances. The age, sex and physical condition were circumstances necessarily affecting her safety in stepping from a moving train, and should have been considered by the jury, in connection with all other such circumstances in proof, in determining whether she acted prudently or recklessly. A young active man might prudently alight, when the attempt would be reckless in an old or lame man; and any man might do so prudently, when it would be dangerous for a lady in female attire to attempt it.

4. Incompetent evidence—Rebuttal.

The defendant is not in a situation to complain that the court admitted evidence to prove that its trains were not stopped at Coal Hill on former occasions. Witnesses for the defense testified that the train stopped on the day of the injury long enough to permit all passengers to alight; to sustain their statement they testified that the rules of the company required a stop of several minutes, and that it was always made. If the evidence was incompetent, the defendant first introduced it, and cannot complain that the court permitted plaintiff to rebut it.

For the error indicated the judgment will be reversed, and the cause remanded for a new trial.

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NATTIN *v.* RILEY.

Decided December 6, 1890.

1. *Conditional sale—Exchange—Vendor's rights.*

In a conditional sale of personal property reserving title until payment, where no demand for payment or the property has been made, the vendee, after maturity and before payment, may exchange the property, without conferring upon the vendor any right to the property for which the exchange is made.

2. *Equitable defense at law—Bill of sale—Mortgage.*

In an action at law a defendant may set up the equitable defense that a bill of sale was intended to be a mortgage. (Mansf. Dig., sec. 5033.)

APPEAL from *Miller* Circuit Court.

W. H. ARNOLD, Special Judge.

Scott & Jones for appellants.

1. A bill of sale, absolute on its face, cannot, in an action of law, be shown, by parol evidence, to have been intended as a mortgage. Jones on Mortgages, Vol. 1, p. 282, 3d ed.; 36 Me., 562; 38 Ala., 89; 13 Mass., 443; 5 Minn., 178; 10 Mo., 483; 62 id., 202; 8 Kans., 380; 8 Conn., 117; 38 Ala., 125; 71 Me., 567; 5 Litt. (Ky.), 74.

2. The appellee did not become the owner of the mare by reason of the trade for the horse. 12 S. W., 330.

BATTLE, J. This was an action of replevin brought by J. H. Nattin against Mike Riley, before a justice of the peace, for the recovery of a bay mare. On the trial Riley testified, in effect, that he, in 1883, sold to Jim Griggs a horse on a credit, and upon condition that the horse was to remain his property *until the debt contracted in the purchase of him was fully paid.* In 1884 Griggs exchanged the horse for the mare in controversy, and let the plaintiff, J. H. Nattin, have her for the alleged consideration of $25, and executed to him a bill of sale. Plaintiff permitted Griggs to remain in possession of the mare. Afterwards Griggs sold and delivered her to the defendant, the consideration being the debt that Griggs owed to the defendant for the horse. The defendant was allowed, over the objections of the plaintiff, to introduce evidence, on the trial, tending to prove that the bill of sale exeeuted by Griggs was a mortgage, and that the same had never been filed with a recorder.

The plaintiff asked, and the court refused to give to the jury, the following instruction: "The jury are instructed that if they find from the evidence that defendant received from one Griggs a certain dun horse, and afterwards delivered to said Griggs said horse, to be his when he paid the defendant a certain debt due by said Griggs to defendant, and that afterwards one Belcher, without notice, traded to Griggs the mare in controversy for said horse, and that Griggs sold the

mare to plaintiff for a valuable consideration, and the plaintiff received from said Griggs an absolute bill of sale to said mare, then they will find for the plaintiff."

The result of the trial was a verdict and judgment for the defendant. Plaintiff filed a motion for a new trial, which was overruled; and he saved exceptions and appealed.

1. Conditional sale—Rights of vendor.

The horse sold to Griggs was to remain the property of the vendor *until the purchase money was paid.* It does not appear when the purchase money was due. Under such a contract, the mere omission of the purchaser to pay the purchase money at maturity "would not operate as a forfeiture of his rights under the contract, in the absence of a demand, on the part of the seller or his assignee, of payment, or of the property for non-payment of the price; and on such demand, even after the purchase money was overdue, the purchaser would have the right to pay the purchase price and retain the property which he received under the contract." *Taylor* v. *Finley*, 48 Vt., 78; *Hutchings* v. *Munger*, 41 N. Y., 155. Until such demand was made, Griggs had the right of possession and a right to use the horse and to dispose of his interest in him, such as it was. He had the right to exchange him for the mare; and she did not thereby become the property of his vendor. As there was no evidence that such a demand was made before the exchange, the instruction refused ought to have been given. *Dedman* v. *Earle*, 52 Ark., 164

2. Equitable defense at law.

It is contended by appellant "that a formal bill of sale, absolute in its terms, conveying personal property, cannot, in an action at law, be shown by parol evidence to have been intended as a mortgage." But this is not true. Under our code of practice in civil cases, all forms of actions are abolished, and the plaintiff in an action is entitled to whatever relief the principles of law or equity would entitle him; and the defendant "may set forth in his answer as many grounds of defense, counter-claim and set-off, whether legal or equitable, as he shall have." Mans'. Dig., sec. 5033. So justices of the peace, in cases coming before them, if they

have jurisdiction of the subject matter of the action, may apply and enforce equitable as well as legal principles, but cannot administer equitable remedies. Consequently it was competent for the defendant to show by parol evidence that the bill of sale in question was intended for a mortgage, and that it was of no effect as to himself. *Whitesides* v. *Kershaw*, 44 Ark., 377.

This disposes of all the questions discussed here. It is not necessary to decide any other. For the error indicated the judgment of the circuit court is reversed, and this cause is remanded for a new trial.

TURNER *v.* RISOR.

54	33
56	627
54	33
57	15
54	33
76	394

Decided December 6, 1890.

Original and ancillary administration—Limitation.

A judgment against an ancillary administrator in another State is not binding on the original administrator in this State; nor can the judgment creditor, after expiration of the time for presentation of claims, pursue assets of the estate here which have descended to heirs or distributees.

APPEAL from *Ashley* Circuit Court in Chancery.

CARROLL D. WOOD, Judge.

J. W. Van Gilder and *M. L. Hawkins*, for appellant.

1. This claim was a subsisting demand against the intestate at the time of his death, and should have been presented to the administrator in Arkansas within two years, and, not having been so presented, it was barred. 14 Ark., 246; 15 *id.*, 412; 18 *id.*, 334; 39 *id.*, 577; 15 *id.*, 41; 20 *id.*, 84; 113 U. S., 449; Mansf. Dig., sec. 98, sec. 5; 18 Ark., 118. The statute runs against non-residents. 6 Ark., 14; 16 *id.*, 694.

2. The presentation in Louisiana and obtaining judgment there, did not relieve her from presenting the same to the domicilary administrator. The administrations were

independent of each other. Story, Conf. Laws, 5th ed., sec. 522.

G. W. Norman for appellee.

1. Appellee was not bound to present her claim to the administrator in Arkansas within two years after grant of letters in Arkansas. She was a resident of Louisiana. There was an ancillary administration there. She must pursue the estate in Louisiana until exhausted. When this is done, if the estate in Arkansas was wound up, she might proceed against the heirs at law who received the assets. 40 Ark., 439–442. There are three modes of exhibiting claims against estates, one of which is by action against the administrator. 5 Ark., 468; 7 *id.*, 78. She brought suit and recovered judgment. This was a presentation as to estate in Louisiana, and the estate here and there are one and the same.

It is the duty of the ancillary administrator to collect the assets in his State and apply them to debts due citizens of his State and remit the balance. 34 Ark., 117; 31 *id.*, 539; 42 *id.*, 164. As to appellee's right to proceed in equity, see 40 Ark., 440; 31 *id.*, 229; 94 U. S., 746. No Louisiana creditors could prove their claims in this State as long as an ancillary administration was in existence in Louisiana. 34 Ark., 135. See, also, 103 Mass., 245; 13 Allen (Mass.), 48; 2 Rawle (Pa.), 431; 2 Sandf. Chy., 173.

BATTLE, J. John Turner was a resident and citizen of Ashley county, in this State, and died there in September, 1869, leaving real and personal property in that county, and in the State of Louisiana. Letters of administration on the estate in Arkansas were granted on the 20th of September, 1869, to John C. Eckles, who qualified as administrator and administered the estate. About the same time W. H. Vaughan became administrator of so much of the estate as was in Louisiana. Mary A. Risor, a citizen and resident of the State of Louisiana, having a subsisting demand against the estate, recovered a judgment against Vaughan, as such

administrator, for the sum of $533 and interest. The estate in Arkansas was fully and duly administered, and the property remaining on hand after the payment of the debts probated against it was distributed and divided among the heirs of the deceased. Mrs. Risor failed to present her claim to the administrator in Arkansas within two years after the date of his letters, but waited until the assets in the hands of the Louisiana administrator were exhausted, and then, failing to collect her claim, brought this action against the heirs and distributees to recover her debt out of the property which they had received in this State, notwithstanding she had wholly failed to present her claim to the Arkansas administrator.

Original and ancillary administration—Limitation.

Mrs. Risor's contention is, that the estate of John Turner, in Arkansas and Louisiana, was only one estate; that she commenced suit on her claim against the Louisiana administrator; that while her suit was pending, she was not required to present her claim to the Arkansas administrator; that the commencement of the same in the time prescribed by law for presenting claims was a sufficient presentation to both administrators; that she, being a non-resident, had no right to prove her claim against the estate in this State until the Louisiana administration was closed; and that, inasmuch as the Arkansas administration had closed before she recovered judgment in her suit, and the assets in Louisiana were fully administered, she had the right to subject the assets which had descended to the heirs to the payment of her judgment. But this contention is not correct. These administrations were wholly independent of each other. The administrators received their authority from different sovereignties and over different property. Each was only a representative of Turner, the deceased, to the extent of the assets of which the court appointing him had jurisdiction; neither was accountable to the other; neither was privy to the other in law or estate; and no connection existed between them. The presentation of the claim to the Louisiana administrator was no presentation to the other. The judg-

ment obtained against one "furnished no right of action against the other, to affect assets received by the latter in virtue of his own administration." For, as said in *Stacy* v. *Thrasher*, 6 How., 61, "the laws and courts of a State can only affect persons and things within their jurisdiction," and "both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta*. It is not even *prima facie* evidence of a debt." *Stacy* v. *Thrasher*, 6 How., 58; *McLean* v. *Meek*, 18 How., 16; *Low* v. *Bartlett*, 8 Allen, 259; *Ela* v. *Edwards*, 13 Allen, 48; *Brodie* v. *Bickley*, 2 Rawle, 431.

The primary administration was in this State. It is unlike an ancillary administration. An ancillary administration is taken out for the benefit of resident creditors, legatees and distributees. In *Shegogg* v. *Perkins*, 34 Ark, 117, 131, it is said that it is generally held "subordinate to the original administration," and that the only duty devolving upon the administrator is to collect the assets in the State in which it was granted, and appropriate so much of the avails of the same to the payment of creditors residing in such State as would be authorized by the general solvency or insolvency of the estate of the deceased, and remit the balance to the place of the primary administration. Whether this doctrine be correct or not, the primary administration is for the benefit of resident and non-resident creditors. Non-resident creditors can, and are required to, prove up their claims against it in the same time as the resident. In this case, Mrs. Risor might have prosecuted her original claim against the primary administration in Arkansas at the same time she was prosecuting it in Louisiana. She was under no necessity to wait until she had prosecuted it to judgment, or until the ancillary administration was closed, or until she was barred by our statute of non-claim. In fact she could not wait until the two years from the grant of letters of administration in this State had expired, and then pursue the assets in the hands of the heirs. When the two years expired, her claim was barred. She cannot

now successfully prosecute it to recovery against the heirs or distributees to whom assets have descended. She does not come within that class who may in equity subject the assets in the hands of the heirs to the payment of their debts. She is not a creditor whose claim has been duly proved or whose claim came into existence too late to be proved, or after the administration was closed. She had a subsisting demand against the estate when letters of administration were first granted. In such cases equity will not set aside or disregard the statute, but will be governed by it. *Low* v. *Bartlett*, 8 Allen, 259; *Hall* v. *Brewer*, 40 Ark., 433; Mansf. Dig., sec. 97; *Erwin* v. *Turner*, 6 Ark., 14; *Morgan* v. *Hamlet*, 113 U. S., 449; *Churchill* v. *Boyden*, 17 Vt., 319; *Dawes* v. *Head*, 3 Pick., 145–6.

The decree of the circuit court is, therefore, reversed, and the complaint is dismissed.

REIGLER *v.* QUINN.

Decided December 13, 1890.

Justice of the peace—Trial fee.

A justice of the peace is entitled to a trial fee where a defendant makes default upon an open, unverified account.

APPEAL from *Pulaski* Circuit Court.

JOSEPH W. MARTIN, Judge.

Quinn & Gray sued John Reigler, a justice of the peace, to recover the statutory penalty for extortionate charges. Upon a trial before the court, the facts were found to be substantially as follows: Plaintiffs brought four civil suits upon open accounts, not verified. There was a default in each case. The justice heard the testimony of the plaintiffs, as provided by the statute, and rendered judgment in their favor. He taxed up a fee of one dollar for the trial in each case. The court held that there could be no trial, in the

sense of the statute, in the absence of an appearance by the defendant, or of an issue joined, and rendered judgment against the defendant for $20.

F. T. Vaughan for appellant.

This in an action under sec. 1760 Mansf. Dig. Mansf. Dig., sec. 3259, allows justices of the peace "one dollar for a trial in civil cases." Was there a *trial* in these cases? A non-suit, so far as costs are concerned, is a trial. 1 Abb. Pr., N. Y. "A trial is a judicial examination of the issues, whether of law or fact, in an action." Mansf. Dig., sec. 5104. The presumption of law is always with the defendant. If no evidence is introduced, or if it is balanced, the judgment is always for defendant. 45 Ill., 374. The law itself makes an issue, by throwing the burden on plaintiff. Mansf. Dig., sec. 4068. Prosecuting attorneys are entitled to a fee when there is a plea of guilty. Mansf. Dig., 3233; 47 Ark., 442. The very point in this case was decided in 57 Iowa, 390, under the same law as ours.

W. J. Terry for appellees.

A judgment by default is not *a trial*, within the statute. As to what was a trial at common law, and the meaning to be given words used in statutes, see 4 Mason, 236; 32 Cal., 265. For definition, see Bouvier, "Trial;" Anderson, "Issue;" Mansf. Dig., sec. 5104. At common law, no issues were raised by presumption of law. Tyler's Ed., Stephens on Pl., p. 215. Under our statute, no issue is raised until answer filed. 38 Ark., 481. Fee bills are strictly construed. 47 Ark., 442; 43 *id.*, 377; 25 *id.*, 226. Counsel virtually admit that no trial can be had without an issue, but contend that the law raises the issue for defendant. Their *admission* is right. 29 Ark., 304; 34 *id.*, 282; 38 *id.*, 481; 47 Mich. 365; 39 Ind., 9; 63 How. Pr. (N. Y.), 123. But their contention that the law raises the issue is wrong. 1 Chitty Pl., 235, note; 3 Black. Com., 215; 2 Ark., 104; 30 Conn., 488; 57 N. H. 164; 1 Green Ch., (N. Y.), 157; 3 E. D. Smith (N.

Y.), 648; 4 Abb. Pr., (N. Y.;) 262; 63 How. Pr., 123; 17 Cal., 564; 27 *id.*, 495.

Justice of the peace—Trial fee.

HEMINGWAY, J. The statute regulating the fees of justices of the peace allows one dollar "for each trial in a civil case." The only question in this case is, whether or not that provision applies to the proceeding, upon failure of the defendant to appear in cases in which the plaintiff's claim is not founded on a written instrument, purporting to have been signed by the defendant. In such cases it is provided that the justice shall proceed to hear the allegations and proofs of the plaintiff, and to render judgment thereon for the amount to which he shows himself entitled, not exceeding the amount claimed. Mansf. Dig., sec. 4068.

The statute puts in issue the allegations upon which plaintiff's claim rests, and exacts proof of them. It requires the justice to hear the proof, and from it ascertain the rights of the parties. If it is not an examination of issues made by the pleadings, it is an examination of issues made by the law upon a pleading; and as the service performed by the justice is the same in either case, and the statute was intended to provide a compensation for service, we think the case fairly comes within the statute.

The statutes of Iowa regulating practice and fees of justices of the peace are, in all respects material in this case, like our own. The supreme court of that State held that in default cases the justice was entitled to the fee allowed for "trial of civil causes." *Shaw* v. *Kendig*, 57 Iowa, 390.

Upon the facts found by the circuit judge, the judgment should have been for the appellant.

The judgment will be reversed and a judgment rendered here on the finding below for the appellant.

COCKRILL, C. J., did not participate.

BANKS *v.* FLINT.

Decided November 8, 1890.

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54 569
54 574
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55 272
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57 255
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63 250
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64 58
65 315
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87 538

1. *Usury—What constitutes.*

A loan of money is usurious where it appears that the lender was to receive excessive interest, or that a bonus or commission was paid to an agent of the lender with his knowledge, or under circumstances from which his knowledge will be presumed, which commission, when added to the interest, will exceed the lawful rate.

2. *Agency—Proof of.*

Where, from a consideration of their intimate relations toward each other, of their respective business purposes and of their large and constant dealing with each other for a number of years in a uniform manner, it was apparent that it was understood between a bank and a loan company that the bank would solicit borrowers in the south and west, make the necessary examinations, and obtain the desired information as to security and borrowers, and present applications and information to the company; that the company would accept such applications to the extent of its fund, as it deemed safe; that the bank would see that the securities were properly prepared and executed, and the title to the mortgaged property perfected, and attend to the collection of notes as they matured. *Held:* The bank was the agent of the loan company, though the borrower signed an agreement which recited that the bank was his agent.

3. *Usury—Agent's commission.*

Where the loan company paid the bank nothing for negotiating the loan, it will be presumed to know that the borrower paid for such services; where the company knew the terms on which the bank habitually did business before the loan in controversy was made, it was reasonably apprised that it would be made on the same terms; where the bank's commission, in addition to the interest paid the lender, exceeded the lawful rate of interest, the loan is usurious and the security void.

APPEAL from *Yell* Circuit Court in Chancery, Dardanelle District.

G. S. CUNNINGHAM, Judge.

John Hallum for appellant.

The proof shows that the Corbin Banking Company, Ocobock and Hall & Carter were all the agents of the New England Mortgage Security Company, and that the banking company and security company were jointly interested in placing the loans. Ocobock is the same person who

figures in the Nebraska cases cited below. 13 Neb., 553, 556; 11 Neb., 488; 13 *id.*, 151-7; 14 *id.*, 91; 15 *id.*, 335. The acts of an agent and his knowledge, within the scope of the agency, bind the principal. Field on Corp., sec 184. 204; Story, Ag., sec. 140, 140 *a*, *b*, and notes. The security company is a delusion, a blind, a snare, to hide and cover guilty knowledge and corrupt contracts for the banking company. 13 Neb., 166. The notes are void in the hands of Ocobock, the security company or the banking company, and could gather no vitality by circulation. 41 Ark., 331. It is plain that Hall was agent of the lender. He could not *for the same purpose* be the agent of both borrower and lender. The shifting of allegiance and responsibility from lender to borrower will not be tolerated. It is simply double dealing. 100 Ill., 611; 13 Neb., 161, 551 to 556. A party making a usurious loan through an agent takes the contract subject to all the infirmities attaching to it in the hands or by the acts of an agent. 14 Neb., 91, and cases *supra;* 13 *id.*, 157; *ib.*, 555-6; 11 *id.*, 487; 6 *id.*, 151. The loan was usurious and void.

J. M. Rose for appellees. *U. M. & G. B. Rose*, of counsel.

The lender only charged 8 per cent. interest, and even assuming that the Corbin Banking Company was the agent of the security company, knowledge of any illegal exaction in the way of commissions must be brought home to the lender. 51 Ark., 544. To make this loan usurious, the banking company, Ocobock, or Hall & Carter, must have been the agent of appellee. No part of the commissions went to appellee, nor did it have knowledge of any illegal exactions. It paid the full amount of the loan, and only charged legitimate interest. This does not constitute usury. *Ib.*, 544. There are two contracts in this case. One, the loan with 8 per cent. interest. The other, to pay Hall & Carter, and their associates, their commissions and fees. The first is a contract for the loan of money; the second, a contract for services in procuring a loan of money. The first is legal, for the interest is only 8 per cent.; the second is

legal because the law prescribes no limit to charges of this kind. The charge may be excessive, but there is no evidence to that effect, and courts do not relieve against foolish contracts, in the absence of fraud or mistake. To render these two legal contracts illegal, the broker who received the commission was the agent of the lender, or the bonus was a mere device or cloak for usury. 7 S. E. Rep., 265; 1 So. Rep., 242; 6 *id.*, 239. The case in 32 Fed. Rep., 119 is in direct conflict with the decision of the Supreme Court of the same state. The courts follow the construction of the court of last resort of the state. 22 Ark., 125. See also 9 S. E. Rep., 1092; 114 Ill., 133; 12 Sawyer, 73; 7 S. E. Rep., 332–4.

Notice to an individual corporator, if he be not an organ of communication between the corporation and those who deal with it, is not notice to the corporation. 1 Waterman on Corp., sec. 135; Mechem on Agency, 730; 82 N. Y., 307; 1 Hill, 572; 26 Conn., 376; 10 Md., 517; 11 Vroom, 435; 5 Denio., 329; 41 Conn., 255; 44 Wisc., 342; 12 Ala., 502; 18 Kans., 481; 12 C. E. Green. N. J. Eq., 33; 47 Ia., 575.

G. W. Bruce, *C. W. Cox* and *E. A. Balton*, of counsel for appellant.

The question of agency is one of fact; and the signing of a contract that a party is the borrower's agent, where all the facts and circumstances show said party to be the agent of the lender, will not avail the usurer. 32 Fed. Rep., 119; 46 Mich., 393; and the Nebraska cases.

Everything that was done was for the lender's benefit; nothing for the borrower's. 46 Mich., 393. All the services performed in this case were for the lender, and the security company knew, or might have known, what their agents were doing. They are bound by the knowledge and acts of their agents. 9 N. W., 445; 15 Neb., 336; 14 N. W., 471; 15 *id.*, 726; 9 *id.*, 650; 12 *id.*, 916; 11 *id.*, 753; 15 *id.*, 214: 33 Conn., 81; 24 Minn., 269; 100 Ill., 611; 59 Ind., 93; 10 N. W., 698; 7 N. W., 275; 18 *id.*, 78. The Georgia cases are not sustained by reason or authority. 11 S. E., 878; *id.*, 881; 32 Fed. Rep., 119; 1 So. Rep., 242.

HEMINGWAY, J. The appellee, Charles L. Flint, on the 24th of September, 1888, filed his complaint in the Yell circuit court against the appellant, Hardy M. Banks, seeking to foreclose a mortgage executed by the latter. It was alleged in the complaint that the appellant executed the mortgage on the 16th day of February, 1883, to secure the payment of six notes executed by him on that day to the New England Mortgage Security Company, one for one thousand dollars, payable in five years, and the others payable annually, representing the interest thereon at the rate of 8 per cent. per annum. That the two interest notes, maturing in 1884 and 1885 respectively, had been paid, and that no part of the principal or other interest notes had been paid. The defendant admits that the facts are correctly set out in the complaint, and relies for a defense upon the plea of usury. He also seeks the cancellation of his mortgage and notes on the same ground. On the final hearing in the court below judgment was rendered in accordance with the prayer of the bill, and the defendant has appealed. The errors assigned relate to the finding of facts by the court, and this requires that we review the evidence. It is conceded that, of the $1000 represented by the principal note, $200 was retained by persons engaged in negotiating the loan, and that $800, and no more, were paid directly to Banks. Of the $200 retained $20 went to Hall & Carter, and $180 was paid to one A. W. Ocobock, to be shared with the Corbin Banking Company.

It is obvious that if the sum thus retained was any part of the sum paid for the use of the money borrowed, excessive interest was contracted for; but if it formed no part of the sum paid for the use of money, within the meaning of the constitution, excessive interest was not contracted for. The testimony is voluminous, and, without stating it in detail, we recite the facts as they are conceded or clearly proved.

Banks was a farmer residing in Yell county. Hall & Carter were attorneys at law, residing at Dardanelle, in said

county. A short time before the mortgage was executed, Banks learned through an advertisement in a local newspaper that Hall & Carter "were prepared to negotiate loans on well-improved farms upon five years' time, in sums of $300 and upwards." He applied to them for a loan. They explained to him fully the terms upon which he could get a loan, stating the rate of interest, time that loan would run, security that would be required, and the amount that would be retained by them. He wished a loan on the terms stated, and they then caused him to fill out an application for a loan on printed blanks furnished by them, setting out in full the character and quantity of the land and of its improvements, the quality and quantity of its annual products, its location—in fact, everything in any way material in determining its value as security. The application concluded with the statement that the representations therein were true, and were intended to be used by Hall & Carter as agents for the applicant in procuring for him a loan. At the same time he signed, at their instance, a printed agreement, which, after reciting that he had employed them to negotiate for him a loan of $1000 for a term of five years, at 8 per cent. per annum, to be secured by first mortgage on his farm, obligated him to furnish an abstract of title, to pay the fee for recording the mortgage, and to pay them 20 per cent. of the amount obtained. The land was examined by L. C. White, an examiner engaged by Ocobock for that place, and he filled out a blank certificate, furnished by Hall & Carter, setting out the results of his examination. A blank certificate was filled out by Hall & Carter, setting out their opinion as to the value and character of the security, and also as to the character of the applicant and his habits as regards the payment of his debts. They also prepared an abstract of his title to the land offered as security. They then forwarded the application, the examiner's certificate, their statement, the abstract of title and their contract with Banks to Ocobock at Memphis, who forwarded all the papers to the Corbin Banking Company at No. 115 Broad-

way, New York. It presented all the papers, except the agreement between Banks and Hall & Carter, to the New England Mortgage Security Company, and solicited it to lend the money. It, after examining the application and accompanying papers, agreed to make the loan on delivery to it of the applicant's notes and mortgage, with an abstract showing his title perfect on the date of the mortgage. The Corbin Banking Company took the papers, and from blanks kept by them prepared the mortgage and notes. They forwarded the papers so prepared by them, the abstract of title and their check for $1000 to Ocobock. He retained the check received from them, but sent to Hall & Carter his check for $800, with the mortgage, notes and abstract of title. They caused Banks to execute the mortgage and notes, saw that his title was clear to date, and then delivered to him the check received from Ocobock. They received the mortgage and notes, had the mortgage recorded, completed the abstract of title to date, and forwarded them all to Ocobock, who in turn forwarded them to the Corbin Bank. Upon receipt by the Corbin Bank of the notes, mortgage and abstract of title, it forwarded them to the New England Mortgage Security Company, and received $1000. The notes were all made payable at the office of the Corbin Bank. A short time before the first interest note matured, the Corbin Bank addressed a circular, almost entirely printed, to Banks, which was indorsed at the top, "Very Important." They reminded him that all payments upon his loan must be made at their office promptly, and suggested that it would be better to always have money in their hands to meet maturing paper a few days before its maturity. They informed him that they had no agent authorized to collect his notes; that a payment at any other place than their bank would be at his risk, and would be of no avail until the money reached their bank; that no other notice would be sent him of the maturity of any one of his notes; and that, upon a failure to pay one note, all matured.

Banks failed to pay the first coupon note when it matured in 1884, and, on the 6th of June of that year, Hall & Carter notified him that they had just received instructions to advertise and sell the land under the power in the mortgage. A few weeks later Banks paid to them the amount then due on interest, and took their receipt therefor. Their right to make the collection has never been disputed, but was ratified, if not previously authorized, by the acceptance of the money. On the 18th of March, 1888, J. P. Dosh, an attorney at No. 115 Broadway, New York, wrote Banks that he had been instructed by the holder of his notes to make a final effort to collect the interest then due, without recourse to legal proceedings, and saying he would hold his papers and forbear to sue until a reply could be made to his letter. Banks did not reply favorably, and Dosh engaged Hall & Carter to bring this suit. One B J. Martin, an attorney residing in Memphis, had previously written Banks with a view of procuring a settlement of the debt, and had at one time visited the house of Banks for the same purpose. According to Banks' testimony, he represented the Corbin Bank, and in this he is supported by the testimony of its managing officer, who testified that Martin was its agent in Memphis. Martin denies that he represented the Corbin Bank. The testimony contains letters written by him in attempting to collect the loans in Yell county, in which he appears to act for the mortgage company. Banks says that Dosh wrote him as the attorney of the Corbin Bank. Its managing officer says that he is not its attorney. His office and that of the bank are at the same street number, and in the only letter from him which the testimony contains, he refers to the Banks loan by number, and adopts that used by the bank for its convenience.

From the money received by Banks, he paid Hall & Carter for making abstract of title, and White for examining the land and reporting upon it. The amount thus paid, with the 8 per cent. contracted for expressly as interest, would not make the interest excessive, and need not be considered.

These are the only facts elicited particularly connected with the loan to Banks, but the mortgage company, the Corbin Bank and Ocobock have participated and been the actors in many similar transactions during a term of years beginning at the organization of the mortgage company and extending down to the 28th of January, 1889, the day when the depositions in this case closed. A history of their business relations and dealings during those transactions is set out in the evidence, and is pertinent to the inquiry in the case.

The Corbin Banking Company, which shall hereafter be designated as the bank, was organized January 1, 1874, to do a banker's and real estate broker's business. It was and is a partnership. Until 1883, its members were Austin Corbin, J. B. Upham and Francis A. Osborn; and since then they have been Austin Corbin, J. B. Upham, W. H. Wheeler and Fred W. Dunton. The bank had two places of business, one in Boston and one in New York City, until 1883, when the Boston office was closed.

The New England Mortgage Security Company, which will be designated as the company, is a corporation with its place of business in Boston, organized in April, 1875, with a capital of $500,000, for the purpose of lending money on improved farms in the South and West. Of its original stock, the bank subscribed for $25,000, Upham for $22,500 and Corbin for $50,000. Upham was from its organization one of its directors, and Corbin has been one since 1880. They have each retained their interest in its stock, and when the depositions in this case were taken, the bank held $25,000 of its stock standing in the name of some one else. When the company was organized, the Boston offices of the bank were large, and the company took a portion of them. After that and until the bank's Boston office closed, they occupied adjoining offices. Francis A. Osborne was the secretary and treasurer of the bank until 1882, and occupied the same office in the company during part of that time.

The bank was organized to negotiate, and the company to make, loans in the south and west, on the security of improved farms; but neither concern, as their officers testify, ever advertised its business in the country in which it contemplated operating, or had an agent there to further its objects. It is said for the company, that it expected to reach southern and western farmers through brokers; how the bank expected to reach them, it has not explained.

The bank, from the date of its organization to that of taking the depositions, fifteen years, had negotiated 37,428 loans, of which 15,660 had been made by the company. The company, during eleven years after its organization, had made 13,000 loans, of which 12,500 had been made through the bank. That is, during fifteen years of the bank's life, it had done nearly half of its business with the company; while the company, during the eleven years succeeding its organization, had transacted twenty-five twenty-sixths of its business through the bank. From April, 1886, to January, 1889, the company had made 3160 loans through the bank, the business averaging for each day, not including holidays, almost four loans. All loans made by the bank for the company are payable at the bank, and it sends out to all borrowers circulars similar to the one sent Banks, notifying them as to payment of their notes.

Ocobock has acted in connection with the bank in procuring loans on real estate since about the time of its organization, the field of his operation being at different times in Iowa, Nebraska, Mississippi, Washington and Oregon, and the business done aggregating $2,000,000. Many of said loans had been obtained from the company, in some of which payment was resisted upon a plea of usury, out of which litigation had arisen before it began making loans in Arkansas. In September, 1882, Ocobock moved from Oregon to Memphis, where he engaged in the business of soliciting loans on farms in Arkansas. The bank furnished him all blanks needed to carry on the business. There was an understanding between him and the bank that he would

solicit applications of persons wishing to obtain loans on farms in Arkansas, which applications would be presented to the bank; the arrangement contemplated that he would secure reliable attorneys, resident in different parts of the State, whose duty it would be to solicit applications for loans from good men, examine and report on the value of farms offered as security, make and furnish abstracts of titles, and attend to the details incident to closing loans—that is to say, to receive money from Ocobock, see that mortgages and notes were properly executed, and titles cleared of all incumbrances, and then pay over the money, receive the securities, have the mortgage recorded, and forward the securities and abstract to Ocobock. As a remuneration, it was agreed between Ocobock and the bank that 20 per cent. of all loans should be collected from the borrower, out of which he should pay the resident attorney 2 per cent., defray all the expense of his office, and from the balance retain five hundred dollars per month for his services; the balance was to be paid to the bank. He sent an agent to Dardanelle to engage an examiner and attorney. The result was the employment of Hall & Carter, who at his instance published the advertisement seen by Banks. The borrower then dealt with Hall & Carter, they with Ocobock, he with the bank, and it with the lender. Ocobock received applications only from such resident attorneys, the bank would receive them only from Ocobock, and the company, which made seventy loans in Arkansas, made none except on applications presented by the bank.

The bank furnished Hall & Carter all blanks intended to be filled by borrowers, attorneys and examiners. These blanks were designed, executed and furnished to him by the bank; and when properly filled by the parties for whom they were intended, they furnished to the company all the information it desired or ever received as to the character of the applicant and the sufficiency of the security offered. The bank and the company began to do business in Arkansas about the same time. The bank in negotiating each loan

supplied information acquired by it after the application for that loan had been made to the local attorney.

The *modus operandi*, as detailed in the bank's loan, was substantially pursued in all the other transactions between Ocobock, the bank and the company.

As to the law governing the case, there is no controversy between counsel; it seems to be conceded that the case is to be determined by the laws of Arkansas.

1. What constitutes usury.

To sustain the plea of usury, it must appear that excessive interest was paid to the lender, or that a bonus or commission was paid to the agent of the lender with his knowledge, or under circumstances from which his knowledge will be presumed, which commission, when added to the interest paid or to be paid the lender, would exceed the lawful rate.

There is no proof of the payment of or agreement to pay excessive interest directly to the company. That narrows the inquiry to the two questions: 1st. Was excessive interest paid to those occupying toward the lender the relation of agent? 2d. Was such payment made with the knowledge, express or implied, of the lender?

2. Proof of agency.

The bank, Ocobock and Hall & Carter, divided among themselves 20 per cent. of the sum borrowed. What were their relations to the lender and borrower respectively?

Hall testified that his firm advertised that it could negotiate loans at the instance of Ocobock, and that he arranged with them to assist him in negotiating loans. In assisting him they were expected to solicit applications for loans from good men, to examine and report upon security offered, and prepare and furnish abstracts of title; to report upon the character of applicants for morality, sobriety, industry and promptness in the payment of debts; to receive and hold moneys forwarded for applicants until all defects of title were cured and the notes and mortgages executed, and then to pay over the money and receive the securities. They were engaged by Ocobock to assist him, and all the services they performed were for the protection of the lender. In the long enumeration of their duties, as set out in the evi-

dence, there is none which is designed for the benefit of the borrower. They all arise from the employment of Ocobock. Nothing done by the attorneys was at the instance of the borrower, or under his direction. He did not direct the examination of his land or the report upon his character. It was not at his request, nor in his interest, that money forwarded by Ocobock should be held by the attorneys until all flaws upon his title were cleared away and the mortgage on his farm executed. That was a part of their duty—but of a duty owing to some other than him. They were employed by Ocobock to assist him, they did assist him, and they were paid by him according to the terms of their employment. But it is insisted that Banks signed an agreement with them, wherein it was recited that he employed them to act as his agent in procuring the loan. The recital of a falsehood does not alter facts, nor does its incorporation in a written instrument prejudice existing rights, where it is uncredited and the truth known at the time. To hold that Hall & Carter were the agents of Banks would be to sanction an obvious juggle.

The attitude of Ocobock is determined without difficulty. It is contended that he was the agent of Hall & Carter. The testimony of Hall that Ocobock employed them, is conclusive against the contention. The relation of principal and agent is not instituted by the agent; on the contrary, principals create their agents. As Hall & Carter were employed by Ocobock to assist him, so he was employed by the bank to assist it. It was a part of the bank's purpose to negotiate loans on southern farms. It placed him in Memphis, prepared to receive the applications of borrowers, and fully instructed as to the manner of conducting the business. It furnished him a complete system of blanks which it had devised for the business, designed to afford all the information which a lender could desire, when properly filled out by applicants, attorneys and examiners. As the letters accompanying the applications in evidence show, no explanation from him to the bank was needed to inform it what he

wanted, from whom he wanted it, or on what terms he would like it; but when an application was received by the bank, it understood the thing to be done. But it never proceeded to obtain the loan until it had in its possession the contract from the applicant for the payment of commissions; although the contracts were made with the local attorney, they were turned over to the bank, which was treated as entitled to their custody. The agreement between them and their conduct under it clearly show that he was the agent of the bank. It is contended that he was not the agent because he had no authority to close a loan; the argument goes to the extent of his agency, not to its existence.

It has been more difficult to determine the attitude of the bank toward the parties. The mortgage company was organized to lend money in the south and west, keeping its office in Boston. Its residence and that of its officers were quite removed in distance and business associations from the field of its contemplated activity. It must have contemplated some means of reaching the farmers whose business it sought. To invest large sums in a loan company, without opening some channel of communication between it and the borrowers, would ill comport with the shrewdness and sagacity usually displayed by intelligent capitalists. Its officers testify that they never advertised its business, and had no agents to promote it. It would lend only on the security of first mortgages on improved farms, and then only upon being satisfied that the security was sufficient and the borrowers good ones; but it employed no means to obtain this information, and relied upon getting it from borrowers and their agents. It is seldom that, in such important matters, so great reliance is placed by one party to a transaction on agents selected by the other.

But the bank, in whose apartments the company had its birth, went into the territory of the company's contemplated operations, and advertised to negotiate loans upon stated terms, which terms were the same as those contemplated by the company; when applicants for loans came, the bank

procured, without suggestion from the applicants, all the information which the company desired, and without which it would not lend. It engaged attorneys and examiners, resident throughout the country, to the end above stated, whose duties were well understood, and through whom the interest of the lender was jealously guarded from the moment the applicant presented himself until his mortgage had been recorded and forwarded. By these agencies those things were done, guarded or ascertained, which prudent men in lending money usually see to in person. Of the value and necessity of such services the company furnishes proof, for they would make no loan unless they were performed. It is said that brokers in New York and Boston sought all the money they had and relieved them of the necessity for activity. The force of the explanation would be greater if it were not conceded that, after doing business for fourteen years in various States and making fifteen thousand loans, twenty-five twenty-sixths of its business had been done through one broker. That such should be true would excite no surprise if it were stated that the lender employed the broker to find borrowers and lend his money; but it is remarkable, to say the least, that such a proportion of all its borrowers should have engaged the same broker to deal with it.

This is not a case in which a broker, in the ordinary course of his business, has acquired information of men or property, which he gives, when asked, to those with whom he deals. The bank and the company began to do business in Arkansas at the same time, and the bank knew nothing from its past business of borrowers or securities which it could communicate. It, in order to acquire the necessary information, was bound to incur the expense of travel and employing agents, just as the company would have been if it had seen fit to seek its own information. In this case the bank has incurred expense and trouble to obtain information which the company expected and demanded, but would not pay for. It is said in the testimony

that the company could not meet the expense and lend money at lawful interest. That is perhaps a reason, but it is no justification, for a charge of excessive interest.

The bank not only performed all the service which the company might have performed to protect itself before lending the money, but was equally watchful for its collection after the loan. All notes were payable at the bank. The bank gave notice of the first maturing note, and the lender remained passive until after default. The bank, assuming that it alone looked after payments, stated in its circular that no notice would be given of payments to fall due after the first one. It also interested itself to see that the taxes were paid on lands mortgaged. Another fact, remarkable upon the theory that the broker acted as agents of the borrower, is that the broker knew in advance exactly the terms upon which money could be obtained, and that, in this world in which all things are subject to the law of change, those terms never changed. The borrower was told, when he applied for money, how his loan must be secured, the term it would run, and the interest it would bear. All those things were unalterably fixed and understood by the broker before he sought or found the borrower. This fact suggests the idea of a possible pre-arrangement between the broker and the lender. If the broker had been in fact employed by the borrower, it is reasonable to assume that he would have gone into the money markets to obtain the loan on the most favorable terms possible, and could have informed the applicant of such terms only after such an effort. Surprise at the broker's inaction in this respect gives way, upon the theory that he was lending money under instructions from its owner.

Without a more extended discussion of the facts, we are satisfied that it was understood between the bank and the company, that the bank would solicit borrowers in the south and west, make the necessary examinations, and obtain the desired information as to security and borrowers, and present applications and information to the company; that the

company would accept such applications to the extent of its fund, as it deemed safe; that the bank would see that the securities were properly prepared and executed, and the title to the mortgaged property perfected, and would attend to the collection of notes as they matured. Such an agreement between the bank and the company may not have been express, but a consideration of their intimate relations toward each other, of their respective business purposes and of their large and constant dealing for a number of years in that uniform manner, precludes all doubt that it was understood and relied upon by them. The services, for which the commission was retained, was performed under that understanding with the company and for its benefit; as a consequence those who rendered them are to be regarded as its agents.

3. Usury—Agent's commission.

That the company knew that the commissions were paid cannot, we think, be controverted. It had made loans through the same parties in Nebraska, the payment of which was resisted for usury. Those loans resulted in many suits, in which the depositions of the bank's officers were taken. To presume that the company's officers knew the material facts developed in those cases would be only to impute to them ordinary attention to business. They admit that they knew that usury was set up, and virtually concede full information. Soon after the trouble in Nebraska, the same parties—that is to say, Ocobock and the bank—began to negotiate, and the company to make, loans in Arkansas upon substantially the same plan and terms as formerly in Nebraska. The company, having learned of the terms on which the bank did its business before the loan in controversy was made, was reasonably apprised that it would be made on the same terms. But it also knew that the services had been rendered, that it had enjoyed the benefit thereof, and that it had paid nothing therefor. This would give it reasonable notice that the borrower, the only other person interested, had paid for it.

That the method employed in making the loan in controversy was designed to evade the usury laws, we feel convinced. The determination to prevent usurious exactions in this State is manifest both in its organic and statute laws. If taking excessive interest is an evil when not prohibited by law, the evil is magnified if permitted to flourish against and in defiance of law. It would mock the power of the government and degrade it in general esteem, if its ordinances directed to the extinction of abuses, could be diverted from the objects contemplated by cloaks and coverings. Whenever they are employed to prevent a law's enforcement, they should be cast aside, and the law given its proper course. Courts should not be imposed upon by the name which is given to a transaction, or by the outward form it assumes; but, when necessary to ascertain realities, should ignore names and look through forms. That appellant executed the documents in which it was alleged that Hall & Carter and their assistants were his agents, does not alter the facts; that statement was designed to give a deceptive form and outward appearance to the transaction; it was not true, and its reiteration gave it no force. If exacting usury in an open manner is to be condemned, it merits no higher consideration when it asks immunity upon a sacrifice of candid and open dealing.

Under the view of the facts taken by us the decree will be reversed, and a decree rendered here in favor of appellant.

[Supplemental opinion on motion for rehearing. Filed May 23, 1891.]

HEMINGWAY, J. In the determination of this cause we announced as our finding of facts that the bank, in pursuance of an understanding with the company, entered a field unoccupied by either of them, for the purpose of soliciting and obtaining borrowers for the company; that in this way the company obtained most of its business, including the application of the appellant; that the bank, for its service

in procuring this application and closing the loan, collected a commission of which the company was informed; and that the commission, with the interest agreed to be paid to the company, exceeded 10 per cent. per annum. Upon those facts our conclusion of law was, that the bank was the agent of the company, and that the loan was usurious. Upon a similar state of facts we had so ruled at a former term in the case of *Thompson* v. *Ingram*, 51 Ark., 546, in which the excessive commission had been paid to a party doing business as a broker.

The motion for a rehearing challenges the correctness of our finding of facts and of our conclusions of law thereon, and is supported by elaborate briefs, ably and persuasively urging the views of counsel.

No good could be accomplished by a repetition of the testimony or of our opinion regarding it. Upon the original consideration of the cause we carefully read, scrutinized and weighed the evidence, and reached our conclusion after the most mature deliberation. The arguments in support of this motion have received a like consideration at our hands, and our convictions remain as formerly expressed. We think the testimony not only supports our finding of facts, but precludes any other. If the bank was the agent of the company, the collection of excessive interest by it with the company's knowledge is imputable to the company, and this without reference to what the general business of the bank may have been. We think our judgment is right, and the motion to reconsider will be denied.

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SIMON v. SEVIER ASSOCIATION.

Decided December 13, 1890.

1. *Corporation—Directors' meeting—Notice.*

A deed of assignment of the property of a corporation, executed by a majority merely of its directors at a meeting of which absent directors had no legal notice, is invalid.

2. *Attachment—Removal of property out of the State.*

The removal by a corporation of a material part of its property out of the State, not leaving enough therein to pay its debts, is ground for attachment.

APPEAL from *Sevier* Circuit Court.

RUFUS D. HEARN, Judge.

Feazel & Rogers for appellants.

1. The assignment was *ultra vires*. Field on Corp., sec. 53, note 3; 21 Pa. St., 22; 38 N. W. Rep., 43; 9 Fed. Rep., 640; 3 Pac. Rep., 911. A corporation can do no acts except as provided in its charter. 1 N. E. Rep., 138; 13 Pet., 519; 21 Ark., 302.

2. If it had the power, the assignment was a fraud on creditors, as having been made in the interest of its stockholders. Burrill on Ass. (4th Ed), 276; 47 Ark., 347, 370; and it does not matter whether the assignee knew of the fraud or not. Acts 1887, p. 195.

3. The withdrawing of assets renders it void. 46 Ark., 405.

4. The defendant shipped a material part of its property out of the State, not having enough to pay its debts. 44 Ark., 301.

Cohn & Cohn for appellant.

The executive committee had no power to make the assignment. Bates, Part., vol. 1, sec. 338; 37 Ark., 228. The effect of the assignment was to deprive the association of all it had. 31 Ark., 429; 11 S. W. Rep., 960. All the members of the executive committee did not sign the deed. 47 Iowa, 27, 30. Directors could only act as a board. 26

Minn., 43, 54, 55; 42 Mich., 536; 6 Nev., 51; 45 Pa. St., 386; 47 Iowa, 27.

BATTLE, J. On the 15th of January, 1889, "the Sevier County Co-operative Association," being the owner of a stock of goods, wares and merchandise, assigned the same to D. M. Bryant for the benefit of its creditors. On the 19th of the same month H. T. Simon, Gregory & Co., sued out an order of attachment, and caused the same to be levied on the property assigned. The grounds of attachment were: "The Sevier County Co-operative Association" "had sold, conveyed, or otherwise disposed of its property with the fraudulent intent to cheat, hinder, delay and defraud its creditors," and that the defendant had "removed a material part of its property beyond the limits of this State, not leaving enough therein to pay its debts." After the attachment Bryant appeared and filed a complaint, in which he claimed to be the owner of the property attached, under the deed of assignment made to him. The court sustained his claim, ordered the property attached to be delivered to him, and discharged the attachment; and plaintiff appealed.

It was admitted on the trial that "the Sevier County Co-operative Association" was a corporation duly organized according to the laws of this State. It was proved that it had no by-laws or rules for its government, except its articles of association, and that they failed to fix the time when its board of directors should hold regular meetings, or how the board should be called together.

1. Corporation—Directors' meeting.

In pursuance of a short notice given to them by its general manager a majority of its directors held a called meeting on the 14th day of January, 1889, and resolved to assign its property to Bryant for the benefit of its creditors, and on the next day made the assignment. Was the assignment valid?

The act under which "the Sevier County Co-operative Association" was organized provides that the stock, prop-

erty, affairs and business of such corporations shall be under the care of, and shall be managed by, not less than three directors, and that a majority of the directors, *convened according to its by-laws*, shall constitute a quorum for the transaction of business. Mansf. Dig., secs. 964-969. Such directors constitute a board, and, in the management of the property, affairs and business of their corporation, can only act as a board. They have no authority to act save when convened in a board meeting. The separate, individual action of each director is not the action of the corporation. Less than all do not, under the statute, constitute a quorum for the transaction of business unless they are legally convened. No director is required to attend a meeting of directors held without authority. Every one of them is entitled to vote and be heard in all the proceedings of the board. The shareholders in the corporation are entitled to the influence and advice of every director in the management of their affairs. Hence, in order to accomplish the object for which each director was elected, a mere majority of the directors cannot constitute a majority of the board for the transaction of business, unless they meet according to, and by authority of, the by-laws or rules of the corporation, or are called together upon due and legal notice given to all of them. Assembled in any other manner they cannot act as a board, but as individuals, and such acts are not the acts of the corporation. *School District* v. *Bennett*, 52 Ark., 511; *Ogden* v. *Murray*, 39 N. Y., 207; *Baldwin* v. *Canfield*, 26 Minn., 43; *Doyle* v. *Mizner*, 42 Mich., 332; *Herrington* v. *Liston*, 47 Iowa, 11; *Stoystown, &c., Co.* v. *Craver*, 45 Pa. St., 386; 1 Morawetz on Private Corporations, secs. 531-532, and cases cited.

In this case all the directors were not present at the meeting held pursuant to the call of the general manager. Those present were not convened in pursuance of any by-law or rule of the corporation, and were not called together upon due and legal notice to all of them. They met as a board without authority. Consequently, the deed of assignment

was executed without authority; was invalid; conveyed nothing; and the court erred in holding that the property in controversy belonged to the assignee.

But it is said that the assignment was subsequently ratified by the board of directors. But it does not appear, if the ratification was lawful, that it occurred before the property was attached, and other parties had thereby acquired an interest in the same.

The court below erred in dismissing the attachment. The association, according to the evidence adduced on the trial, had unquestionably shipped out of this State a material part of its property, without leaving enough therein to pay its debts. The proof was, it had shipped thirty bales of cotton to St. Louis, Mo., and that the remainder of the property left in the State was insufficient to pay its debts. This was sufficient to sustain the attachment. *Durr* v. *Hervey*, 44 Ark., 301.

Reversed and remanded, with directions to sustain the attachment.

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FAIRCHILD *v.* HAGEL.

Decided December 13, 1890.

Foreign administrator—Assets—Land in this State.

A foreign administrator cannot sue for possession of his intestate's land in this State; nor is he liable to an action for rents and profits which accrued on account of the occupancy by his intestate of another's land in this State.

APPEAL from *Randolph* Circuit Court, in Chancery.

J. W. BUTLER, Judge.

Sanders & Watkins for appellant.

Sam W. Williams for appellee.

Appellant cannot recover as administrator of his wife in Illinois. Letters could not be granted him here (Mansf. Dig., sec. 14), and sec. 4937 must be construed with sec. 14. While our statute permits foreign administrators to sue in

this State (sec. 4937) and recover assets, yet lands in this State are not assets in the hands of a non-resident administrator, nor can a probate court grant letters to a non-resident. 34 Ark., 118; 31 *id.*, 539; 16 *id.*, 259; 30 *id.*, 231. See, also, on this subject, 17 La. An., 15; 14 *id.*, 633; 17 Vt., 319; 19 Wend., 382; 3 Mass., 514; 4 Bush (Ky.), 27; 1 Root. Conn., 413; 1 Allen, 132; 2 Humph., 224.

BATTLE, J. Eli Fairchild, as administrator of Susan E. Fairchild, deceased, brought this action in the Randolph circuit court, on the chancery side, against R. H. Black and William James, for the possession of certain lands described in his complaint. He based his right to sue as such administrator upon a grant of letters of administration by the county court of Jefferson county, in the State of Illinois, and alleged that he, as such administrator, was the owner and entitled to the possession of the land by virtue of a deed executed to his intestate in her lifetime, and alleged that he was kept out of possession by the defendants.

The defendants answered and denied that they were in the wrongful possession of the land, and alleged that they had been put in possession by Dias C. Hagel; that he and Lewis Boswell purchased the land from Elijah Dunn on the 2d of January, 1879, and paid a part of the purchase money, and executed their notes for the balance; that Dunn executed to them a bond and thereby bound himself to convey the land to them when all the purchase money was paid; and from some cause unknown, and in the absence of Hagel, Boswell caused Dunn to convey the land to him instead of to him and Hagel; and that afterwards, on the 10th of January, 1881, Hagel caused Dunn to convey to him one undivided half of the land according to the terms of his bond.

Hagel was made a defendant and answered, adopting the answer of his co-defendants, and further said that, after the purchase by Boswell and Hagel, Boswell took control and remained in posssesion of the land for three or four years and until his death; that, when they purchased, forty acres of

the land were in cultivation, and that the annual use of it was worth four dollars per acre; and asked that Hagel's interest be declared to be one-half of the land; that an account be taken between him and Boswell; and that the land be divided.

Plaintiff deraigned title through deed made by Dunn to Boswell. It was shown that Boswell died intestate, leaving Susan E. Fairchild and William Boswell his only heirs at law; and that William Boswell conveyed the interest in the land inherited by him to Susan E. Fairchild. The defendants adduced evidence tending to prove the allegations contained in their answers.

The court found the facts to be as stated by the defendants; and appointed a master and directed him to state an account between Hagel and Lewis Boswell and his legal representatives, and ascertain and report the indebtedness of the respective parties to each other on account of purchase money paid, rents received and improvements made by them on the land.

The master reported that Lewis Boswell and his legal representatives were chargeable with $841.50 for the use of the land in controversy, and the court approved his report.

The court, finding that Hagel and Lewis Boswell purchased the land in controversy, that Boswell and those claiming under him enjoyed the rents and profits thereof from January, 1879, to January, 1888, that the rents and profits amounted, on the 1st of January, 1888, to $841.50, that Susan E. Fairchild was entitled to Boswell's interest in the land, that Hagel is entitled to one-half of the land and rents and profits, and that Dunn conveyed the whole of the land to Boswell, ordered that the deed made by Dunn to Boswell be so reformed as to convey to Boswell one undivided half of the land; that the land be divided between the parties according to their respective interests; and that Hagel recover of the plaintiff the sum of $420.60 as his share of the rents and profits: and declared such sum to be a lien on the interest in the land owned by plaintiff as administra-

tor; and directed the master to sell such interest if the lien was not satisfied within thirty days. And thereupon plaintiff appealed to this court.

Foreign administrator—Lands in this State.

At common law an executor or administrator has no right to bring or maintain a suit in his official capacity in the courts of any country other than that from which he derives his authority to act by virtue of the letters testamentary or administration there granted to him. But the statutes of this State provide that "administrators and executors appointed in any of the States, Territories or Districts of the United States, under the laws thereof, may sue in any of the courts of this State, in their representative capacity, to the same and like effect as if such administrators and executors had been qualified under the laws of this State." (Mansf. Dig., sec. 4937). But they do not undertake to say what shall be assets in the hands of the foreign administrator or executor. They simply authorize them to sue in any of the courts of this State in their representative capacity. It is obvious that they confer no authority to sue for anything which cannot become assets in the hands of the foreign administrators or executors for the payment of debts against the estate of their testates or intestates.

Lands at common law are not assets in the hands of an administrator. They are only made so by the statute. When the owner dies intestate, the legal title to his lands in this State descends to and vests in his heirs at law, subject alone to his widow's dower and the payment of his debts. Under our statutes such lands are assets in the hands of an administrator or executor appointed by our courts, and no others. No foreign executor or administrator has the right to take or hold them by virtue of his appointment. His appointment is of no effect in this State, except that given by our statutes. Inasmuch, therefore, as the land in this State belonging to the estate of his testator or intestate are not assets in his hands, he has no right to sue for or recover them. Mansf. Dig., secs. 68–71, 170–187.

Inasmuch as appellant had no right to the possession of the land in controversy, he is not liable in his fiduciary capacity for taking exclusive possession of the same and occupying it. He is not, individually or as administrator, liable for rents and profits which accrued on account of the occupancy of the land by Lewis Boswell. Consequently the court erred in rendering judgment against him as administrator for the sum of $420.60, the one-half of the entire rents and profits which accrued from the occupancy of the lands by Boswell and those claiming under him.

The circuit court erred in reforming the deed of Dunn to Boswell, in ordering partition and dividing rents and profits, the heirs of Susan E. Fairchild not being parties to the action, and only one party in interest being in court.

The decree of the circuit court is therefore reversed, and the complaint is dismissed. Judgment will be entered here in favor of appellees against appellant for the costs which accrued in the lower court, and in favor of appellant against appellees for the costs of the action in this court.

KILLOUGH *v.* HINTON.

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Decided December 13, 1890.

Administration—Application to sell land—Limitation.

A delay of twenty years after grant of letters of administration before applying for an order to sell lands of an estate, which had been set apart as dower, is not unreasonable, where the application was made as soon as the widow died.

APPEAL from *Cross* Circuit Court.

J. E. RIDDICK, Judge.

Sanders & Watkins for appellant.

1. The facts show a homestead with all its rights on the northeast quarter of the section. 22 Ark., 400; Ch. 68, secs. 29, 30, Gould's Dig. The homestead could not be sold. 47 Ark., 445.

2. As to the limitation by alleged laches, no rule can be laid down; each case is governed by its own peculiar facts. 37 Ark., 159. The reversionary interest, subject to the dower of the widow, might have been sold, but it would have been at a sacrifice to both heirs and creditors, and it was not laches to wait. Woerner, Am. Law of Adm., p. 1072; 51 Ill., 310; 60 Ill., 277.

3. Upon the facts in this case there was no unreasonable delay. An administrator may maintain ejectment. 42 Ark., 26.

N. W. Norton for appellees.

No homestead was selected by the owner during his lifetime, or by his widow or children after his death. The law does not force a homestead right on any one, and those entitled may waive it. The question is: Can creditors stand by for twenty-one years, and until there is no homestead right in any one, without an effort to subject the lands to their debts, and now excuse their laches by setting up that some time in the past a homestead could have been selected somewhere out of the 640 acres so as to include the dwelling. 52 Ark., 213. It is the policy of our law to have a speedy settlement of estates. Within three years, says the statute. Mansf. Dig., sec. 206. The delay in this case was unreasonable. The reversion should have been sold. 46 Ark., 373; 27 Ark., 155; 46 *id.*, 470; 7 Wheat., 59.

HUGHES, J. This was an action of ejectment by appellant, as administrator *de bonis non*, to recover the possession of lands belonging to the estate of his intestate, which were in possession of the appellees, the heirs of the intestate, and which they had divided among themselves, and which were assigned to the widow of the intestate as dower in his real estate in the year 1873, and had been held by her till her death in 1887. The widow qualified as administratrix of her husband's estate in 1867, soon after his death, and made her final settlement of her administration in 1880, showing that she had exhausted the assets of the estate except this

land in controversy, which settlement was confirmed 15th of October, 1880.

A large number of debts had been probated against the estate of appellant's intestate, and remained unpaid. The appellant, as sheriff, qualified as public administrator *de bonis non* of said estate, 12th of October, 1887, and brought this suit soon after to recover possession of said lands, for the purpose of sale of same to pay the unprobated claims against the estate. More than twenty years had elapsed after administration was first granted upon the estate before appellant brought this suit.

Defendants, appellees, pleaded that there was unreasonable delay, and that the action was barred, the cause of action as they averred not having accrued within ten years next before the institution of this suit.

The widow had occupied the residence of the intestate after his death till her death, but had never selected a homestead, or had one assigned her out of the real estate of the deceased, which consisted of 2000 acres, 640 of which was in a body and included the land in controversy, assigned to the widow as dower, and in possession of which she was at the date of her death.

The court below found that one quarter section of the land, the northeast quarter of section one in controversy, was the homestead of the widow, and gave judgment as to it in favor of the administrator. As to the other quarter section, the southeast quarter of section one in controversy, the court found for the heirs, holding that the homestead could not be sold in the lifetime of the widow, but that the reversionary interest in the other piece might have been sold, notwithstanding the life estate of the widow, and that as to this there was no good reason for the delay. Both parties filed motions for new trial, which were overruled, and they appealed.

Administration—Application to sell lands—Limitation.

Was appellant's right of action barred? Were the creditors guilty of such laches as barred their right to have

these lands subjected to sale for the payment of their unpaid claims probated against the estate?

Only the reversionary interest could have been sold, while the widow's dower continued. Were the creditors bound to have that sold within the ordinary period of limitation?

"The necessity for a prompt and speedy settlement of the administration of the estates of deceased persons, in order that creditors may be satisfied and devisees and heirs be put in the indisputable possession of their inheritance as early as a just regard for the right of creditors will permit, requires a limitation upon the time when either creditors or executors and administrators may apply for the subjection of real estate to the payment of debts. It is admitted by all the authorities, that, in the absence of statutory regulation of the subject, it is the duty of courts to determine what shall be considered a reasonable time in this respect, and to refuse the application if the parties who demand it have been guilty of palpable laches. Courts have found this duty not without difficulty, and no precise rule to be inflexibly followed has been anywhere laid down." 2 Woerner's Am. Law of Administration, sec. 465.

There is no statute bar in this State against the enforcement of allowances of claims against estates by the probate court. *Mays* v. *Rodgers*, 37 Ark., 155. "The analogy of the statute of limitation is followed in many of the American States."

In *Mays* v. *Rodgers* it was said: "The power of the administrator must be exercised in a reasonable time, and will be lost by gross laches, or unreasonable delay." "The heirs should not be forever deterred from making improvements on the property, or prevented from selling it, by the possibility that it may be sold for the debts of the estate." "What is such reasonable time must be determined by the court, in its sound discretion." And it was held in this case that a delay of ten years, where there was no hindrance or proper cause therefor, was unreasonable, and that the lien on the real estate was lost thereby. There were other lands

than the interest the administrator was seeking an order to sell, and he had made no effort to sell any lands for ten years after grant of letters to him as administrator *de bonis non.*

That was unlike the case at bar, where the administrator had exhausted the assets, except the lands assigned to the widow as dower, and which he applied for an order to sell soon after her death.

Upon consideration of the circumstances of this case, we cannot say there has not been reasonable cause for delay, or that the creditors or the administrator have been guilty of gross negligence or palpable laches.

The lands were assigned to the widow as dower in 1873, and she occupied and held them till 1887, when she died.

To have sold them before her death would have been a sacrifice of the interests alike of the creditors and heirs. How hazardous a speculation would a purchaser have made! "Who would have bid except a price proportioned to such hazard?" *Liddel* v. *McVickar,* 11 N. J. Law, 58; Wœrner's American Law of Administration, 2 vol., sec. 465; *Moore* v. *Ellsworth,* 51 Ill., 310.

Had the land been forced to sale encumbered by the widow's dower, the creditors "would not have derived any appreciable benefit from the sale; the heirs would have lost the lands and the creditors their debts." "What just cause of complaint have the heirs that that result was not precipitated? We think it unreasonable to hold the creditors bound to resort to a fruitless and destructive sale." *Bursen* v. *Goodspeed,* 60 Ill., 277.

Whether there was a homestead or not in the lands, the dower interest covered both tracts, and the court erred in holding the action barred as to the southeast quarter of section 1, township 8 north, range 3 east, as it was not barred as to either tract. For this error the cause is reversed and remanded, with directions to the circuit court to render judgment for the appellant as administrator for the recovery of the northeast quarter and the southeast quarter of section 1 in township 8 north, range 3 east.

BEAM *v.* COPELAND.

Decided December 20, 1890.

Money—When bona fide *holder protected—Administration.*

Where, relying upon the statutory presumption of the death of the owner of money, based upon his absence from the State for the period of five years, without proof that he was alive within that time (Mans. Dig., sec. 2850), the administrator of his next of kin in good faith received it from a bailee, charged himself with it in his account as administrator, and expended part of it in discharging the debts of such estate before he learned that the owner was alive, he will be protected to the extent of the amount so expended.

APPEAL from *Faulkner* Chancery Court.

JOHN FLETCHER, Special Chancellor.

Jasper Copeland died in 1882, leaving his two children, Mrs. Canfield and Monroe Copeland, his sole distributees. Upon final settlement of the administration of his estate, the share of Monroe Copeland was $1265.37 in money. His whereabouts being unknown, the probate court placed the money in the hands of a master, to be held subject to its orders. In 1887, Mrs. Canfield filed a petition in the court, setting forth that Monroe Copeland had been absent from the State for five years without proof that he was alive within that time. She asked that his share be paid to her as his next of kin. Upon her death soon after, the money, by order of the court, was paid to an administrator *ad litem.* Letters of administration on her estate were subsequently granted to H. N. Beam, and, by order of the probate court, the money was paid to him.

In 1888 Monroe Copeland brought suit against Beam, alleging the foregoing facts, and that he had been in Texas for more than seven years, and knew nothing of the proceedings; he asked that Beam be held liable for the money so received. Beam answered that he had received the money in his fiduciary capacity, after the probate court had decided that it was the property of his intestate; that with the approval of the probate court he had expended all of the

money received by him in payment of debts of her estate, except the sum of $8.36, which he still held; that such expenditures had been made in good faith and without knowledge that plaintiff was alive.

From the judgment of the court sustaining a demurrer to the answer, defendant has appealed.

Section 217 of Mansfield's Digest provides as follows:

"An estate recovered in any case in which the death of the person having right thereto shall have been presumed shall be restored to such person on making his personal appearance, or on making satisfactory proof of his being in full life, and he may recover the rents and profits of the estate during the time he may have been deprived thereof, with interest."

House & Cantrell for appellant.

The judgment of the probate court, declaring that Monroe Copeland was dead, and ordering the money paid to his heir or representative, was valid and binding until revoked or annulled, and was a protection to all parties dealing with the fund under said order, even if Monroe was alive at the time. 63 N. Y., 460; 58 Me., 225; 13 Vt., 71; 28 Vt., 663; 24 Mo., 265; 39 Ill., 555; 14 Ga., 185; 2 Gray, 231; 17 N. H., 577; 12 Wend., 533; 4 Denio, 119; 9 N. Y., 356; 29 N. Y., 106; 2 How., U. S., 319; 11 N. H., 198; 52 Ark., 34; 33 Ark., 575; 34 Ark., 63; 31 Ark., 74; 1 Woerner, Am. L. of Adm., sec. 211; *id.*, sec. 212; 14 Am. Law. Rev., p. 337; 113 N. Y., 517.

Letters of administration are conclusive as to the administrator's authority. 84 N. Y., 48; 113 *id.*, 517. They cannot be impeached collaterally, and hence protect any one dealing with the administrator. 52 N. Y., 630; 36 Hun., 218; 7 Ind., 442; 27 Vt., 571; 17 *id.*, 165.

Where there is no statute, death is presumed at the end of seven years, etc., and probate courts, acting upon this presumption, are authorized to grant letters. 126 Pa. St., 299; 65 Md., 287; 36 Me., 176; 62 Mo., 121; 97 U. S., 628;

2 Best on Ev., sec. 409. See, further, 84 N. Y., 48; 113 N. Y., 516; 23 Pa. St., 114; 109 *id.*, 222.

Even if appellee's contention be true, that administration on a live man's estate is a nullity, Beam cannot be held responsible after having paid out the money under the direction and order of the court and without notice that Copeland was alive. He was the administrator of Copeland's heir, and not of Copeland, and he paid out the money in due course of administration of the estate of Disse Canfield, who was dead.

But sec. 2850, Mansf. Dig., settles the question. Sec. 217 must be construed in connection with sec. 2850. They are both taken from act November 25, 1837. See construction placed on similar statutes in New Jersey. 46 N. J. Law., 211; 2 McCarter (N. J.) Chy., 119; 1 and 2 Pennington, N. J., 167; 45 N. J., 219; 1 Halst., N. J. Chy., 484; 2 Dutch., N. J., 388.

W. S. McCain and *G. W. Bruce* for appellee.

We make no complaint as to the probate court ordering the money paid to Beam. We only ask that he pay the money back. The appellee's claim is clearly within the spirit and letter of section 217. This section requires the estate to be restored. He had no order of the probate court authorizing him to pay it out, and the payment was made in indecent haste. He had no right to pay it out before the end of one year, and not then without the order of court. Secs. 121, 142, 143. The statute is explicit and imperative. 35 Ark., 180; 25 *id.*, 471; 15 *id.*, 41.

The statutory presumption of death is one of fact. There is no difference between a fact presumed and a fact proved. In either case, if the man is actually alive, the probate orders are a nullity. While judicial records import verity, questions of life and death are exceptions. A judgment against one dead, though supposed living, is a nullity; so a judgment which assumes the death of one who is in fact alive is a nullity. See 1 Whart. on Ev., sec. 810 and notes;

15 Am. Law Reg., 212; 45 Wis, 334; 18 Blatch, 1; 1 Johns. Chy., 389; 1 Otto, 238.

HEMINGWAY, J. How far the probate court of Faulkner county was authorized to direct the distribution of the estate of Jasper Copeland, remaining in the hands of his administrator after the payment of his debts; to what extent the distribution made in pursuance of such order would be binding upon distributees at law who were not parties thereto nor notified that it would be made; and whether the distribution of the share of Monroe Copeland, made without notice to him upon the finding that he was dead when in fact he was alive, would be of any validity against him—are questions that were argued or suggested by the argument of this cause. It is contended on behalf of the appellant that the finding that Monroe was dead, and the order directing that his share in the estate be paid to his sister, were acts within the competency of the court, and afford complete justification for all things done in pursuance thereof; while the appellee insists that such acts were without jurisdiction and void, because he was in fact alive, and had no notice of the contemplated order.

The contention involves more than one inquiry of a jurisdictional character, and opens a boundless field for speculation and argument. In its various phases it has been considered by different courts of the highest dignity, learning and ability, with results not entirely harmonious or satisfactory. *Melia* v. *Simmons*, 45 Wis., 334; *Lavin* v. *Bank*. 18 Blatchford, 1; *Williamson* v. *Parisien*, 1 Johns. Ch., 389; *Ins. Co.* v. *Tisdale*, 1 Otto, 238; *Thomas* v. *People*, 107 Ill., 517; 15 Am. Law Reg., 212; *Long* v. *Thompson*, 60 Ill., 27; *Bresee* v. *Stiles*, 22 Wis., 120; *Shriver* v. *State*, 65 Md., 278; *Arnold* v. *Smith*, 14 R. I., 217; 2 Woerner's Am. Law of Administration, p. 1229; *Smith* v. *Rice*, 11 Mass., 507; *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87; *D'Arusment* v. *Jones*, 4 Lea, 251, S. C., 40 Am. Rep., 12; *Loring* v. *Steineman*, 1 Met., 204; *Pierce* v. *Prescott*, 128 Mass., 140; *Stock-*

bridge et al., *petitioners*, 145 Mass., 517; *Roderigas* v. *East River Sav. Inst.*, 63 N. Y., 460; *Plume* v. *Howard Savings Institution*, 46 N. J. Law, 211; 14 Am. Law Review, p. 337.

We withhold our judgment upon the contention; for whether we should sustain one side or the other, the same decision of this cause would be made upon an entirely different principle.

Money—*Bona fide* holder—Administrator.

As to chattels generally, the rule is, that a title cannot be acquired from one who has no title. "But, as concerns money, bank notes and current negotiable instruments lost or stolen, the rule is well established, in the courts both of England and America, that the *bona fide* holder, who has paid a valuable consideration or furnished an equivalent, shall retain title against any former owner—even against one from whom such chattel had been stolen." 2 Schouler's Personal Property, sec. 20; *Miller* v. *Race*, 1 Sm. L. Cas, *p 516, and cases.

The right of such holder is not defeated by circumstances calculated to excite suspicion or prompt inquiry, unless of such a character as proves that he acted in bad faith. *Seybel* v. *Nat. Currency Bank*, 54 N. Y., 288.

The appellant's liability grows out of the payment to him of money that should have been paid to the appellee. According to the allegations of the answer the money was paid to him as the administrator of Mrs. Canfield; he received it, believing that the appellee was dead, and that it was rightfully paid to him; while of that belief, he expended a large part of it in paying debts of his intestate. He knew, as the answer discloses, that the money came from the share of the appellee in his father's estate, but it does not disclose that he knew the appellee was not dead, or that he knew facts which, upon principles of good faith, put him upon inquiry that would have resulted in his learning it.

Although he parted with nothing of value when he received the money, he charged it against himself in his account as administrator; and before he learned that the appellee was alive, he paid out a large part of it for the estate.

By such payment he became *pro tanto* entitled to be treated as favorably as a transferee for value; and to that extent he is protected. But he is liable for as much of the money as he had not paid out when he learned that the appellee was alive, including as well what he retained for commissions as what he admitted to be in his hands.

The court erred in rendering judgment against the appellant for so much of the money received from Dawson as he had paid out as administrator before he learned that appellee was alive. The judgment will be reversed and the cause remanded, with directions to overrule the demurrer to the answer and proceed further according to law.

AMERICAN INSURANCE CO. *v.* HAMPTON.

54 76 75 331

54 f81 75 204

54 85 75 345

Decided December 20, 1890.

Fire insurance—Forfeiture—Authority of agent to waive.

An agent with authority to receive an application for insurance has no apparent authority to waive a forfeiture incurred by re-insurance.

APPEAL from *Greene* Circuit Court.

J. E. RIDDICK, Judge.

J. C. Hawthorne for appellant.

There is no contention that notice was given appellant, or that it attempted to waive the condition prohibiting further insurance without its consent. The only contention is that the appellant waived the condition in the policy. When an insurance policy provides that if the assured shall procure other insurance without the consent of the insuring company written on the policy, the policy shall be void; the procuring further insurance without the consent so indorsed renders the policy void. 3 S. E. Rep., 732; 15 N. E. Rep. 810. The agent has no authority to waive or modify any of the conditions in the policy. 32 N. W. Rep., 660; 60 Miss., 302; 13 N. W. Rep., 164; 34 Am. Rep., 122; 6

id., 491. A mere soliciting agent has no authority to bind the company. 16 N. W. Rep., 94; 13 N. E. Rep., 902; 23 N. W. Rep., 926; 39 Am. Rep., 277; 42 N. W., 654. The fact that the insurance company has notice of other insurance and fails to cancel the policy does not justify the conclusion that it elects to allow it to continue in force. 43 N. W. Rep., 59; *ib.*, 810. Notice must be given. Mere knowledge of the fact on the part of any agent is not equivalent to notice to the company. 64 Am. Rep., 218; 4 Zabr. (N. J.), 447; 17 N. Y., 609; 9 Cush. (Mass.), 370; May on Insurance, 152; 26 Ohio, 348. There is no testimony that Cole was the agent of the company, or had any authority to waive conditions of the policy.

W. R. Coody for appellee.

From the language of the clause, its context and connection, it has more the appearance of a clause enabling the company to protect itself from increased risk of over-insurance than an inhibition against further insurance. If this be so, then Cole, the agent, was acting within the scope of his authority in getting further insurance, and notice to him bound the company. 25 Ark., 261.

2. An agent may be called to prove the extent of his agency. Mecham on Agency, sec. 102; 15 Kans., 492. He is presumed to act within the scope of his agency. 25 Ark., 219. Although a principal may limit the authority of a special agent, yet the law recognizes an implied power which is the reasonable necessary power to carry into effect the main power conferred and not forbidden. Mech. on Ag., secs. 279-80. Even if the agent violates his instructions, or exceeds the limit of his authority, he will bind his principal as to third persons, if his acts are within the scope of his agency, which the principal has *allowed* or *permitted* him to appear to possess. Mech. on Ag., secs. 83, 279; 42 Ark., 219. Notice to an agent in reference *to a matter over which his authority extends* is notice to the principal. Mech. Ag., sec. 718. When a party performs his duty, he cannot be affected by the fault of a third party. 28 Ark., 244.

3. But the question of agency was submitted to the jury, and by their verdict they have found in favor of appellees. There was evidence to justify the verdict, and this court will not reverse. 40 Ark., 168; 27 *id.*, 519; 24 *id.*, 183, 251. The judgment is right on the whole record. 28 Ark., 59. See also on the question of an agent and waiver. 20 Ill. App., 228; 56 Conn., 528; 77 Iowa, 155. An agent to solicit insurance may waive conditions. 15 N. E., 166. Where an agent has notice of other insurance and does not cancel the policy, the company is estopped. 7 S. W. Rep., 261; 8 *id.*, 453. The assent of the agent binds the company. 6 S. W. Rep., 605. Notice to company or agent is sufficient. 6 S. W. Rep., 605; 30 N. W., 727. See also Mech. on Ag., sec. 931, note 4. A limitation on the power to waive any condition is against public policy and void. 39 N. W. Rep., 76

BATTLE J. Appellees instituted this action against appellant to recover $600 on a policy of fire insurance. The policy sued on contained a clause in the following words: "If the assured * * * shall have or hereafter make any other insurance on the property herein covered, or any part thereof, without notice to and consent of this company in writing hereon, * * * then, and in every such case, this policy shall be null and void." The defense to the action was that the appellees, in violation of their agreement, procured other insurance upon the property described in the policy sued upon, for the sum of $400 dollars, in a company known as the New Orleans Insurance Association, without the knowledge or consent of the appellant.

The facts are: Sometime about the first of July, 1887, T. P. Cole, as agent of the appellant, made out an application for insurance for appellees, and in about a week thereafter delivered to them a policy executed by appellant, it being the policy sued on in this action. Thereafter, sometime in the month of October next following, he made out another applicatien for the same parties for additional insur-

ance in the New Orleans Insurance Association, and in a short time afterwards delivered to them a policy issued by the New Orleans Insurance Association upon the property covered by the first policy. Both applications were signed by appellees; and the premiums on both policies were paid by them at the time the same were respectively delivered.

Insurance agent—Apparent authority.

In order to entitle appellees to recover in this action, it was necessary for them to prove that appellant, or its authorized agent, consented to appellees taking the additional insurance in the New Orleans Insurance Association. It was not sufficient to show that such consent was given by Cole, as agent of appellant. For the consent of Cole to be of any effect it devolved on appellees to show, not only that he was agent of appellant, but that the consent given was within the real or apparent scope of his authority. But no such evidence was adduced on the trial. The only evidence that Cole had such authority was that he was local agent of appellant in Greene and Clay counties, in this State, and had authority to solicit insurance, receive and write applications for insurance, and forward the same to appellant's general agent, and when an application was granted and they forwarded to him the policy filled out and signed, to deliver it and collect the premium. But this was not sufficient to prove that he had authority to alter any of the essential provisions of the policy sued on, or to waive forfeitures for a breach of any of its conditions, or to consent to the additional insurance. There was nothing in the nature and requirements of the business intrusted to him from which such authority could be reasonably inferred. On the contrary, they show that he was not given authority to fix any of the terms of the insurance or conditions upon which appellant would become liable for the loss of property insured. From this fact the reasonable presumption is, he had no authority to waive any requirement of the policy intended to protect the appellant, or to consent to any act that would increase its risks—to determine how or in what event it should be liable.

There was no evidence that appellant had notice of, or consented to, the additional insurance, or that Cole did any act within the real or apparent scope of his authority which was a waiver of the forfeiture incurred by the additional insurance. The verdict of the jury was not sustained by evidence.

Reversed and remanded.

HEFFNER *v.* DAY.

Decided January 3, 1891.

Appeal—Final decree.

A decree avoiding an assignment for the benefit of creditors, and directing the receiver appointed to sell the property to make a statement of his account, is not a final decree from which an appeal may be prosecuted.

APPEAL from *Lonoke* Chancery Court.

D. W. CARROLL, Chancellor.

T. J. Dick, a merchant at Carlisle, Ark., made an assignment for the benefit of his creditors, preferring, among others, Mrs. E. E. Heffner. She thereupon brought suit, alleging that fact and that creditors would suffer great loss if the property was sold by the assignee. She prayed for the appointment of a receiver to sell the property under the directions of the court. A receiver was appointed.

Day, Horton & Bailey and certain other creditors intervened, alleging that the assignment was fraudulent. Upon a hearing, the court adjudged the assignment to be fraudulent. The receiver was directed to file a statement of his account, and to deposit the money in bank subject to the orders of the court. From this ruling and judgment of the court plaintiff has appealed.

T. C. Trimble and *J. W. House* for appellant.

See sec. 1266, Mansf. Dig., as to appeals: 1 Ark., 405, 406; 8 Ark., 209–10–11–12; 40 Ark., 535–536; 42 Ark., 283, 284, 285; 28 Ark., 92, 93, 94; 44 Ark., 46, 47, 48; 52

Ark., 227. An appeal is allowed when a distinct and severable branch of the cause is finally determined, although the suit is not ended. 23 Ark., 601; 25 Ark., 129. See Powell on Appellate Proceedings, p. 368, sec. 16, note 5; *ib.*, p. 371, sec. 20; *ib.*, p. 367, sec. 15. A judgment to foreclose the equity of redemption in mortgaged premises for the satisfaction of the debt, and that the defendant pay any deficiency appearing after such sale, is final and not interlocutory. 38 N. Y., 172. A case precisely in point. 67 N. Y., 199, 200–203.

J. C. & C. W. England and *N. W. Norton* for appellees.

The decree is not final, and the appeal should be dismissed. Freeman on Judg., sec. 30; 5 Ark., 398; 41 *id.*, 85. There is nothing adjudged to any one; nothing ordered to be paid to any one—no judgment even for costs.

What is a final decree.

PER CURIAM. The decree is not a final disposition of the whole controversy as to the appellant. There is no ascertainment of the amount of the debts due the attaching creditors, who the court has indicated shall be preferred to the appellant in the distribution of the assets, and there is no direction to pay out any sum. For aught that appears, the appellant's debt may be paid out of the property covered by the assignment; and if so, no injury has been done. The appeal is premature. *Myers* v. *Becker*, 95 N. Y., 486; *Davie* v. *Davie*, 52 Ark., 224. The motion to dismiss the appeal will be granted.

It is so ordered.

RAILWAY COMPANY *v.* JAMES.

Decided January 3, 1891.

1. *Vendor's lien—Redemption from foreclosure.*
   The right of redemption from a foreclosure of a vendor's lien is exactly analogous to the right of redemption from a mortgage foreclosure.

2. *Mortgage—Redemption.*
   Where a mortgagor refuses to apportion his lien, the purchaser of a parcel of the premises subject to the mortgage may, before foreclosure, redeem the whole premises by paying the entire mortgaged debt.

3. *Parties necessary to foreclosure—Redemption.*
   One who has purchased from the mortgagor a portion of premises which he had mortgaged to another is not a necessary party to a suit by the mortgagee to foreclose the lien on the remainder of such premises, nor has he any right to redeem from a sale under such foreclosure.

4. *Mortgage foreclosure—Fraud—Laches.*
   A foreclosure sale of mortgaged premises will not be set aside for fraud and inadequacy of price, and a resale ordered where the application for a resale was without excuse delayed more than two years after the sale and until it had become obvious that the value of the lands had greatly increased since the sale.

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

Suit by Thomas S. James, administrator of Thomas S. James, deceased, against C. M. Neel and the Pine Bluff, Monroe and New Orleans Railway Company, to foreclose a vendor's lien upon land.

James sold to Neel block 40, comprising four lots, consecutively numbered, in Old Town addition to the city of Pine Bluff. The sale was upon credit; the deed reserved a vendor's lien. Subsequently James released his lien upon lot 3 and all of lot 2 except forty feet off the north side. Afterwards Neel conveyed to the Pine Bluff, Monroe and New Orleans Railway Company, a company of which he was president, a strip forty feet wide off the north side of lots 1 and 2.

Suit was brought by the administrator of James to foreclose the vendor's lien upon lot 4 and all of lot 1 except

On page 81, second line of second syllabus, for "mortgagor" read *mortgagee.*

forty feet off north side. The railway company was not made a party. Decree was rendered against Neel for the unpaid purchase money, and the land condemned to be sold upon failure of Neel to pay the amount adjudged due. In accordance with the decree, a sale was made on May 21, 1887, and approved by the court, the administrator being the purchaser.

There being a balance of the purchase money due, the administrator, at the March term, 1888, brought this suit against the railway company to foreclose the vendor's lien upon the forty feet off the north side of lots 1 and 2. The railway company answered on April 4, 1888, and subsequently, on April 29, 1889, filed a cross-complaint, in which it alleged that it had not been made a party to the suit to foreclose the lien upon lot 4 and all of lot 1 except forty feet off north side, that no one bid at the sale except James, tha the balance claimed to be due on the decree was conceived for the purpose of compelling it to pay the same, and that the part purchased was at the time worth more than the amount of the decree; and asked that it be allowed to redeem all of lots 1 and 4 and the north forty feet off lot 2 from the administrator by paying the entire lien debt.

The court denied the prayer of the cross-bill, decreed in favor of the administrator for the balance due the estate, and ordered that, upon failure in payment thereof, the land be sold by the commissioner. From this decree the railway company has appealed.

M. A. Austin, for appellant.

Appellant was not bound by the decree of foreclosure in the suit of *James* v. *Neel.* It was not made a party nor served with notice, and it was a necessary party. Mansf. Dig., sec. 4940; Wiltsie on Mortg. Forecl., secs. 1406-50; Story's Eq. Pl., sec. 193; 37 Vt., 345; 101 Ind., 258; 50 Ill., 274; 35 Iowa, 288. Those persons who own, or have an interest or estate, in the land, are debtors to the mortgagee, and *beyond doubt necessary parties.* If they are not, their rights remain unaffected, and they retain all their

rights of redemption, even from the *purchaser after the sale.* Pom. Rem., sec. 342; Dan. Chy. Pr., vol. I, p. 179, and cases *supra*; 98 U. S., 34; 99 Ind., 45; 11 Ark., 104; 27 *id.*, 219; 21 *id.*, 91. Mere notice of the decree or sale would not bind appellant, nor cut off any right of redemption not legally foreclosed. 1 Paige, 49; 16 N. Y., 234; 35 *id.*, 385. The decree and sale therefore as to appellant was a nullity. Jones on Mortg., sec. 1947; 50 N. Y., 336; 41 How. Pr., 33; 99 Ind., 45; 77 Ind., 52; 19 Iowa, 56.

2. The appellant has the right to redeem the *whole* of said land from the lien of James. 13 Ark., 533; 34 *id.*, 397; 2 Pom. Eq. Jur., sec., 1220; Jones on Mortg., secs. 1394, 1366; 16 Ind., 361; 28 Ala., 352; 4 Pet., 190. Any one who has an interest in the land, and would be loser by a foreclosure is entitled to redeem. Jones, Mortg., sec. 1055; 27 Ba., 230; 8 Cush., 46; 44 N. H., 9; 21 Miss., 149; 9 Mich., 465; 13 Met. (Mass.), 494. So firmly is this doctrine fixed that it cannot be taken away or lessened, except by unmistakable deed or strict legal foreclosure. Jones, Mortg., sec. 1041; 29 Ark., 667; 13 Ark., 127; 23 N. E. Rep., 698; 99 Ind., 45; 9 Wis., 552; 37 Vt., 345. See also 7 Mass., 355; 1 Penn., 33; 49 Me., 260; Jones, Mortg., sec. 1062–3, 1073; 2 Pom. Eq. Jur., 1221. Appellant has also the right to compel appellee to first resort to the lands unsold by Neel. 31 Ark., 203; *ib.*, 91.

3. The suit should have been consolidated with that of the bank. 2 Pom. Eq. Jur., 1221; 43 Conn., 274; Jones, Mortg., sec. 1069. The case in 37 Vt., 345, is decisive of the bank's right to redeem. It also had a right to contribute to the payment of the redemption money and share in the benefit. Pom. Eq. Jur., secs. 1211 and 1212; 11 Gray (Mass.), 276; 45 Conn., 513. The suits should have been consolidated. Mansf. Dig., sec. 4945.

M. L. Bell for appellee.

1. The appellant is not entitled to redeem that part of the land in which it has no interest, and which had been sold under the decree. Jones on Mortg., secs. 1394–5.

2. Appellee sold first Neel's equity of redemption in the lots not claimed by appellant. This was all it could have asked, if it had been made party to the first suit by James. 2 Pom. Eq. Jur., sec. 1224.

3. As between the mortgagor and his grantees, the parcels remaining in his hands are primarily liable for the whole mortgage debt, and should be exhausted before having recourse to that claimed by his vendees. 2 Wash. R. P., 202, 206; 2 Jones, Mortg., secs., 1620-32. This was done. See 31 Ark., 234; 34 N. W. Rep., ——; 1 So. Rep., 506.

COCKRILL, C. J. It is argued that the railway company, which was the owner of the equity of redemption in a separate parcel of the premises upon which James' vendor's lien existed, had the right, prior to the sale under James' decree of foreclosure, to redeem the entire premises by paying the entire lien debt; and that the decree has not cut off that right, inasmuch as the company was not a party to the suit to foreclose.

1. Foreclosure of vendor's lien—Redemption.

The rights of the parties, so far as those questions are concerned, are exactly analogous to those of a mortgagee and a subsequent vendee of the mortgagor of a part of the encumbered premises. A consideration of the equitable rules which govern those relations makes it clear that such a purchaser has not the unconditional right to redeem the whole mortgaged premises.

2. Mortgage—Redemption.

The rule in such cases is sometimes stated to be, that a part owner, or owner of a parcel, of the mortgaged premises may redeem the whole by paying the entire mortgage debt. But that is a generalization, and not an accurate statement of the rights of the respective parties. The reason of the rule rests solely upon the mortgagee's right to hold his security intact and to receive his debt entire. The purchaser of a part of the premises from the mortgagor acquires no inherent right to be subrogated to the mortgagee's advantageous hold upon the other parts. He succeeds only to the mortgagor's rights in the parcel purchased. If the mortga-

gor's conveyance contains a warranty against the incumbrance, the vendee of a part is then clothed with two remedies for his protection, viz.: He may force the mortgagee to resort to the other parts of the premises before subjecting his to the satisfaction of the mortgage debt; and he may redeem his parcel. He has no other rights as against the mortgagee. If the latter is willing to apportion his security and receive the due proportion of his debt for the release of the alienated parcel, the vendee thereof can demand no more; if the mortgagee is unwilling to do that, he will be compelled to submit to equitable terms, which, by the established rule, are that he shall be made whole by the payment of the entire mortgage debt.

3. Parties to foreclosure—Redemption.

But that is done only to prevent a failure of justice, and not in recognition of a right in the vendee to acquire an interest in portions of an estate which he has in no manner bargained for. His purchase of a part of the premises from the mortgagor does not impair the mortgagee's right to proceed to make his money out of the residue by any means permissible before the sale of the parcel. If the mortgagee takes a conveyance of the equity of redemption of the unalienated portion of the premises from the mortgagor at its fair market value, in satisfaction *pro tanto* of the mortgage debt, he may resort to the alienated parcel for collection of the residue of the debt. If his mortgage contains a power of sale, and he causes the unalienated parcels to be first sold, the mortgagor's vendee is uninjured. 2 Jones on Mort., secs. 1857–1859. The strictest good faith in these transactions is all the latter can demand. *Hawhe* v. *Snydaker*, 86 Ill., 206–7. The mortgagee is not required to proceed against the entire premises for a foreclosure in equity, but may go against any parcel at his election. If he proceeds only against the unsold part of the premises, he does only what the owner of the other part might require him to do first; and a fair sale of such part is all the owner of the other parcel can demand. In the absence of fraud, the mortgagor's vendee is not in an attitude

to complain if the property brings less than its value at the judicial sale, because the remedy pursued by the mortgagee, like that of the power of sale under the mortgage, or of the purchase of the equity of redemption by stipulation, is an incident to the mortgage, subject to which he acquired his rights. Gross inadequacy of price, in connection with slight circumstances indicating an unfair advantage on the part of the mortgagee, may be taken as legal fraud upon the rights of the mortgagor's vendee of the parcel, and justify the opening of the bid and an order for a resale of the premises. *Gilbert* v. *Haire*, 43 Mich., 283. But if there is no fraud, he cannot question the price brought at the judicial sale. The proceedings under the decree are binding upon him, as they are upon other creditors of the mortgagor, who have no other right than to demand that his assets shall not be squandered to their detriment. If the mortgagee proceeds in equity against the mortgagor for a foreclosure and sells the whole premises, without making the vendee of the alienated parcel a party, the latter's right to redeem his part is of course unimpaired by the decree. The purchaser at the judicial sale acquires a defeasible title to the alienated parcel, subject to be defeated by redemption, and an indefeasible title to the residue. The owner of the alienated parcel cannot then be forced to redeem the whole premises by paying the whole debt. The decree has dismembered the security, and he may redeem his parcel alone. He has no other right. *Dukes* v. *Turner*, 44 Iowa, 575; *Green* v. *Dixon*, 9 Wisc., 532; *Kirkham* v. *Dupont*, 14 Cal., 559. If the property has been sold *en masse*, the amount to be paid for redemption is not fixed by the sale; and the court ascertains the proportion the parcel should contribute toward the discharge of the mortgage debt in order to effect a redemption. Cases *supra*. The opinion in the case of *Watts* v. *Julian*, 122 Ind., 124, relied upon by the appellant, the reasoning of which goes upon the theory that the vendee of the part has the unconditional right in such a case to redeem the

whole or require a resale after decree, is not in line with the authorities on that subject.

The doctrine deducible from the principles which govern the rights of the parties in cases like this may be stated as follows: A purchaser of the equity of redemption of a part of the mortgaged premises may force a redemption of the entire premises, and be subrogated to the rights of the mortgagee, only when the latter has failed to resort first to the other parts of the premises for the satisfaction of the mortgage debt, and neglects or refuses to apportion his debt and security upon equitable principles so as to permit the release of the alienated parcel.

In the case in hand the mortgagee has resorted by equitable foreclosure to the premises not conveyed by the mortgagor before proceeding against the parcel conveyed by him to the railway. The railway's right to redeem its parcel remains untouched. It has no right, as we have seen, to redeem the other parts.

4. Laches applying for a sale.

The premises sold under the decree did not bring their full value, but the price paid was not greatly inadequate; and the proof does not warrant a finding that the foreclosure proceedings operated as a fraud upou the appellant. There is no cause therefore for requiring a resale. On the contrary, a fuller statement of the facts shows that there is no equity in the railway's position. At the time of the conveyance by Neel to the company he was president and chief owner of the railway. The consideration recited in his conveyance was an inadequate price for the property conveyed, and there is no other evidence that the railway paid anything for it. The sale under the decree was duly advertised, and Neel, who was still the president of the company, was apprised of it. The company delayed its application for a resale for more than two years after James' purchase under the decree, and it was not made until it had become obvious that the value of the lands had greatly increased since the sale under the decree. No excuse was offered for the delay. If the right to cause the sale to be

set aside had existed, it would have been lost by the unreasonable delay. It is the established rule that the right to a resale must be exercised promptly. It would be manifestly inequitable to permit the person having the right to sit by and speculate on the rise or fall in the value of the land sold, at the expense of the purchaser. That is what the railway company appears to have attempted in this case.

Let the decree be affirmed.

NIEMEYER *v.* HUDSPETH.

Decided January 3, 1891.

Special findings—Reversal—New trial.

A new trial will be granted upon reversal of a cause wherein the circuit court, sitting as a jury, has specially found facts from which judgment may be rendered on appeal, if it appears that the appellee might have been misled by rulings of the court to omit testimony which he could have introduced.

APPEAL from *Drew* Circuit Court.

CARROLL D. WOOD, Judge.

Action of replevin by Niemeyer & Darragh against Hudspeth, sheriff of Drew county, and his deputy. Defendants answered that they held the property under certain writs of attachment. A demurrer to the answer was overruled.

Sitting as a jury, the court found specially that the property was held by the officers under process as claimed; but also found facts from which, it is argued, it follows that the property belonged to plaintiffs. The court declared the law to be:

"That where personal property is in the hands of an officer holding the same under process of attachment, the same cannot be taken out of the hands of the officer by process of replevin, notwithstanding such process of replevin issued at the suit of a stranger from whose custody and possession the property was taken by the defendant officer."

From a judgment in defendants' favor, plaintiffs have prosecuted this appeal. Appellees have filed a written confession of error in the above declaration of law made by the court.

W. S. McCain for appellants.

1. The declarations of law made below are not law. Mansf. Dig., sec. 4122; 52 Ark., 128.

2. Upon the finding of facts appellants are entitled to judgment. 50 Ark., 85.

3. The laborers' lien act, although remedial, is summary and strictly construed. 27 Ark., 564; 29 *id.*, 601. No provision was made to enforce it except as against the owner, nor is anything said about a purchaser, or how it shall be enforced against him. 34 Ark., 179, seems to recognize the right of a sub-employee, but it is decided it cannot be enforced if the original contractor has been paid. The lien can only be enforced by employee of the owner. 53 Wisc., 543; 52 Ga., 374; 20 Fla., 163; 16 Wisc., 70; 46 Ga., 112; Phillips, Mech. Liens, secs. 41–55; 68 Wisc., 89; 50 N. H., 71; 94 U. S., 386. In this class of cases the only remedy, if any, would be in equity. 30 Ark., 568; 36 *id.*, 575; 48 *id.*, 355.

C. H. Harding and *Thomas B. Martin* for appellees.

1. The contract in this case constitutes a partnership. Pars. on Cont., vol. 1, *p. 147; 32 La. An., 1126; 2 So. Rep., 410; 1 Lindley on Part., p. 2; 8 Ga., 285; 37 Ga., 115; 114 Mass., 114; 5 Leigh (Va.), 583; 29 Oh. St., 429.

2. If not a partnership as to third parties, it was a contract of rental so far as McWilliams was concerned, and he was the owner of the shingles. If so, the laborers had liens superior to appellants' rights. Mansf. Dig., secs. 4425–36; 33 Ark., 737; 36 *id.*, 525. And there is no exception in favor of innocent purchasers, and the courts can make none.

See 42 Ark., 263, where the lien was enforced against third parties. Shingles are the "production of their labor,"

as much so as hay from grass. 29 Ark., 601; 42 *id.*, 263; In cases of *specific* attachments the property is *in custodia legis* and not the subject of replevin. Mansf. Dig., sec. 4434.

3. The cause should be remanded for a new trial. Mansf. Dig., sec. 1306. To remand the cause with instructions to enter judgment for appellant would work an injustice to appellees, as it would cut them off from showing that the shingles were never paid for or delivered to appellants.

BATTLE, J. The confession of error filed in this court by appellees relieves us of the duty to inquire into the correctness of the declarations of law made by the circuit court. The question now is, shall the judgment of the court below be reversed and the cause remanded for a new trial, or shall this court render a judgment on the conclusions of facts found by the circuit court?

When new trial granted upon reversal on special findings.

The ruling of the court on the demurrer to appellees' answer indicated to some extent what was necessary to prove to recover judgment. According to that ruling it was not necessary for appellees to prove that the property in controversy had not been paid for and delivered to appellant before the orders of attachment under which it was seized were issued; yet the circuit court found that such payment and delivery were made before the orders of attachment were issued. Appellees say that they were able to prove that no such payment or delivery was made, and that they failed to do so on the trial because of the ruling of the court on the demurrer. Whether this be so or not, it is not necessary for us to inquire. It is manifest, however, that they might have been misled by the ruling of the court, and thereby induced to make no effort to adduce evidence within their control. Under such circumstances it would be unjust to deprive them of the opportunity of adducing such evidence by rendering a judgment on the facts found by the court. Without expressing what the judgment of the court upon the facts found by it should have been, the judgment rendered is reversed, and the cause is remanded for a new trial.

DARR *v.* KEMPE.

Decided January 3, 1891.

Mortgage—Description of crop. 54 91 / 57 152

A mortgage of all the cotton to be raised "on five acres of land situated on or in the south portion" of a certain field on a farm does not include cotton grown on five acres in the north part of the field, though that is the only cotton grown in the field.

APPEAL from *Pope* Circuit Court.

G. S. CUNNINGHAM, Judge.

J. E. Joyner for appellant.

BATTLE, J. On the 23d of November, 1887, Sam Moore executed to John Kempe a mortgage on property described in the mortgage as follows: "All the crop of cotton which I may raise or in which I may in any manner have an interest for the year 1888 on five acres of land situated on or in the south portion of the west field on my own farm in Wilson township, Pope county, Arkansas." On the 24th of November, 1888, John Kempe, claiming under this mortgage, brought an action of replevin against E. A. Darr for the recovery of two bales of cotton. On the trial in this action it was proved that Sam Moore owned a farm in Wilson township, in Pope county, in this State; that the west field of this farm contained fourteen acres; that nine acres of this field lying along the southern fence were planted in corn in 1888; that cotton was grown on the other five acres in that year; that these five acres are in the northern part of the field and lie along the northern fence; that of the five acres Moore cultivated only three, and a tenant tilled the other two; that in the two bales in controversy there were 545 pounds of lint cotton raised by Moore on the three acres in 1888; that this lint cotton was worth 9 cents a pound; and that Moore sold the two bales of cotton in controversy to Darr for the sum of $81. Upon this evidence Kempe recovered judgment against Darr for the sum of $49.65, and Darr appealed.

Mortgage—Description of crop.

Appellant contends that the judgment is not sustained by the evidence. This is true. The property described in the mortgage, under which Kempe claimed, was not that in controversy. It is true that this court held in *Watson* v. *Pugh*, 51 Ark., 218, that a mortgage on property described as "eight bales of cotton weighing 500 pounds each, of the crop" which the mortgagor should raise in a certain place, is not void for uncertainty when the whole crop raised in the designated locality did not amount to eight bales, and that the description in the mortgage was sufficient to hold the cotton raised. But the facts in this case are different. In this case there was no cotton raised in the locality designated, and the description in the mortgage was not sufficiently comprehensive to include the cotton in controversy. The cotton described and that in controversy are entirely different. They are not the same, not because the description in the mortgage is insufficient, but because it is essentially different from that of the cotton sued for in this action. There was nothing in the mortgage to indicate that there was a mistake made in the description of the property intended to be described. To hold that the cotton in controversy was meant, the description in the mortgage would have to be rejected and another substituted. With equal propriety it might be said that the corn raised in the southern portion of the field was intended.

As against Darr, Kempe had no right to the cotton in controversy.

Reversed and remanded.

TENNEY *v.* SLY.

54 93
84 564

Decided January 3, 1890.

Mechanic's lien—Buildings on contiguous lots—Entire contract.

Where material is furnished, under an entire contract, for the erection of several buildings, owned by the same person and situated upon contiguous lots, though part of them are separated from the remainder by a street, a lien attaches upon the entire property for the whole value of the material furnished, as against all who, with notice of the lien, subsequently acquired interests in the several lots.

APPEAL from *Sebastian* Circuit Court, in Chancery, Fort Smith District.

JOHN S. LITTLE, Judge.

Tenney, Martin & Anderson, lumbermen, agreed to furnish L. H. Sly material to build several houses upon contiguous lots. Under this agreement they at different times supplied him with material for the construction of seven houses. Within ninety days from the time the last of the material was furnished, they filed with the clerk their account in gross for all of the material. They kept no account of the material used in the construction of the houses separately. Between the time when the first material was furnished and their account was filed, Sly mortgaged several of the houses to various parties. Suit was brought against Sly and the intervening mortgagees to enforce a mechanics' lien on all of the buildings for the entire material furnished, under the provisions of Mansfield's Digest, section 4402, *et seq.* The court declared plaintiff's lien subject to the lien of the intervening mortgages. From this decree plaintiffs appealed.

Winchester & Bryant for appellants.

The lien is not created by contract with the owner, but by the use of the materials. 30 Ark., 25; Mansf. Dig., secs. 4402–8–9. Other States having statutes similar to our own have sustained liens upon facts similar to this case. Jones on Liens, sec. 1317; Phillips on Mech. Liens, sec. 369; 44 N. W. Rep., 3; 33 *id.*, 377; 35 N. W. Rep., 601; 115 Mass.,

429; 117 *id.*, 176; 119 *id.*, 459; 5 Minn., 155; 5 S. W., 72; 101 U. S., 721; 52 N. Y., 346; 69 N. Y., 618; 4 E. D. Smith, 734; 16 Neb., 153; 85 Ill., 546; 71 N. C., 444.

B. H. Tabor for appellees.

1. Appellants were charged with notice that the land had been laid off into lots and blocks. 7 Mo. App., 343.

2. Appellants could easily have complied with the law by keeping an account of the materials that went into each house. Materialmen must follow the law. Phil. Mech. Liens., sec. 230, p. 385; 121 Mass., 418. The lien arises by furnishing materials, and not from contract. 30 Ark., 29; Houck on Liens, sec. 3, p. 106; 18 Ill., 323; Phil. Mech. Liens, sec. 9; Jones, Liens, sec. 1186; Mansf. Dig., sec. 4402, *et seq.* The materialman, therefore, can have only a lien on each house, with the land pertaining thereto, for the materials actually used in *that* house; it cannot be *in gross* on several houses and several distinct lots. Phil. Mech. Liens, p. 337; Jones on Liens, sec. 1310–12; 16 N. J. Eq., 150; 73 Ill., 540; 42 Ill., 308; 17 *id.*, 300; 42 Conn., 293; 30 *id.*, 461. These cases show that a joint mechanic's lien cannot be taken on several separate and distinct buildings. See also 45 Ind., 258; 78 Ind., 490; 61 Mo., 500; Phil. on Mec. Liens, sec. 376; 3 Or., 527; 5 Allen, 406, and cases *supra.*, 101 U. S., 725.

HEMINGWAY, J. Although the appellants in apt time filed with the circuit clerk a just and true account of the demand owing to them, with a correct description of the property to be charged with the lien, it is contended that they have no lien as against those who acquired subsequent interest in the property, because they filed an entire account seeking to charge a lien on seven houses, when separate accounts should have been filed against each house for the amount furnished for its construction. The court below so decreed.

Mechanics' lien—several buildings.

At the time when the material was furnished, the land was embraced in a plat, on which it was laid off in lots and

blocks; but it was used for the purpose of agriculture, and was included in a cotton field. Sly applied to the appellants to furnish him the material for building "several houses" on the land; they consented to do it at prices stated. Sly from time to time ordered material that was delivered according to the terms of their offer, but neither party took note of the particular house into which any particular lot of material entered. The material furnished was charged in one account. The contract to furnish it was an entirety, and was used in carrying out the plan of one building operation. The lots were contiguous, except that two of them were separated from the other five by a space indicated on the plat as a street. To sustain the decree of the court, the appellees refer us to the language of the statute in relation to mechanics' liens, and lay much stress by the fact that it provides that the lien shall exist on "the building"—in the singular—and this, they argue, implies that a separate account must be filed to charge a lien on each building. "Else why," they say, "use the singular, 'building'?" The same argument has been made as to the force of the same word, in similar statutes, in cases before the Supreme Courts of Iowa and Minnesota. They declined to accept it—wisely, as we think. To do it would, in the language of the latter, "defeat the spirit of the law by a too strict adherence to its letter." *Lax* v. *Peterson*, 42 Minn., 214; *Bowman Lumber Co.* v. *Newton*, 72 Iowa, 90; *Beckel* v. *Petticrew*, 6 Ohio St., 247; *Wall* v. *Robinson*, 115 Mass., 429; *Batchelder* v. *Rand*, 117 *id.*, 176; *Chadbourn* v. *Williams*, 71 N. C., 444.

The fact that one account was filed and one lien on all the houses sought would seem not to prejudice the owner of the houses or to benefit the party seeking the lien. If other parties have subsequently acquired interests, they have no reason to complain that the account and lien are entire. About this there could be no controversy, unless they had been misled to their prejudice by the failure to file a lien within ninety days after the house they acquired was finished.

They acquired with notice of the lien or the right to charge one, and can only ask that it be apportioned among the several houses, as in the particular case equity and justice dictate. It does not appear that any interest was acquired in this case, under an innocent belief that the time to file the lien had expired without one being filed, or that it was thought to be several, when in fact it was entire. What the law would be in that case we need not consider.

When the right to a lien exists, the statute directing the manner of enforcing it is to be liberally construed in behalf of the party invoking its benefits. We think the appellants have shown a sufficient compliance with the statute, and that they are entitled to the lien on the entire property as against all who acquired subsequent interests. Upon the question considered the authorities divide, but the reason of the act, justice and the majority of adjudications favor the rule announced.

The judgment will be reversed, and the cause remanded, with directions to render judgment for the plaintiff for the balance due, and charge it as a lien on the entire property. As between the subsequent claimants the charge will be apportioned as justice and equity may require, and to that end the court may, if it is desired, hear further proof.

COCKRILL, C. J., did not participate.

VESTAL v. KNIGHT.

Decided January 3, 1891.

54 97
73 484

1. *Joint maker of note—Parol evidence of suretyship.*

Parol evidence is admissible to show that one of the makers of a note signed as surety.

2. *Note—Extension of time—Consideration.*

Payment of interest on a note in advance is a sufficient consideration to support a contract for the extension of the time of payment.

3. *Extension—Discharge of surety.*

An agreement upon a valid consideration by the holder of a note, without consent of a surety thereon, to extend the time of payment for a stated time will discharge the surety.

APPEAL from *Crawford* Circuit Court.

HUGH F. THOMASON, Judge.

Nimrod Turman for appellant.

1. Parol evidence should have been excluded, because it qualified and varied the terms of the written instument. 50 Ark., 393 and cases cited; 15 Ark., 9. See, also, 2 Dan. Neg. Inst., sec. 1338; 141 Mass., 587; 68 Me, 390; 6 Atl. Rep., 11.

2. An extension of time will not release sureties, unless supported by a valid consideration. 2 Dan. Neg. Inst., secs. 1315–16. The evidence showed no consideration for the extension.

3. A part payment of a debt at or after it becomes due is not a sufficient consideration for an extension of time, and will not discharge the surety, though the agreement be carried out by the creditor. 34 Ark., 52; 2 Dan. Neg. Inst., sec. 1317 b.

HUGHES, J. Appellant brought suit before a justice of the peace against A. S. Waltermire and the appellees, Merritt Knight and George W. Knight, upon the following promissory note:

"$98.90 VAN BUREN, ARK., December 4, 1886.

"Twelve months after date, we or either of us promise to pay V. S. Vestal or order ninety-eight and 90-100 dollars, with interest at the rate of 10 per cent. per annum from date until paid.

"A. S. WALTERMIRE,
"MERRITT KNIGHT,
"GEORGE W. KNIGHT."

This note bore upon its back the following indorsement:

"Rec'd on this 5th day of December, 1887, $10 and time of payment extended twelve months from maturity.

"V. S. VESTAL,
Per NIMROD TURMAN."

On the trial in the circuit court upon appeal from the justice of the peace, appellees, over the objection of the appellant, were allowed to show by parol evidence that Merritt Knight and George Knight were sureties on the note for Waltermire; that Vestal, the appellant, knew that they signed as sureties; that the ten dollars credited on the note was paid appellant's agent, who at the time extended the time of payment one year from maturity of the note; and that Waltermire, the principal, was solvent, when the time for payment was extended; and that before the extension of time expired he became insolvent, and has been insolvent ever since; also that appellees did not consent to the extension, and did not know of it until told of it afterwards by Waltermire. The proof also showed that appellees did not notify appellant after maturity of the note to bring suit against the principal.

The court gave to the jury the following instruction: "If the jury believe from the evidence that said defendants, Merritt Knight and George W. Knight, signed the note in controversy as surety for said Waltermire, and that said Vestal knew that they so signed the note, and that at the time of the maturity of said note said Vestal, or his legally authorized agent or attorney, made an entry and agreement upon said note extending the time of payment thereof for

twelve months from the maturity thereof, and that the extension was made without the knowledge and consent of said Merritt Knight and George W. Knight, that the act of the plaintiff in so extending the time discharges the said sureties from all liability upon said note and will find for said sureties." To the giving of this instruction—which was the only instruction given by the court—the plaintiff objected, his objection was overruled by the court, and he at the time excepted.

Appellants asked the court to give the following instruction, which was refused by the court, to which appellant excepted: "That if the jury find from the evidence that the defendants, Knight, were only sureties on said note, and that, when it fell due, Waltermire, the principal on said note, paid ten dollars, which was credited by plaintiff's agent on said note, and that said agent extended the time of payment one year, in the absence of defendants, Knight, and without their consent or objection, this is not a good consideration for the extension of time, and will not release the sureties, because there was no valid extension of time, and the jury will find against both principal and sureties."

The jury found for appellees, Knight. Plaintiff moved for a new trial, which was refused, and he excepted and appealed.

1. Note—Parol evidence.

Appellant's counsel contends that the parol evidence should have been excluded because it qualified and varied the terms of the written instrument. There is conflict of authority on the question of the admissibility of parol testimony to show that a joint maker of a promissory note signed only as surety. It is well settled that parol evidence is not admissible to alter or controvert the terms of a written contract. But "such proof does not controvert the terms of the contract, but is simply proving a fact outside of, and beyond, such terms." "It is a collateral fact to the contract and no part of it." "The parties still remain bound by the same instrument and in the same manner." Brandt on Suretyship, sec. 17; *Carpenter* v. *King*, 9 Met., 511; *Harris* v. *Brooks*,

21 Pick., 195; *Ward* v. *Stout*, 32 Ill., 399. The weight of authority and reason is that such testimony is admissible. *Stillwell* v. *Aaron*, 69 Mo., 539; 1 Glf. Ev., secs. 303–4; *Hubbard* v. *Gurney*, 64 N. Y., 461.

2. Consideration for extending time.

But it is said there was no consideration for this extension, and that it did not bind the appellant not to sue. Why not? The ten dollars were paid before the payment of the note could have been demanded. It was paid before the three days of grace expired. Payment of interest on a note in advance is sufficient consideration to support a contract for the extension of the time of payment. Wherever any injury to one party to a contract, or any benefit to the other party, springs from a consideration, it is sufficient to support the contract. The adequacy of the consideration, if the agreement is *bona fide*, is in the discretion of the parties. However slight the inconvenience or damage appears to the promisee, provided it be susceptible of any legal estimation, it is sufficient to support a contract. *Stillwell* v. *Aaron*, 69 Mo., 539, and cases cited; *Uhler* v. *Applegate*, 26 Pa. St., 140; Brandt on Suretyship, secs. 305–6. "The payment of part of a debt by the principal, at the time or after it became due, is not a sufficient consideration to support an agreement for forbearance. * * * In such case, no benefit is received by the creditor but what he was entitled to under the original contract, and the debtor has parted with nothing but what he was already bound to pay." But "payment of a part of a debt, before it is due, is a sufficient consideration to support an agreement for delay of payment of the remainder" Brandt on Suretyship, sec. 306, and cases cited, note 3.

3. When extending time discharges surety.

"An agreement upon a valid consideration by a creditor, without the consent of the surety, not to sue the principal debtor for a stated time, discharges the security. Such an agreement ties up the hands of the creditor, because, if he breaks it, he may be sued for damages." *Thompson* v. *Robinson*, 34 Ark., 52.

The instruction refused by the court below was abstract. Finding no error the judgment is affirmed.

COCKRILL, C. J., did not participate.

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RAILWAY COMPANY *v.* GILL.

Decided January 3, 1891.

1. *General Assembly—Rules.*

The observance by the general assembly of the rules adopted by it for the conduct of its business is a matter entirely within its control and discretion, not subject to be reviewed by the courts.

2. *Railway passenger tolls—Penalty for overcharge—Voluntary payment.*

In a suit under the act approved April 4, 1887, regulating the rates of charge for the carriage of passengers by railroads, a voluntary payment will not preclude a recovery of the penalty for an overcharge.

3. *Cumulation of penalties.*

Under the act a person who has paid several overcharges may recover the penalty for each overcharge, although he went upon the train solely for the purpose of accumulating penalties.

4. *Congressional grants—Immunity from State regulation.*

The various acts of Congress, declaring defendant's railroad to be a post and military route and national highway for postal, military and all other governmental service and granting lands and a right of way over government lands, confer no immunity from State regulation of passenger tolls.

5. *Constitutional law—Regulation of passenger rates.*

Under the present constitution (article 12, sections 6–11) the general assembly may alter or repeal any general law regulating the rates of charges for the carriage of passengers, without impairing the obligation of any contract; in such manner, however, that no injustice shall be done to the corporators.

6. *Consolidated railway—Regulation of tolls.*

A consolidated railway company cannot complain of the injustice of an act regulating railway passenger tolls, because of its effect upon one of its constituent roads. The operation of the act must be judged by its effects on the net earnings of the entire road.

7. *Classification of railroads—Effect of act upon members of a class.*

An act classifying railroads according to their length and providing a schedule of passenger tolls for each class must be judged, as to its effect upon any given class, by its effect upon railroads of that class operated under usual or ordinary conditions.

APPEAL from *Washington* Circuit Court.

J. M. PITTMAN, Judge.

John B. Gill filed a complaint against the St. Louis and San Francisco Railway Company, alleging in five separate counts that, on five several occasions, defendant, operating a railroad in the State more than seventy-five miles long, had charged him five cents per mile, being in excess of the maximum charge allowed by the statute. Defendant filed an answer in eleven paragraphs. The first paragraph denied the facts alleged. A demurrer to the other ten paragraphs of the answer was sustained. Their substance is stated in the opinion. There was a trial upon the issue raised by the first paragraph of the answer. The court found for plaintiff upon each count of the complaint, awarded judgment for $375, and allowed an attorney's fee of $50. Defendant appealed.

The act referred to in the complaint is as follows:

"*Be it enacted by the General Assembly of the State of Arkansas:*

"SECTION 1. That the maximum sum which any corporation, officer of court, trustee, person or association of persons, operating a line of railroad in this State, shall be authorized to charge and collect for carrying each passenger over such line within this State, in the manner known as first-class passage, is hereby fixed at the following named rates:

"On line of railroad fifteen miles or less in length, eight cents per mile. On lines over fifteen miles in length, and less than seventy-five miles in length, five cents.

"On lines over seventy-five miles in length, three cents per mile. And for carrying children in charge of an adult, there may be charged and collected one-half of the above-named rates for such of said children as may be under the age of twelve years and over the age of five years; and for such of said children as may be under the age of five years no charge whatever shall be made beyond what is collected from the adult or adults who may have charge of them;

Provided, That any railroad company may charge the sum of twenty (25) cents for the carriage of any passenger who may get on or off a train at other than a regular station; *Provided, further:* All passengers who may fail to procure regular fare tickets shall be transported over all railroads in this State at the same rate and price charged for such tickets for the same service.

"The number of miles in any railroad shall be held to include the entire length of said railroad, whether wholly within this State or extending beyond the limits thereof, and any branch railroad operated by the same person or corporation operating any main line, shall be held to constitute a part of said main line for the purpose of determining the length of said main line for the purposes of this act.

"SEC. 2. That each passenger who shall pay fare at the rate specified in section one, shall be entitled to have transported along with him, on the same train, and without any additional charge, one hundred and fifty pounds of baggage to consist of such articles as are usually carried by ordinary persons when traveling; and payment of fare, at the rate specified in section one, shall entitle the person paying the same to be transported, without additional charge, over any bridge or ferry, or through any tunnel, that may be used by the persons aforesaid, to make a continuous line between the points on said line of railroad between which the passenger may have acquired the right to be carried by payment of fare at the rate aforesaid.

"SEC. 3. Any of the persons or corporations mentioned in section one, that shall charge, demand, take, or receive from any person or persons aforesaid any greater compensation for the transportation of passengers than is in this act allowed or prescribed, shall forfeit and pay for every such offense any sum not less than $50, nor more than $300, and costs of suit, including a reasonable attorney's fee, to be taxed by the court where the same is heard on original action, by appeal or otherwise, to be recovered in a suit at

law by the party aggrieved in any court of competent jurisdiction. And any officer, agent or employee of any such person or corporation, who shall knowingly and wilfully violate the provisions of this act, shall be liable to the penalties prescribed in this section, to be recovered in the same manner.

"SEC. 4. That all acts and parts of acts in conflict with this act be and the same are hereby repealed, and that this act take effect thirty days after its passage.

"Approved April 4, 1887."

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

1. The legislature could not compel appellant to carry passengers for less than the actual amount expended in performing the service incident thereto. 94 U. S., 155; 21 A. & E. R. Cases, 14; Mansf. Dig., sec. 5473; 125 U. S., 680; 116 U. S., 307, 325; 128 *id.*, 174; 123 *id.*, 661.

2. Appellant was not a *bona fide* passenger, and hence not within the meaning of the pretended law. Laws of this kind are not intended for the purpose of encouraging a party to speculate in penalties. 46 N. Y., 544.

3. The act discriminates between roads of the same class. Appellant's road was less than seventy-five miles in length.

4. The overcharge was entirely for carrying plaintiff over the bridge, and it follows that, if such rate was authorized, there was no offense. Congress had the right to regulate the rate of fare or toll for crossing this bridge. It delegated the power to the secretary of the interior, and he fixed the rate. The act, in so far as it attempts to regulate the charges made on this bridge, is in conflict with the act of Congress, and is void. 6 Wall., 35; 12 How., 229; 105 U. S., 470; 109 U. S., 385; 3 Wall., 713; 10 Wall., 557; 13 How., 565; 18 *id.*, 421; 10 Wheat., 316.

5. The act was never properly enacted.

Dan W. Jones for appellee.

1. This case is not distinguishable from that in 49 Ark., 329, and 125 U. S., 680. When the St. Louis, Arkansas and

Texas Railway consolidated with two other corporations, it was not the same corporation, but became *functus officio*, and a new corporation came into existence. 41 Ark., 436; *ib.*, 509; 112 U. S., 609; 44 Ark., 17; 49 *id.*, 325; 125 U. S., 680. Hence evidence as to the cost of the St. Louis, Arkansas and Texas Railway was not admissible in evidence.

2. The Arkansas statute differs from that construed in 46 N. Y., 644. See Mansf. Dig., secs. 5014–5019. The law intended a penalty for each violation, which may be recovered in one suit. 3 Hill, 527; 4 T. R., 229; 3 *ib.*, 98; 1 Chit. Pl., 181; Cowen's Tr., 561, 2d ed.; and see 46 N. Y., 660.

3. It is admitted that appellant's road is more than 75 miles in length.

4. All the objections urged against this act are answered by 49 Ark., 329, and 116 U. S., 325.

5. The allegation that appellee *voluntarily* paid the overcharge is no defense. The *charging, demanding, taking or receiving* more than three cents a mile fixed the company's liability, as a punishment for the violation of the act, and is within the police power of the State. 49 Ark., 455; 46 N. Y., 644.

HEMINGWAY, J. The questions presented by this appeal depend upon the sufficiency of ten several paragraphs of the answer of the defendant below, appellant here, to each of which a demurrer was sustained. There was a trial upon one paragraph, and verdict and judgment for the plaintiff.

1. Legislative rules.

In the second paragraph it was alleged that the act of April 4, 1887, entitled an act to regulate the rates to be charged by railroads for the carriage of passengers, was not passed by the several houses of the general assembly in accordance with their joint rules, and that the bill as passed did not contain any provision limiting the rates that could be charged for the transportation of passengers. The joint rules of the general assembly were creatures of its own, to be

maintained and enforced, rescinded, suspended, or amended, as it might deem proper. Their observance was a matter entirely subject to legislative control and discretion, not subject to be reviewed by the courts. That the act as passed contained a clause limiting passenger rates, was settled by this court in *Dow* v. *Beidelman*, 49 Ark., 325.

2. Voluntary payment of overcharge.

The substance of the ninth paragraph is that the appellee voluntarily paid the alleged overcharge, and that he therefore could not recover. Whether the conclusion would follow if he sought to recover the amount of the overcharge, we need not decide; a voluntary payment of the overcharge does not preclude a recovery of the statutory penalty.

3. Cumulation of penalties.

The eighth paragraph sets up that the plaintiff went upon the defendant's train, not for the purpose of ordinary business or pleasure, but for the sole purpose of accumulating penalties against it, and that it would be against public policy to allow him to maintain this action, and thereby speculate in penalties. The act was not intended to provide a compensation for the injured passenger; but to deter railroad companies from taking excessive fares by punishing every such act. Each overcharge is in violation of law, and every payment of it is a legal wrong to the party making it, who is thereby aggrieved within the meaning of the act, and by its express terms entitled to sue. *Fisher* v. *Ry. Co.*, 46 N Y., 644; *Parks* v. *Nashville, etc., Ry.*, 13 Lea, 1; S. C., 18 A. & E. R. R. Cas., 404.

4. Congressional grants—Immunity from State regulation.

In the sixth paragraph it is alleged that, by virtue of various acts of Congress, the line of defendant's road is declared a post and military route and national highway for postal, military and all other governmental services, and is subject to be regulated only by act of Congress; that it became such by grants of land and right of way from the government, and is thereby exempt from State regulation. We do not appreciate the force of this defense. We do not understand that a grant of lands or of a right of way over lands by the government confers immunity from State regulation upon its grantee.

The remaining paragraphs of the answer contain objections by which, as it is claimed, the act in question is shown to be in conflict with the provisions of the State and Federal constitutions. As they contain many repetitions of the same allegations, varying only in the different paragraphs in respect of form, we will state and consider them together. They are substantially as follows: That the alleged overcharges were made for passage on that part of the defendant's road formerly owned by the St. Louis, Arkansas and Texas Railway Company in Arkansas; that said company was duly organized under the general laws of the State of Arkansas in 1880; that, by the laws then in force, and which were a part of its contract with the State, it was provided that said corporation, its successors or assigns, might fix such rates of fare as to it should seem proper, but that the legislature might alter or reduce its rates, provided that no such reduction should be made until the net proceeds of its road for one year had exceeded 15 per cent. of its capital actually paid in; and provided further, that such rates should not be so changed as to produce a profit below 15 per cent. as aforesaid; that, in accordance with the general laws of the States of Arkansas and Missouri, said St. Louis, Arkansas and Texas Railway Company, on the 10th day of February, 1881, was consolidated with two other corporations, in the name of the St. Louis, Arkansas and Texas Railway Company, Consolidated, which latter company succeeded to all the property, power, privileges, rights and immunities which belonged to either of the consolidating companies.

That, at the time of the consolidation, the road of the original Arkansas corporation had not been completed, and that it and the consolidated corporation were without means to complete the road.

That, on the 2d day of February, 1882, the consolidated company, by the authority and in pursuance of the general laws of the States of Arkansas and Missouri, sold and conveyed to the appellant all its railroad in said State, together

with all its rights, privileges, franchises and immunities thereunto belonging or appertaining, the appellant assuming in consideration thereof all the debts and obligations of the consolidated company; that the appellant thereby succeeded to the rights of the consolidated company, under its contract with the State, to fix such reasonable rates of fares for the transportation of passengers as would enable it to realize a profit of not less than 15 per cent. per annum of its capital actually paid in.

That the road of said consolidated company has been completed for five years, and has never earned during any year profits to exceed 3 per cent. on the capital actually paid in, and that neither of the consolidating roads had earned profits during any year in excess of such rate; that the net earnings of said consolidated road for the next two years would not exceed 3 per cent. on the capital actually paid in, or on the amount actually expended on the consolidating lines; and that, if appellant is required to charge no more than three cents per mile for the carriage of passengers on said line of railway, its earnings will be so reduced that no profit whatever will inure to its owners, and such earnings will not pay reasonable interest on the fixed indebtedness actually incurred in constructing the road.

That the formation of the original company, its consolidation with others and the sale by the consolidated company, each and all constitute contracts between the State and said several companies, entered into upon the faith that each of said several companies should have the right to fix its rates for the carriage of passengers at any sum it might deem proper which would not produce an annual net profit on the capital actually paid in, to exceed 15 per cent.; that the act in question alters the said several contracts, and is in violation of section 10, article 1, of the Federal constitution.

That, by section 6, article 12, of the constitution of Arkansas, in force at the several dates aforesaid, it is provided that no charter of any corporation shall be altered, revoked,

annulled or repealed in such a manner as to do injustice to the corporators, and that the act is in violation of said provision.

That the line on which the stations named are located contains heavy grades, many cuts and fills, bridges, trestles, embankments and tunnels, the construction of which cost, and the maintenance of which does and will continue to cost extraordinarily and unusually large sums of money, and that it is reasonable and just to charge five cents per mile for carrying passengers over said line; that to limit its passenger rate to three cents per mile takes its property without compensation, in violation of the fifth and fourteenth amendments to the Federal constitution.

That it is special legislation, and discriminates against the defendant in this, that it permits a company operating seventy-five miles of road or less to charge five cents per mile passenger fare, but prohibits a company operating more than that length of road from charging that amount for a passage not exceeding that distance, in violation of article 2, section 18, of the State constitution, and of section 1 of the fourteenth amendment to the Federal constitution. stitution.

That the defendant's road is made up of roads that formerly belonged to different companies, and the stations named are situate on a line which, as formerly owned, was less than seventy-five miles in length; that therefore the former owner might have charged five cents per mile fare, and the appellant as its successor acquired the right to make the same charge.

That, before the consolidation of the companies before named, the St. Louis, Arkansas and Texas Railway Company in Arkansas, for the purpose of constructing its road, mortgaged its property to secure bonds, which were placed on the market and sold to purchasers, who in good faith relied upon the observance on part of the State of its contract with the company relative to fixing its passenger rates; that said bonds are unpaid, and if the appellant is permitted

to charge no more than three cents per mile for carrying passengers, the earnings of the road of the original company will be insufficient to pay the interest on said bonds, and default will be made therein; that the act is therefore unconstitutional.

5. Constitutional law—Regulation of passenger rates.

In the view that we have taken of the law, it will be unnecessary to go into the discussion of the act, as affected by the provisions of the Federal constitution, relied upon by the appellant. When the St. Louis, Arkansas and Texas Railway Company in Arkansas was organized, the constitution of the State contained the following provisions:

Section 6, article 12. "Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the corporators."

Section 11, article 12. "Foreign corporations may be authorized to do business in this State, under such limitations and restrictions as may be prescribed by law. Provided, That no such corporation shall do any business in this State, except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State, nor shall they have power to condemn or appropriate private property."

Those provisions have ever since been and now are a part of the fundamental law of the State. They entered into and became a part of the contract between the State and the corporations concerned in this cause. By their terms

the State was authorized to alter, revoke, annul or repeal all charters of corporations thereafter created in this State, whenever, in the opinion of the general assembly, such charter is injurious to citizens of the State. The only limitation upon the power is that it shall not be so exercised as to do injustice to the corporators. It is provided that foreign corporations may be admitted to do business in the State upon certain conditions, and that upon compliance therewith they shall conduct their business subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State.

The appellant purchased its line in this State subject to the provisions just mentioned. Though the statute then in force for the regulation of rates to be charged for the transportation of passengers (Mansf. Dig., sec. 5473) permitted a higher rate to be charged than that allowed by the act in question, the appellant knew that all such acts were subject to legislative change. Thus warned, it elected to come into the State to operate a railroad. It thereby undertook and became bound to do it according to the terms and conditions imposed upon domestic corporations. It bound itself to the State by contract that it would conform to such rates of charges as the State might fix, provided they worked no injustice to its corporators. If the act in question violates that provision, the act must fail; otherwise it must stand. To all other objections that may be urged against the act, it is sufficient to reply: *Consensus facit jus.* We therefore pass without discussion the clauses relied upon in the Federal constitution, and address ourselves to the single inquiry, Do the allegations of the answer disclose that the act is unjust to the incorporators of the appellant?

For the purpose of this case we have not felt called to decide whether the question of the justice or injustice of the act is political and for the sole determination of the general assembly, or judicial and subject to be investigated in the

courts. Nor have we considered how far the determination of that question is controlled by the recent decisions of the Supreme Court of the United States, in what is known as the Minnesota railway cases. *Chicago, etc. Ry. Co.* v. *Minnesota*, 134 U. S., 418; *Minneapolis Ry. Co.* v. *Minn., id.*, 467. We treat it as a question within the cognizance of the court, but reserve a decision thereon until a case is presented which calls for it.

We are of opinion that the answer and argument in its support rest upon erroneous conceptions of the law.

6. Consolidated railway—Regulation of tolls.

It appears from the answer that the appellant operates a continuous line of railroad from Fort Smith in this State to the City of St. Louis in Missouri. That the line, as owned and operated when the act in question passed, comprises a road constructed by the appellants and one purchased by it, which latter was made up by consolidating the roads of three different companies. The transportation for which the charges complained of were made was over that part of appellant's road which was formerly a part of one of the consolidating roads. The answer seeks to test the justice of the act, not by its effect on the net earnings of the entire road of the appellants, but by its effect upon the net earnings of that portion of its road acquired by purchase, as well as of that part formerly owned by one of the consolidating companies. But that is not the correct test. The appellant cannot claim the right to earn a net profit from every mile, section or other part into which its road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative. It can only claim a profit from the operation of its entire line, and attack as unjust an act that denies it the right to fix such rates as will yield a profit upon its aggregate business. The corporations owning the several parts of the road as to which it is charged that the act operates unjustly were dissolved years before it was passed. As to them it could not operate unjustly, and in their behalf no cause of complaint can exist. The lines, though once independent, are now

parts of a whole, and any division of it into its original parts for the purposes of the act in question is arbitrary. There is as much reason to divide the line according to sections or stations, or into divisions of a designated mileage, and demand the right to charge for service upon each part a rate sufficient to make the operation of that part alone, independently of other parts, remunerative. If an act were to be thus tested, it would be necessary in each case to ascertain what part of the line was included in the trip, and then determine what charge was necessary to make the business of that part profitable. That would involve the ascertainment of what expense was incurred in operating the particular division alone; but as there are other general expenses, not incurred in operating any other division more than the one in question, it would be necessary to compute them and apportion a just part to the designated division. It would then be necessary to ascertain what the road could earn at the rate fixed from receipts arising exclusively from the business of the particular part, and its *pro rata* of receipts from business done in part over it and in part over other divisions. It could then be seen whether the expense of operating the particular division exceeds the receipts under the rate proposed. In what proportion the several parts should share with others in the expenses and receipts in which they participated it would be difficult to determine. In fact the problem proposed would be difficult, if it did not baffle solution. If upon the examination it was ascertained that division A could earn a profit at a rate of three cents per mile for passengers, as to it the act would be valid; but if it was ascertained that division B would sustain a loss unless permitted to charge five cents per mile, the act as to it would be invalid. If it could be conceived that, with such an issue to be submitted to a jury, a decision would ever be reached in two different causes, a remarkable result might be anticipated. It would then be judicially determined that a law fixing three cents as the maximum would be constitutional as regulating rates from Fayetteville to the

next station south, but unconstitutional as regulating the rates from Fayetteville to the next station north. Such a condition would be rendered improbable, only because it is exceedingly improbable that two cases would be prosecuted to a termination in the life of any one person.

7. Classification of railroads—Effect of act upon members of a class.

We think it must be evident that, to the extent that the question of injustice is to be determined by the effect of the act upon the earnings of the appellant, the earnings of its entire line must be estimated as against all its legitimate expenses, under the operation of the act. But we think that a more enlarged scope should be given the inquiry, to decide the question properly; and the justice of the act should be determined by its effect upon classes, and not by its effect upon single members of classes. The parent company was organized and the appellant began its business in this State after the adoption of a policy by the State with reference to corporations that marked a change in that regard. It had been usual to create corporations, grant privileges and limit powers by special act of the legislature; it was then provided by the constitution that no special act of incorporation should be passed, and that all corporations should be formed under general laws. In pursuance of the changed policy, the act was passed providing for the organization of railway companies. As the powers of corporations were conferred and defined by general laws, so the State indicated its policy to regulate their enjoyment and exercise by laws likewise general. The provision relied upon by the appellant, from the act of July 23, 1868 (Mansf. Dig., sec. 5473), authorizing railway companies to regulate passenger fares, was general in its terms and applied to all railroads in the State. The act in question, though it classifies roads for the purpose of regulation, is general; for it prescribes the same regulations as applicable to each member of a class. It would therefore be unreasonable to test the rate fixed for any class by its effect upon a single member of the class. One member might be so situated that at a given rate of fares its earnings would be large;

while another member, at the same rate but affected by different conditions, perhaps temporary, such as destructive competition, wasteful management, or limited business, could not earn expenses. Neither of said members, the one enjoying favorable circumstances nor the one suffering from unfavorable circumstances, would furnish the proper criterion by which to judge the rate proposed; whether it would be just or unjust, should be determined by its effects upon those operating under usual and ordinary conditions. The appellant nowhere alleges that the rate fixed by the act in question is unjust as applied to other roads in its class, or that it cannot be adopted by them without any unjust impairment of their earnings. We think it follows, if roads may be classified for regulation, that the justice or injustice of the regulation must be determined with reference to its effect on the class and not a particular member of it. Any other rule would lead to confusion—almost chaos—in the law. An act held valid as to one member of a class might be held invalid as to another, and no adjudication would remove or lessen the uncertainties as to the validity of an act. We do not mean to imply that the act under the construction given it is free from the objection that the question of its legality is undetermined after the adjudication of any one case. If the question of constitutionality is to be determined by a judicial inquiry into the reasonableness of the limit prescribed, it is obvious that the result in each case would depend upon the facts developed in it and the conclusions drawn therefrom, thus varying as the facts in proof varied, and as different trial tribunals might differ in viewing them. It would be better for all concerned, the public and the corporations, if the law provided some means for testing the reasonableness of the rates prescribed, before they were to become operative, in a proceeding in which the corporations contesting it and the public, through its representatives, would have an opportunity to be heard. The final determination in such a proceeding should be conclusive as to that fact, and determine the legal status of the act; and if

it were sustained, a defense of its unreasonableness should not be entertained in an action like this. The plaintiff in an action of this character has not the facilities or interest to present the matter as it should be in a controversy so wide in its scope, affected by circumstances so universal and complex. The burden of the litigation is too great for the return. While we think the law should be as we have indicated, we cannot conclude that it is; although a somewhat similar principle was contended for by the late Justice MILLER, in a separate opinion in the Minnesota cases.

It was ruled in *Dow* v. *Beidelman*, 49 Ark., *supra*, that the classification of roads for regulation of rates was proper.

Affirm.

RAILWAY COMPANY *v.* STEVENSON.

Decided January 3, 1891.

Van Buren bridge act—Construction—Tolls.

The act of Congress authorizing the construction of a railway bridge across the Arkansas river at Van Buren, Arkansas, provides that no higher charge shall be made for the transportation of passengers over it than is paid for similar transportation over the railroad leading to the bridge. Under the act of the general assembly of April 4, 1887, regulating the maximum charge for transportation of passengers by railroads, a charge of forty cents as a toll for crossing the bridge, in addition to the maximum charge for transportation, is illegal.

APPEAL from *Crawford* Circuit Court.

JOHN S. LITTLE, Judge.

Action to recover the statutory penalty for an overcharge, similar to the case of *Railway Co.* v. *Gill*, *ante* p. 101, the defendant being the same in each case.

Plaintiff purchased a ticket from Fort Smith to Lillie, a station eleven miles north. The transportation included passage over the bridge across the Arkansas river. He was charged seventy cents for the transportation. Defendant interposed the same defenses as in the case of *Railway Co.* v.

Gill, and an additional defense that forty cents of that amount was charged as a bridge toll.

Section 2 of the act approved April 4, 1887, quoted *ante* p. 102, provides that the payment of fare, at the rate specified, "shall entitle the person paying the same to be transported, without additional charge, over any bridge," etc.

Judgment was rendered for the plaintiff. Defendant has appealed.

Clayton, Brizzolara & Forrester for appellant. *John O'Day* and *E. D. Kenna* of counsel.

The overcharge was entirely for carrying plaintiff over the Van Buren bridge, and it follows that, if such rate was authorized, there was no offense. Congress had the right to regulate the rate of fare or toll for crossing this bridge. It delegated the power to the secretary of the interior, and he fixed the rate. The act, in so far as it attempts to regulate the charges made on this bridge, is in conflict with the act of congress, and void. 6 Wall., 35; 12 How., 229; 105 U. S., 470; 109 U. S., 385; 3 Wall., 713; 10 Wall., 557; 13 How., 565; 18 *id.* 421; 10 Wheat, 316.

Brown & Sandels for appellee.

HEMINGWAY, J. The answer in this cause presented the same questions decided against the appellant in the case of *Gill* v. *St. Louis & San Francisco Railway Company*, *ante* p. 101. It presented an additional paragraph, in which it was alleged that the overcharge was for transportation over ten miles of the defendant's railroad, and also for passage over a bridge across the Arkansas river; that the bridge connects the line of the appellant's road on either side of the river, and was built under an act of Congress which reserved to the appellant and the secretary of war the exclusive right to regulate tolls for carrying passengers across it; that appellant charged for the ticket three cents per mile for passage over the road, and forty cents for passage over the bridge. The appellant sold the ticket for a continuous passage from Fort Smith to Lillie, including

passage over the bridge. By the act of Congress, under which the bridge was built (approved July 3, 1882), it is provided that no higher charge shall be made for the transportation of passengers over it than is paid for similar transportation over the railroad leading to the bridge. It is therefore no defense that the charge of seventy cents for a ticket for travel of eleven miles included a passage over the bridge.

Affirm.

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McFADDEN v. OWENS.

Decided January 10, 1891.

Practice—Injunction pending appeal.

An injunction pending an appeal to restrain a county judge from paying to one a fund claimed by another will be denied, if the county, being solvent, will still be liable in case the payment is wrongfully made.

APPEAL from *Jefferson* Circuit Court in Chancery.
JOHN M. ELLIOTT, Judge.

Owens, as county judge, let the contract to repair the court house of Jefferson county to Hilliard for a certain sum, the material and work to be paid for by the contractor. Before entering upon the work Hilliard executed to Owens, as such county judge, a bond conditioned that he would deliver possession of the building, upon the completion of the work, free from any incumbrance, claim for labor or materials or judgment. Hilliard sublet the woodwork to Jones. Plaintiff McFadden furnished Jones materials which were used on the building. Hilliard refused to pay the bill. It was presented to Owens, as county judge, and he refused to pay it. Plaintiff then filed his complaint against Hilliard and Owens, as county judge, to restrain the latter from paying the balance due on the contract to Hilliard, who is alleged to be insolvent, and to enforce a lien for the amount claimed on the fund due Hilliard in the

hands of Owens, as county judge. A demurrer to the complaint was sustained. Plaintiff appealed and filed a motion in this court for a temporary restraining order pending the appeal.

H. King White and *W. M. Harrison* for appellants.

1. As to appellant's right to subrogation, see Sheldon on Subrogation, secs. 1, 11, 222; 16 Ark., 232; 18 *id.*, 508; 31 *id.*, 411; Wood on Ins., title, "Subrogation."

2. Appellants seek no decree or relief against the county —but merely that the amount of their claims as materialmen be paid to them directly, instead of to Hilliard, who is insolvent.

N. T. White, *S. M. Taylor* and *J. W. Crawford* for appellee.

If plaintiff has a claim that can be enforced against the county, even by subrogation, then the damage would not be irreparable, and a restraining order should not be granted. Even if plaintiff is without remedy against the county and would lose his debt, still the order should not be granted, if it appears from the record that upon final hearing the decree will have to be affirmed.

Public buildings are not subject to mechanics' liens. Mansf. Dig., sec. 2999; 49 Ark., 97; Phillips on Mech. Liens, secs. 179—179a.

Neither the county or county judge is liable to garnishment. 31 Ark., 387; Wade on Att., secs. 422, etc. Insolvency alone will not justify an injunction. High, Inj., secs. 10–18. The doctrine of subrogation has no application to this case. Sheldon on Sub., sec. 3.

PER CURIAM. If the appellant has no demand against Jefferson county, and no lien on the fund in suit, and no right to establish a lien by virtue of his suit, he is not entitled to a restraining order. If he has a claim against the county, or a right to a lien on the fund, he will not sustain irreparable injury if the county judge pay the fund to the appellee, because the county being a party, as far as it can

be reached by suit, to this proceeding, will pay out the fund at its peril, and will not discharge its liability if it pays to the wrong person. The county is solvent, and if the appellant establishes his lien, his claim will not be jeopardized by the wrongful payment. But it is only in case of irreparable injury that an injunction issues pending the appeal.

The motion for restraining order will be denied.

THURMAN v. STATE.

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Decided January 10, 1891.

Felony—Plea of guilty—Sentence.

Sentence may be pronounced on a plea of guilty of a felony at a term subsequent to that at which the plea was entered.

ERROR to *Franklin* Circuit Court.

HUGH F. THOMASON, Judge.

J. V. Bourland for appellant.

Appellant was not legally sentenced. The statute requires sentence to be passed *immediately*. Section 2307 is imperative. Bish. St. Cr.

W. E. Atkinson, Attorney General, for the State.

The court had the power to pass sentence. 52 Ark., 285; 45 Cal., 163; 5 Casey (Penn.), 102; 5 Halst., 163; 2 McArthur, 512; 53 Mich., 296.

COCKRILL, C. J. The appellant pleaded guilty to a charge of felony, and the court adjourned without pronouncing the sentence of the law. Before the next term he escaped from prison, but after an absence of several years was recaptured and sentence was formally pronounced by the court in which the conviction was had. The power to pass sentence under these circumstances is the only question pressed by counsel.

Felony—Sentence.

The statute does not require that the sentence shall be pronounced and judgment entered at the same term at

which a plea of guilty is entered, and the entry of the judgment at a subsequent term does not alter or conflict with anything done by the court at the previous term. There is therefore no lack of power in the court, and the judgment may be deferred until a succeeding term. 1 Bish. Cr. Pr., sec. 1291; *People* v. *Felix*, 45 Cal., 163; *U. S.* v. *May*, 2 McArthur, 512; *People* v. *Reilly*, 53 Mich., 260.

Affirm.

PYBURNE *v.* MOSES.

Decided January 10, 1891.

Replevin—Premature action—Costs.

In replevin, where the defense is that the action was brought before defendant obtained possession, it is error to charge the jury to return a verdict for the property in favor of the defendant if the property was in plaintiff's possession at the institution of the suit, defendant in such case being entitled only to costs.

APPEAL from *Lonoke* Circuit Court.

JOSEPH W. MARTIN, Judge.

Moses executed a chattel mortgage to Pyburne as trustee for Munroe. By some means the trustee secured possession of the property. Moses procured judgment for its recovery. On the day an execution on this judgment was expected to be served, but before the sheriff had taken possession of the property, Pyburne made the affidavit in this case and placed the writ of replevin in the hands of a constable.

Immediately after the property was returned to Moses by the sheriff, the trustee demanded it, and, upon refusal by Moses to deliver it, the writ herein was served. All other facts necessary to its understanding are stated in the opinion.

George Sibley for appellant.

1. The instruction given by the court for defendant was not predicated upon the pleadings and proof, and was not

applicable; it was misleading. 14 Ark., 295; 16 *id.*, 655; 23 *id.*, 733; 2 *id.*, 541; 36 *id.*, 646; 42 *id.*, 61.

2. It is not now necessary, as at common law, to make demand before suing out the order of delivery. 35 Ark., 169; 24 *id.*, 264; 8 *id.*, 510; Dig., sec. 5571, *et seq.*

Thos. C. Trimble for appellee.

The suit was prematurely brought. The plaintiff must be out of possession and entitled to the immediate possession at the time the writ is sued out, and, by reason of some wrongful act of defendant, be deprived of possession. It does not lie against one not in possession. 8 Minn., 470; 8 How. Pr., 188; 106 Mass., 600; 40 Miss., 760; 3 A. K. Marsh. (Ky.), 277; 56 Me., 291; 31 Wis., 536; 2 Carter (Ind.), 229; 63 N. C., 505; 2 Shep. (Me.), 414; 12 *id.*, 464; 13 Mass., 224; 48 Ill., 148; 66 Ill., 62. See also 24 Pick., 29; 25 Cal., 555. "That the property is wrongfully detained by the defendant," is a material allegation, and must be proved. Mansf. Dig., sec. 5572 and notes; 40 Ark., 551.

BATTLE, J. W. H. Pyburne, as trustee, brought an action of replevin against Eli Moses for the recovery of two mules, one cow and a wagon, of the aggregate value of $260. He claimed possession under a deed of trust executed by Moses to secure his indebtedness to L. W. Munroe. Moses denied that he was indebted to Munroe, and alleged that the property claimed was in the possession of plaintiff at the commencement of this action. The issues were tried by a jury; a verdict was returned in favor of the defendant for the property or its value; judgment was rendered accordingly in favor of the defendant against the plaintiff; and plaintiff appealed.

On the trial some evidence was adduced tending to prove that appellant was in possession of the property in controversy at the time of the commencement of his action; and the court, among other things, instructed the jury that if the property, at the time the action was instituted, was in the possession or under the control of the appellant, they

should find for the appellee. The question is, did the court err in giving this instruction?

Replevin—Premature action—Costs.

It is contended that, to sustain an action of replevin, it is necessary that the plaintiff allege and prove that he is entitled to the immediate possession of the property sued for, and that the defendant wrongfully holds the same. This contention is correct, but the fact that appellant was in the possession when he commenced his action did not alone give the appellee a right to a verdict or judgment for the property. This fact, if pleaded and proved, would only go in abatement of the suit, and not to establish a right to the possession of the property. Suppose that it had been the only defense pleaded by the appellee, did the trial of the issue presented by it involve the right to the possession? Certainly not. Then the jury could not have been legally required to return a verdict in favor of the appellee for the property or its value. No issue as to the property or its possession could have been tried by them, as no such was submitted. There having been no controversy about the property and its possession, the appellee would not have been entitled to a judgment for the same. In that case it would be unreasonable to say that appellee was entitled to a verdict or judgment for property that he never claimed. The statutes directing that "in actions for the recovery of specific personal property, the jury must assess the value of the property, as also the damages for the taking or detention, whenever, by their verdict, there will be a judgment for the recovery or return of the property," and that, "where the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property, or its value, in case a return cannot be had, and damages for the taking and withholding of the property" (Mansf. Dig., secs. 5145, 5181), only refer to actions in which the issues to be tried involve the right to the possession of the property. This is manifest. It is equally manifest that the fact that appellant was in possession when his action was commenced, pleaded in

connection with other defenses in which the appellee claimed possession, did not entitle appellee to a verdict or judgment for the property or its value. Appellant did not forfeit to appellee his right to the property by bringing his action prematurely. This fact proved nothing, except that the action should not have been brought at the time it was, and entitled the appellee to nothing except costs; and the jury should have been so instructed.

The instruction given was misleading and prejudicial to appellant.

Reversed and remanded.

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LOWENSTEIN *v.* FINNEY.

Decided January 10, 1891.

1. *Trial—Order of proof—Discretion of court.*

   It is within the court's discretion to allow a defendant to introduce further evidence in defense after the testimony is closed and plaintiff's opening argument has been made.

2. *Assignment—Withholding assets—When not fraudulent.*

   An assignment for the benefit of creditors purporting to convey all of the debtor's property, without reservation of any exempt property, is not vitiated by an unintentional withholding of an immaterial portion thereof, being less than he might have claimed as exempt.

3. *Assignment—Attorney's fees.*

   A provision in such assignment for the payment of an attorney's fee for legal services in preparing and perfecting the assignment is not fraudulent.

4. *Assignment—When title vests—Subsequent fraud.*

   In an assignment for the benefit of creditors title to the property vests in the assignee upon delivery of the deed. Any subsequent fraudulent agreement between him and the assignor cannot affect the vested rights of creditors.

5. *Receiver—Appointment—Collateral attack.*

   A chancery court has jurisdiction, upon proper allegations, to appoint a receiver of assigned property; and where such an appointment has been made, its propriety cannot be questioned in a collateral suit.

APPEAL from *Pulaski* Circuit Court.

JOSEPH W. MARTIN, Judge.

Morris M. Cohn for appellant.

1. To allow the re-examination of a witness after the evidence is closed and argument begun was unfair and an abuse of discretion by the court.

2. Where an assignor purports to convey all his assets and reserves a material part, the assignment is void, whether done intentionally or not. Wait, Fr. Conv., secs. 8, 19, 197, 322–3–4; *ib.*, sec. 9; 22 Wall., 513; 6 *id.*, 78–9; 31 Ark., 666–9; 8 N. H., 288; Burrill on Ass., secs. 108–9.

3. The preference of Ratcliffe & Fletcher for services to be rendered in the future avoided the assignment. The fraud of the assignor is sufficient. Acts 1887, p. 194; 2 Sandf., 594; Wait, Fr. Conv., secs. 329, 335, 331; Mansf. Dig., sec. 308; 12 Fed. Rep., 230; 11 *id.*, 297; 13 S. W. Rep., 513; *ib.*, 515; 37 *id.*, 151; 39 *id.*, 66; 107 U. S., 361

4. The whole proceedings in this case were simply an attempt to evade the assignment laws of this State, and secure the disposition of assets of an insolvent debtor, through a trustee, in a mode not contemplated by law. 7 Wend., 239; 13 S. W. Rep., 423–4; *ib*, 513; *ib.*, 716; 52 Ark., 426; 49 *id.*, 117; 9 Fed. Rep., 483.

5. There was an *intentional* withholding of assets by the assignor. This was a fraud. 46 Ark., 405; 13 S. W. Rep., 736; 5 N. W. Rep., 654. He was not entitled to any exemptions unless expressly reserved. 37 N. W., 811; 28 Conn., 47; 26 N. J. S. (Dutcher), 124, 570; 5 Cowen, 584; 48 Ark., 213, 215; 47 *id.*, 400; 49 *id.*, 114; Burrill, Assign., sec. 96. The mere fact that his wife's money went into the property which he bought, would not make it hers. 50 Ark., 42, 46.

Ratcliffe & Fletcher for appellee.

1. Permitting Finney to testify after the evidence was closed and argument commenced was in the sound discretion of the court, and it was not abused.

2. The court properly inserted the word "*intentionally*." No fraud can be deduced from an unintentional withholding of a small amount of household goods. 46 Ark., 405; 85 N. Y., 464.

3. Assignments by which attorneys were preferred for services rendered have been upheld. 12 Fed. Rep., 230; 23 *id.*, 676. The court below found that the preference was for services rendered in preparing the assignment, and not for future services. But if it had been for future services, this does not render the assignment void. This debt is readily separated from the others, and may be entirely stricken out and the provisions stand. 23 Fed. Rep., 13; 5 Grat., 31; 11 Ind., 89; 9 Ala, 704; 4 Baxter (Tenn.), 162; 33 Md., 607; 24 Mo., 75; 18 Ark., 137; Burrill on Ass. (3d ed.), secs. 117, 352–3.

4. When the assignment was executed and delivered, the title vested in the assignee; and the statutory requirements of bond and inventory were conditions subsequent, which could have nothing to do with the *vesting of title* under the deed. The consent or objection of Finney could in no wise affect the title thus vested. 4 Ark., 302; 36 Ark., 406; 37 *id.*, 64; 71 N. Y., 506; 13 S. W., 513. The fraud must be *in the assignment itself*, and not in some act accruing *before or after* the assignment. 88 Penn. St., 167; Burrill on Ass., sec. 351 *et seq.*; 68 Wisc., 442; 71 N. Y., 505.

The trusts arising under general assignments are peculiarly the objects of equity jurisdiction. 2 Story, Eq. Jur., sec. 1037; 4 Ark., 335; 1 Am. & Eng. Enc. of Law, p. 872; Mansf. Dig., ch. 8. See 52 Ark., 429.

5. Withholding a small amount of household goods, which could have been claimed as exempt, and to which creditors had no right except under the assignment, and unintentionally too, as the court found, was not sufficient to avoid the assignment. If property be not subject to execution, a conveyance made "with a bad motive" is not fraudulent as to creditors. 31 Ark., 554; 44 *id.*, 180; 52 *id.*, 102.

HUGHES, J. Appellants sued out an attachment, and had it levied upon a stock of goods and other property of the appellee, which appellee had before then conveyed, by deed of assignment for the benefit of his creditors, to R. A. Little as assignee. Before the assignee had given bond or taken possession of the property conveyed by the assignment, and upon the day of its execution, upon the petition of the German National Bank, the largest preferred creditor of the appellee, the chancery court of Pulaski county appointed R. A. Little, the assignee, receiver, upon the representation in the petition, that the assets were of such a nature that they could not be administered, under the assignment laws of this State, without great loss, and that it was necessary that they should be sold and disposed of at once. Pursuant to the order of the court the receiver filed his bond, took the oath required by law, and took charge of the property.

The contest below was, and in this court is, over the grounds of the attachment, which was discharged by the circuit court, from which the appeal in this case was taken. The grounds of the attachment were, that, immediately preceding the issue of said attachment, W. C. Finney caused to be executed an assignment for the benefit of creditors, for the fraudulent purpose of evading the laws regulating assignments for the benefit of creditors, in this, that the same was executed by the assignor for the purpose of fraudulently covering up assets which the assignment purported to convey; also because it contemplated a mode of disposition in conflict with the law relating to assignments; and because the assignor preferred a claim for the fraudulent purpose of paying for services in opposing the just demands of creditors. The circuit court found the facts to be: "That the debt preferred in favor of Ratcliffe & Fletcher in the assignment of Finney to Little was for legal services in preparing and perfecting the assignment, and not for future services. That the assignment was made in good faith by Finney, and there was no fraud in the same." Appellant saved all exceptions,

and, after motion for a new trial which was overruled, appealed.

1. Trial—Order of proof.

It is contended by counsel for appellant that the circuit court erred in permitting Finney, the appellee, after the testimony had been introduced and the plaintiffs had presented their argument on the subject of the reservation of household goods by Finney, to testify "that he had purchased the household goods with his wife's money, and that said property was hers." On cross-examination Finney had said that he had purchased the goods and paid cash for them, and on redirect examination he said that he paid for them with his wife's money. "The direct examination must be completed before the cross-examination begins, unless the court otherwise directs. Mansf. Dig., sec. 2899. It was within the sound discretion of the court to allow this statement by the appellee in evidence at the time it was made, in furtherance of justice, and there was no abuse of such discretion apparent to this court. Mansf. Dig., sec. 5131; *Evans* v. *Rudy*, 34 Ark., 390.

It is contended that the circuit court erred in modifying the second declaration of law asked for by the plaintiff, which was as follows (as modified by the court only by the insertion of the word *intentionally*): "The assignment in this case contemplated all the property of the assignor, and if he withheld (intentionally) from his assignee any material portion of his property, it is fraudulent as to creditors."

2. Assignment—Withholding assets.

Fraud, though never presumed, like any other fact, may be proven by circumstances, but we do not think that the unintentional withholding by appellee from his assignee of the small amount of household goods referred to was sufficient proof of fraud in this case, and upon this we will not disturb the court's finding. Besides this, more than the amount of property reserved by appellee was exempt to him, and could not have been taken for his debts; and hence his reservation of it could not have been a fraud against his creditors, as he claimed no exemption. *Probst* v. *Welden*, 46 Ark., 405, and cases cited.

Attorney's fee.

It is urged that the assignment was fraudulent because it preferred by its terms a debt of three hundred dollars for attorneys' fees in favor of Ratcliffe & Fletcher, for services to be rendered in opposing the just demands of creditors. But the court below found that this debt was for "legal services in preparing and perfecting the assignment, and not for future services." We think this finding supported by the evidence, and that there was no fraud in this. *Hill* v. *Agnew*, 12 Fed. Rep., 230; *Wooldridge* v. *Irving*, 23 *id.*, 676.

4. Assignment for creditors—Subsequent fraud.

The fourth declaration of law asked for by appellant is as follows: "If, before the assignment was fully executed by the performance by the assignee of the duty of filing bond and making an inventory, the assignor and assignee assented to the appointment of a receiver for the purpose of making disposition of the property in a mode not contemplated by law in cases of assignment for creditors, that was a fraud upon the assignment law or an abandonment of the assignment, and operated, when used for the purpose of locking up property from the process of creditors, in an improper delay and interference with their rights, which would sustain an attachment."

When the deed of assignment was signed, acknowledged and delivered by Finney to Little, the title vested in Little, and the statutory requirement that Little should file a bond and inventory before he could control the property was a condition subsequent, which could have nothing to do with the vesting of title under the deed. They were requirements with which Finney had nothing to do. The consent or objection of Finney could in no wise affect the title thus vested. Conway, *ex parte*, 4 Ark., 302; *Clayton* v. *Johnson*, 36 Ark., 406; *Thatcher* v. *Franklin*, 37 Ark., 64; *Brennan* v. *Willson*, 71 N. Y., 506. Nor could the consent or any fraud on the part of either Finney or Little, subsequent to the delivery of the assignment, affect the rights of the creditors. The fraud must have been in the assignment itself, and not in some act accruing before or after the assignment. *Wilson* v. *Berg*, 88 Pa. St., 167; Burrill on Assignments,

sec. 351 *et seq.; First National Bank* v. *Baker*, 68 Wis., 442.

5. Appointment of receiver cannot be collaterally attacked.

There was really no evidence to support this declaration of law, as there was no proof that the purpose in seeking the appointment of the receiver was to make a disposition of the property "in a way not contemplated by the assignment laws, and for the purpose of putting the property out of the reach of creditors." In *Penzel Grocer Co.* v. *Williams et al.*, 53 Ark., 81, Judge SANDELS, delivering the opinion of the court, said: "The power of the chancery court, in the absence of statutory regulations, to supervise the execution of trusts, as also the power of chancery, notwithstanding the statute, to interfere upon proper allegations of irreparable loss, mismanagement, incompetency of trustees, etc., has never been questioned." It is true that the practice of interference upon the part of the chancery court, without sufficient allegations and showing, is condemned in that opinion.

But, if the appointment of the receiver in this case was improperly made, that question is not before us on appeal, and cannot be raised in a collateral suit. The judgment of the chancery court cannot be thus attacked. The chancery court had jurisdiction to appoint the receiver. Conway, *ex parte*, 4 Ark., 335; 1 Am. & Eng. Encyclopedia of Law, p. 11, 872; 2 Story's Equity, sec. 1037.

Finding no error the judgment of the circuit court is affirmed.

SOUTHERN EXPRESS CO. *v.* TEXARKANA WATER CO.

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Decided January 17, 1891.

1. *Public street—Excavation—Negligence.*

One who digs a trench in a public street is liable for an injury resulting from a negligent performance of the duty to restore the street to the condition it was in before the excavation, as where he fails to anticipate and provide for the natural effect of rains upon earth excavated and replaced.

2. *Notice of defect.*

One whose wrongful or negligent act has caused a defect in a public street will be liable for injuries resulting therefrom, although he has no actual notice of the existence of such defect. He is bound to take cognizance of the natural consequences of his act.

APPEAL from *Miller* Circuit Court.

C. E. MITCHEL, Judge.

Action on behalf of the Southern Express Company to recover damages for the killing of a horse, occasioned by the negligence of the Texarkana Water Company in filling a trench which it had dug in a public street in the city of Texarkana, for the purpose of laying a water pipe. There was verdict and judgment for defendant. Plaintiff has appealed, and assigns errors in the court's charge.

Scott & Jones for appellant.

The acceptance by the city did not in any manner release the water company from its responsibility from negligence. Authority cannot be given to endanger public safety. The city could not justify against a nuisance created by its officers, nor can any one justify against a nuisance created under a license from the city. Wood on Nuisances, 2d ed., sec. 274; Viner's Abr., "Nuisance." The acceptance by the city does not relieve the company. 44 N. Y., 132; 52 Ind., 428. The seventh instruction clearly erroneous. A party erecting a nuisance is *immediately* liable. 18 Minn., 324; S. C. 10 Am. Rep., 184, and cases cited; 21 Barb., 409. Besides it is inconsistent with the eighth instruction. The charge is not harmonious.

Byrne & Jones for appellee.

The proof shows authority from the city; the ditch was dug and refilled in the usual way, *all the dirt* being replaced. The company exercised reasonable care and caution. This is all the law requires. Whart. on Neg., sec. 816; Thomp. on Neg., vol. 1., p. 262; Cooley on Torts, p. 626. To charge the company the proof must be positive and clear that the injury was the unmixed result of the negligent act sought to be charged. 105 N. Y., 202; Thomps. on Neg., vol. 2, p. 762 (note 6.) Before one can be charged with the burden of a nuisance, it must appear that he had some knowledge of it or by the exercise of reasonable care could have known it. 2 Thomps. on Negl., 762, note 6; Lawson, Rights, Rem. & Pr., vol. 3, p. 1759, sec. 1033; 30 Mass. (13 Pick.), 94; 124 Mass., 165; *ib.*, 289; 80 N. Y., 212; 12 N. Y., 486; 51 N. Y., 573; 104 N. Y., 344.

The law does not hold a city as an insurer of the safety of streets, nor does it impose a greater responsibility on a person using the street with the city's permission, nor is one using the streets under a license an absolute insurer of its safety, when he returns the street to the city. 109 N. Y., 134; 77 Me., 287; 2 Th. on Neg., pp. 745, 765, notes.

COCKRILL, C. J. The charge of the court is to be condemned for the reasons pointed out in *Davis* v. *Railway*, 53 Ark., 129. All of its parts cannot be made to harmonize. Without dwelling upon the inconsistencies, there is positive error in the seventh instruction given at the instance of the appellee, who was the defendant below, which no incidental explanation in another part of the charge could rectify. In effect it declares that the defendant was not liable for the injury sustained by the plaintiff, even though it was guilty of negligence in filling the trench which caused the injury, if the trench had been suddenly washed out by rains, and the defendant was not apprised of its dangerous condition and could not have known of it by the exercise of reasonable

diligence. That construction of its meaning is as favorable for the defendant as ought to be placed upon it.

1. Negligence —Excavation in public street.

If the defendant was negligent in the performance of its duty to restore the street to the condition it was in before the excavation, and by reason thereof the rainfall, which came in the ordinary course of nature, displaced the newly filled earth, then its negligence was the proximate cause of the defect in the street, and it was liable for the resulting injury. "It was not enough that the defendant left the work in a proper and safe condition for the time, but it was its duty to anticipate and provide for the natural effect of rains upon earth excavated and replaced," and it is liable for any injury resulting from its neglect to do so. *Johnson* v. *Friel*, 50 N. Y., 679; *Dillon* v. *Washington Gas Light Co.*, 1 McArthur, 626; *Reeves* v. *Larkin*, 19 Mo., 192.

If guilty of no negligence in the performance of its duty to replace the street in the condition in which it found it, the defendant would not be liable for a dangerous condition subsequently occasioned by natural causes.

2. Notice of defect.

The doctrine of notice of the defect in the street as a prerequisite to liability, which is applicable to cases in which there is a duty resting upon the defendant to keep streets in repair after they have been properly constructed, has no application to a suit against one whose active agency has brought about the danger in the street. He is bound to take cognizance of the natural consequence of his own wrongful or negligent act. The instruction made an improper application of that rule, and is erroneous for that reason also.

For the errors indicated the judgment will be reversed, and the cause remanded for a new trial.

It is so ordered.

HUDSPETH v. WALLIS.

Decided January 17, 1891.

Formation of school districts—Construction of act of 1887.

The act of April 8, 1887, which provides that "the county court shall have the right to form new school districts or change boundaries thereof, upon a petition of a majority of all the electors residing upon the territory to be divided," contemplates a petition by a majority of the electors of all the districts combined, and not a majority of the electors of each district separately.

APPEAL from *Hot Spring* Circuit Court.

J. B. WOOD, Judge.

Anthony Wallis and others petitioned the county court for the formation of a new school district, to be composed of territory taken from four existing districts. Hudspeth and others, electors residing in one of the districts to be affected, intervened to resist the application. The court dismissed the petition upon the ground that a majority of the electors in one of the four districts had not signed the petition in favor of the new district. Upon appeal the circuit court found that, while a majority of the electors in one of the districts had not signed the petition in favor of creating the new district, a majority of the electors in the four districts combined had signed it. Upon this finding, judgment was rendered granting the petition. Intervenors have appealed.

M. M. Duffie for appellants.

A majority of the electors of district No. 8 failing to sign the petition, it was error to dismember their territory without their consent. Acts 1887, p. 286. It requires a majority of all the electors residing upon the territory of the districts to be divided. See Mansf. Dig., sec. 6175, as amended by Acts 1887. A majority of the electors of district No. 8 failed to sign the petition—a majority of the electors, taken as a whole, of the four districts is not sufficient.

Ratcliffe & Fletcher for appellees.

School districts are the creatures of the legislature, which can make or unmake them at pleasure, and say how they shall be formed, modified or destroyed. 30 W. Va., 424; 3 N. H., 524; 92 U. S., 307; 100 U. S., 514; 33 Ark., 497. The language is, "a majority of *all the electors* residing upon the territory of the districts to be divided." The agreed statement of facts shows that the petition was signed by a majority of the electors of said school districts, and there is nothing in the act to indicate that a majority of *each* district is requisite. Acts 1887, p. 286; Mansf. Dig., secs. 6175, 6335. No distributive words are used. Words must be taken in their plain, unambiguous sense. 37 Kans, 240; Endlich, Int. St., sec. 4.

School districts—How formed.

COCKRILL, C. J. The question presented by this appeal is as follows: In the formation of a new school district from parts of territory of several previously organized districts is the county court authorized to act upon the petition of a majority of the electors of the several districts, whose territory is to be dismembered, acting in conjunction; or does it require the consent by petition of a majority of the electors of each of said districts?

It is conceded that the question must be answered by construing the following section of the statute, viz.: "The county court shall have the right to form new school districts or change boundaries thereof upon a petition of a majority of all the electors residing upon the territory of the districts to be divided." Mansf. Dig., sec. 6175, as amended in 1887. Acts of 1887, p. 286.

It is obvious that it was not the legislative intent to authorize the formation of a new school district upon the petition merely of a majority of the electors residing in the territory of the district petitioned for. The part left, as well as the part taken, of each dismembered district is interested in the change, and the intent was to give the electors in both parts a voice in the matter. But the intention to give

each district a veto power upon every effort to change its boundary is not apparent. If that had been the design, it could have been plainly expressed by a slight change of phraseology, as by saying, "a majority of the electors residing upon the territory of each district to be divided." Instead of that we have this language, "a majority of *all* the electors"—that is, a majority of the aggregate or whole number of the electors—"residing upon the territory * * * to be divided;" or, what is the same thing, "residing upon the territory of the districts to be divided," for there is no word to convey the idea of distributive or separate action by the districts to be divided. It is the majority of all combined, and not a majority of each separately, that is required.

The agreed statement of facts disclosed that the petition in this case was signed by a majority of all the electors residing in the several districts proposed to be divided, and that they comprised a majority of those residing in each district, save one in which a majority was not obtained. But the majority in one old district, which was to furnish a component part of the new district, could not defeat the will of a majority of the electors in all the districts to be divided.

The circuit court ruled in accordance with these views, and its judgment is affirmed.

FORD v. ADAMS.

54 137
62 407

Decided January 17, 1891.

1. *Judgment—Constructive service.*

Personal judgment cannot be rendered upon constructive service. Mansf. Dig., sec. 5200.

2. *Process—Steamboat owner.*

A judgment in a justice's court against the owner of a steamboat upon service of process had in another county is void, unless the record shows the steamboat was "found" in the county in which the action was commenced. Mansf. Dig., sec. 4986.

APPEAL from *Desha* Circuit Court.

JOHN M. ELLIOTT, Judge.

J. W. Dickinson for appellant.

The justice certainly had jurisdiction of the subject matter, and hence the only question is, did he acquire jurisdiction of the persons? Mansf. Dig., secs. 4986–7–8, would seem to settle this.

As to errors in assumption of jurisdiction, the office and scope of *certiorari* and the remedy by appeal, see 28 Ark., 87; 37 *id.*, 318; 44 *id.*, 509; 43 *id.*, 341.

Murphy & Gates for appellees.

This being a proceeding under a "special statute" (Mansf. Dig., secs. 4986–7–8), its provisions must be strictly followed; every fact necessary must be affirmatively shown. 64 N. C., 132. The action was commenced by filing a complaint and issuing summons, and as the jurisdiction is governed by sec. 4029 Mansf. Dig., the service was void. If those sections were ever the law they are repealed by sec. 4035 Mansf. Dig.

Nor is there any allegation that the boat was "found" in Desha county, and nothing in the record to show it. *Certiorari* was the proper practice. 39 Ark., 347; 28 *id.*, 87.

HUGHES, J. Appellant filed a complaint against appellees before a justice of the peace of Desha county, Arkansas, stating that appellees were indebted to him in the sum of

$67.30, and claiming $30 damages, alleging that the appellees were part owners of the steamboat James Lee, and had chartered said steamer, and were running her on the Mississippi river, carrying freight and passengers for hire, and that they were responsible for contracts made by themselves or her master, Mark Cheek, who was running said boat as a common carrier; that the appellant, on the 15th day of January, 1889, by his agent, delivered upon said boat, at Arkansas City, a lot of goods and merchandise of the value of $67.30, to be carried for a consideration, and to be delivered at Stormville, Mississippi, a way landing between Memphis and Arkansas City; that the said goods were not delivered at Stormville. Summons was issued upon the filing of the complaint, by the justice of the peace, directed to any constable of Desha county, commanding him to summon appellees to appear before said justice on the 15th day of July, 1889, and answer the complaint, which summons was served on appellee, John D. Adams, at Little Rock, Arkansas, by the sheriff of Pulaski county, and on appellee, James Lee, at Memphis, Tennessee, by one Jesse Williams, whose return was sworn to. On the return day judgment by default was rendered against appellees, who brought up to the Desha circuit court by *certiorari* the proceedings before the justice of the peace. The circuit court found that the justice did not acquire jurisdiction of the persons of the appellees, and ordered that the judgment be quashed, to which appellant excepted and appealed.

Section 4986 of Mansfield's Digest provides that "When any action to recover judgment against the owners or officers of any steamboat, or vessel, or other water craft, for any debt or liability created by them, or either of them, shall have been commenced in any county in which said steamboat, vessel or water craft was found, and, from any cause, the summons or other process cannot be served in such action in the county where such action was commenced, a service in any other county in this State shall have the same effect as if made in the county where the action was

brought." Section 4987 provides that "Where a defendant is out of this State, the plaintiff may take a copy of the complaint, certified by the clerk, with a summons annexed thereto, warning such defendant to appear," etc. Section 4988 provides that "The certified copy and summons, with affidavit and certificate, as provided in the last section, being returned and filed in the action, shall be deemed an actual service of the summons in due time for trial at the first term commencing not less than sixty days after such service."

1. Judgment—Constructive service.

The appellant's counsel contends that, the service on James Lee in Memphis, Tenn., and the return having been made in accordance with these sections, the justice obtained jurisdiction of his person, and that the judgment is valid as to him. But section 5200 of Mansfield's Digest provides that "No personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this State, as provided in section 4987, and who has not appeared in the action." *Silver* v. *Luck*, 42 Ark., 268.

2. Process—Steamboat owner

Of the person of the other appellee, John D. Adams, the justice obtained no jurisdiction, because Adams did not appear, and the summons issued by the justice in Desha county was served on Adams in Pulaski county, Arkansas; and because it nowhere appears that the steamboat, James Lee, "was found" in Desha county (section 4986, *supra*). "A justice's court possesses only a special, limited and inferior jurisdiction. Its proceedings must consequently show such facts as constitute a case within its jurisdiction, or the law regards the whole as *coram non judice* and void." *Reeves* v. *Clarke*, 5 Ark., 27; *Anthony, ex parte*, 5 Ark., 358; *Everett* v. *Clements*, 9 Ark., 480; *Butler* v. *Wilson*, 10 Ark., 316; *Boothe* v. *Estes*, 16 Ark., 104.

The jurisdiction of justices of the peace is co-extensive with the county in which they are elected or appointed. Section 4027 Mansfield's Digest. The territorial act of 1829 expressly limited the jurisdiction of a justice of the peace to the township in which he resided, except in crim-

inal cases and cases where, by statutory provisions then in force, two justices are necessary to form a court. In *Leadbetter* v. *Kendall*, 1 Hempstead's C. C. Rep., 302, it was held that under this act a justice of the peace could not issue process beyond the confines of his township, except in the two cases indicated by the statute, and that when he did so, the act was wholly unauthorized and void.

The judgment of the justice of the peace in the case at bar, having been rendered without service upon or appearance by appellees, was void, and the judgment of the circuit court quashing the same is affirmed.

NEWGASS *v.* RAILWAY COMPANY.

54 140
68 605
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71 191

54 140
188 540

Decided January 17, 1891.

1. *Railway—Right of way—Valuation.*

In a condemnation proceeding instituted by a railway company, the value of land taken for its right of way is to be estimated as of the time the petition was filed.

2. *Damages for additional fencing.*

In such a proceeding where the taking of one's land by a railway company for its right of way impairs the value of his contiguous land, in view of its probable future use, by the requirement of additional fencing, such fact may be considered as an element of damage.

3. *Damages for overflows.*

Where the appropriation of part of one's land and its use as a railroad resulted in flooding the remainder of his land, the damage so occasioned should be included in the assessment of damages; but no account should be taken of injuries thereafter to result from an improper construction or maintenance of the road-bed, for the condemnation does not authorize either.

4. *Measure of damages—Value of railroad track.*

In the estimate of the owner's damages for the right of way, the value of the track previously placed thereon without his license, but with a view of subsequently acquiring the right of way, should not be included. The measure of compensation is the value which the land taken would have had if the road had not been constructed on it, together with the difference between the present value of the owner's contiguous land, with the

road constructed where it is, and what it would have been if the road had not been built. And, in determining the value of the land taken, any appreciation or deterioration that may have resulted to it specially by reason of the building of the road on it will be disregarded, but such as may thereby have resulted to it in common with other lands in the same community will be considered.

APPEAL from *Jefferson* Circuit Court.

JOHN A. WILLIAMS, Judge.

Condemnation proceedings instituted by the St. Louis, Arkansas and Texas Railway Company for the assessment of damages for the right of way of its railroad previously built without license across certain land belonging to Benjamin Newgass. Upon the trial the court held:

"1. That the period to which reference should be made, in estimating the damages of Newgass for the right of way sought herein by the railroad company was the time when the said company entered upon the property mentioned in the company's petition, and built its railroad upon it, and not the day of filing its said petition herein.

"2. That said Newgass was entitled to recover nothing for fences or overflow."

Morris M. Cohn for appellant.

1. The time with reference to which the value of the land is to be ascertained is the date of the filing of the petition to condemn, and not the date of entry. Beach on Railroads, sec. 846; 31 Am. Dec., note 372; Mansf. Dig., sec. 5458; Acts 1885, p. 179. So long as the prerequisites are not conformed to, ejectment will lie. Beach on R. R.'s., sec. 830, note 2, sec. 850; 1 How. Pr., 214; 89 Pa. St, 282; 57 Cal., 417; 66 Pa. St., 404; 34 Ill., 195; 41 Iowa, 419; 40 Wis., 653; 8 Watts and S., 459; 13 Kans., 496; 45 Iowa, 23; 67 Ill., 191; 17 Minn., 215; 48 Ind., 178; 70 Ala., 227; 56 Tex., 66; 54 Wisc., 136; 68 Pa. St., 189; 33 N. J., 115; 90 Ill., 316; 51 Ark., 504; 32 N. W. Rep., 162. See also, 3 N. E. Rep., 720; 10 *id.*, 372; 115 Mass., 1, 13; 117 *id.*, 302; 68 Ind., 137; 61 Ill., 115; 91 Ill., 49,

52; 28 Minn., 503; 30 *id.*, 100; Dill. Mun. Corp., vol. 2, sec. 971, note 1 (4th ed.)

2. What is to be considered in ascertaining the value of property taken? Is Newgass entitled to recover the value of the railroad bed? Railroads enjoy the State's prerogative of eminent domain. 31 Am. Dec., note 372. And when it exercises the privilege of taking private property without leave, it must do so *cum onere*. If it departs from the statute, it is a trespasser. Beach R. R.'s, sec. 830; 3 So. Rep., 252; 32 N. W., 162; 12 Pac. Rep., 362; 11 N. W. Rep., 253.

The law is well settled that a trespasser acquires no rights as against the owner reclaiming his property. Cooley, Torts. (1st ed.), 55, 56; 37 Mich., 332; Bish. Non-Cont. Law., secs. 101, 939. One who puts improvements upon another's property loses them with the property. 24 Ark., 109; 16 *id.*, 182; 31 *id.*, 334, 344–5; Sedg. & W. Trial of Title, etc., secs. 694, 713. When the railroad filed its petition, the land and the road-bed belonged to appellant. 47 Cal., 515, and cases *infra*. Ewell, Fixt., 57–8–9 and notes; 13 Pac. Rep., 300; 97 Mass., 279, 283; 128 *id.*, 391; Tiedeman, Real Prop., sec. 2; Ewell, Fixt., 277 note, 308 note; 13 N. E. Rep., 680; 3 So. Rep., 252; 11 N. W. Rep., 253; 37 Ohio St., 147; 29 Minn., 256; 106 U. S., 196; 9 Cranch., 11, 210, 211; 13 Pet., 498.

3. If the value of the road-bed cannot be recovered, what can be? Most certainly the depreciation in value of the balance of the land by reason of damage from overflow and additional cost of fencing. The value of the land taken for any special purpose, such as town site, etc. See 41 Ark., 202, 208; *ib.*, 431; 49 *id.*, 381–7; 51 *id.*, 324; 39 *id.*, 167; 44 *id.*, 258; 42 *id.*, 528; Beach. R. R., secs. 821–2; 44 Ark., 258.

J. M. & J. G. Taylor and *Sam H. West* for appellees.

By the judgment of the Federal court, and of this court in 51 Ark., 491, the railroad company was neither a trespasser nor liable to be ejected therefrom, and the common

law cases on trespass are without application. All that the owner is entitled to is compensation. The attitude of a railroad that has gone upon lands without making compensation is described in 15 Pick., 198. See also, Lewis, Em. Dom., p. 618, sec. 477.

The rule of compensation is the value of the land at the time of taking, without any enhanced value by reason of the construction of the road. Lewis, Em. Dom., sec. 507; Rorer on Railroads, vol. 1, 366, 380. That appellant was not entitled to the road-bed, or its value: see 46 Cal., 87; Lewis, Em. Dom., sec. 507; 70 Ala., 227; 14 A. & E. Cases, 217. The rule that everything affixed to the lands becomes part of the freehold, was never inflexible, and has always been subject to exceptions. 2 Peters, 137; 30 Md., 347; 2 Kent, 338; Amos & Feard on Fixtures, 10. And one of the exceptions is, that when a railroad enters wrongfully this does not preclude it from subsequently resorting to appropriate proceedings for the acquisition of the land, and, of consequence, availing itself of all structures it may have placed thereon. 87 Penn. St., 28; 23 Wall, 108; 39 Mich., 575; 42 Wis., 538.

Just compensation to the land owner is all he can claim, and this includes the value of the land taken and the injury to the remaining lands. 42 Ala., 83; Cooley, Const. Lim., 705-12; 87 Penn. St., 28 and cases *supra;* 28 N. J. Eq., 450; Pierce on Railroads, 209. See also 39 Mich., 680; 7 Allen, 313; 105 Mass., 303; 125 Mass., 1; 127 *id.*, 571; 1 Rorer, R. R., 380.

There was no error in the court in holding that appellant was not entitled to anything for fencing or overflow. The lands were unimproved and swampy, and neither cost of fencing nor overflow were elements of damage in view of the testimony. 42 Ark., 528, 529; 39 *id.*, 168, 171; 1 Rorer on R. R., 392-4.

HEMINGWAY, J. This appeal presents for our consideration three alleged errors—all relating to the rule adopted by

the court below for assessing the amount to be paid appellant as compensation for taking his land for a railroad.

1. Condemnation—Valuation.

1. It is insisted that compensation should have been assessed with reference to the value of the land taken as of the time of filing the petition, and not as of the time of the entry upon the land by the corporation.

Upon this question the courts in different States have established different rules. It is held by some that the assessment should be made with reference to the time of entry; by others, with reference to the time of filing the petition; and by still others, with reference to the time of the award. Lewis on Eminent Domain, sec. 477 and cases cited. The court below adopted the first rule, against the objection of the appellant who contended for the second one. We recall no case in which the question has been presented for the decision of this court; but there are references by the court to it, and, in so far as they indicate an opinion, it is favorable to the contention of appellant. Either rule is liable to operate harshly in special cases—as well against the land owner as the corporation—but we see nothing in the one contended for which indicates that it would more often work harshly than either of the others; and it has the advantage of fixing a certain and definite time with reference to which the estimate must be made. Besides the corporation has the right to acquire the land; when it files its petition, it declares its purpose to appropriate it and to render just compensation to the owner. Until it has done that, it is in default; but afterwards it can do nothing more until, in the regular course of procedure of the courts, a legal ascertainment of the amount to be paid is made. As the filing of the petition is the attempt to assert the right of condemnation, and subsequent delay is without fault of either party, it seems fair to each alike that the assessment should be made with reference to value as of that date. Lewis on Eminent Domain, sec. 477 and cases; *Burt* v. *Merchants' Ins. Co.*, 115 Mass., 1; *The South Park Com'rs* v. *Dunlevy*, 91 Ill., 49.

There was evidence tending to prove that the land had advanced in value between the time of entry and that of filing the petition, and we cannot hold that the error of the court in making its assessment with reference to the earlier date did not prejudice the appellant. For this error, the judgment must be reversed; and as the other points raised will be presented in the future trial of the cause, it is proper that we determine them.

2. It is assigned as error that the court ruled "that Newgass was entitled to recover nothing for fences or overflow."

2. Damage for fencing.

The appellant was entitled to be compensated for the taking of his land—to no more and to no less. If the taking impaired the value of his contiguous land, he was entitled to be compensated to the extent of such impairment, in addition to the value of that taken. If, in view of the probable future use of the remainder, additional fencing would be necessary, and this fact rendered it less valuable than it would otherwise have been, then such fact would be an element of damage. Such damage is not necessarily the cost of increased fencing, but the amount of depreciation in the value of the land caused by the increased burden upon its use. There is nothing in the proof to show that, in order to use and enjoy the lands, as they probably would be used in future, any additional fencing would be necessary. There was therefore no error in the court's ruling in that regard. Lewis, Em. Domain, sec. 498 and cases cited; *Railway* v. *Combs*, 51 Ark., 324.

3. Damage for overflows.

If the appropriation of the part and its use as a railroad resulted in flooding the remainder of appellant's lands, the damage so occasioned should be included in the assessment; but no account should be taken of injuries thereafter to result from an improper construction or maintenance of the bed, for the condemnation does not authorize either, and the corporation that condemns the land will be liable for such injuries as may thereafter result therefrom. *Railway* v. *Rhea*, 44 Ark., 258; *Railway* v. *Henry*, *id.*, 360.

4. Value of railroad track

3. It is insisted that the court erred in refusing to include, in its estimate of the value of the land taken, the value of a railroad previously constructed upon it by the appellee or its vendors. It is argued that the railroad was built on it by a trespasser; that it became a part of the land, and as such passed to the landowner; that when the petition was filed, the railroad was as much the property of the appellant as the soil itself, and could not be taken from him without just compensation.

There is an old maxim that "Whatever is affixed to the soil, belongs to the soil;" and it is a general rule of the common law that a trespasser who builds on another's land dedicates his structure to the owner. The reason of the rule, which has been often stated, is that the entry was a trespass to the injury of the owner, and that the trespasser could not add further injury by tearing down and removing the building, for in that the law contemplates that an injury to the soil will result as a necessity. The trespasser has no legal right to acquire the soil, and when he places on it a building which can not be removed without some injury to it, it will be presumed that he intended to dedicate the building to the use of the land, and not that he contemplated a second trespass. He could not remove the building, for its severance would damage the soil; he could not exact pay for it, for he could not impose upon the owner of the soil an obligation to pay for improvements which he had not authorized and may not have desired. Those reasons fail when applied to the case at bar. The corporation had the right to enter upon the land for purposes of survey, and to appropriate it on making just compensation. It is therefore not necessary to presume that, when it built its railroad, it intended either to dedicate it to the use of the land, or to commit another trespass to the damage of the land; but it is more reasonable to presume that it intended to retain the railroad for use as such, and lawfully to acquire the land upon which it rested. The railroad was not built to improve the ground or to enhance its ordinary utility, but to be used

as part of an easement for public purposes, entirely independent of the ordinary uses of the ground. To the rule relied upon exceptions have always been recognized, increasing with the importance and value of personal property and with the demands and exigencies of society; and, as its reasons fail in this case, we do not think it should control.

All that the constitution guarantees or the law demands is that just compensation shall be made to the owner in return for property appropriated by the public. A rule that would exact of a corporation the payment of a sum to cover the value of a railroad as such, constructed at its own expense, would go beyond the demands of justice, and could find no sort of countenance in conscience or in law outside of the strict letter and fanciful presumptions of the rule stated.

The same question has been often adjudicated by the courts of the highest dignity and learning in sister States, and the decided weight of adjudged cases is against the appellant. Aside from adjudication, reason and justice condemn the contention. *Justice* v. *Nesquehoning, etc., Ry. Co.*, 87 Pa. St., 28; *Toledo, etc., Ry. Co.* v. *Dunlap*, 47 Mich., 456; *The Chicago, etc., Ry. Co.* v. *Goodwin*, 111 Ills., 273; Lewis, Em. Dom., sec. 501 and cases cited; *Jones* v. *N. O., etc., Ry. Co.*, 70 Ala., 227; *Searl* v. *Sch. Dist.*, 133 U. S., 553; *Lyon* v. *Green Bay, etc., Ry. Co.*, 42 Wis., 538.

In most of the cases relied upon by the appellant the claim to improvements was presented in such form that, if it were sustained, a separation of the improvements from the land would become necessary, or some other prejudice result to the land owner. But neither would result in this case, for the corporation acquires the land, as it lawfully may do, upon the payment of just compensation, and holds the road built thereon at its own expense without cost or detriment to the appellant.

The injury resulting to the appellant from the unauthorized entry might have been promptly checked and redressed, if need be, by an appeal to the courts. That it was borne

so long, argues that it did not assume a violent or aggravated form.

The measure of compensation is the value which the land taken would have had at the time of filing the petition, if the road had not been constructed on it, together with the difference between the present value of the owner's contiguous land, with the road constructed where it is, and what would have been its present value if the road had not been built. *Lyon* v. *Green Bay, etc., Ry. Co.*, 42 Wis., 538. And in determining as to the value of the land taken, any appreciation or deterioration that may have resulted to it specially by reason of the building of the road on it will be disregarded, but such as may thereby have resulted to it, in common with other lands in the same community, will be considered.

As the corporation has been in the enjoyment of the land, the damages assessed will bear interest from the date of filing the petition.

For the error indicated, the judgment will be reversed, and the cause remanded for further proceedings.

[54 148
55 399]

GILKERSON-SLOSS COMPANY *v.* FORBES.

Decided January 24, 1891.

Homestead under act of Congress—Mortgage.

One who has become entitled to a patent, under the homestead act of Congress, may mortgage the land before the patent is issued.

APPEAL from *Franklin* Circuit Court.
HUGH F. THOMASON, Judge.

Ed H. Mathes for appellants.

BATTLE, J. This action was instituted by Gilkerson-Sloss Commission Company to foreclose a mortgage executed by E. Forbes and his wife upon land acquired by Forbes from the United States under the homestead act of Congress. It

was executed after Forbes entered the land and made the proof of residence and cultivation necessary to entitle him to a patent, and after he had received from the proper officer a final receipt, but before the issuance of the patent; and was given to secure a note executed at the same time. The court below held that this mortgage was void, and dismissed the action.

The judgment of the lower court was evidently based on section 4 of an act of Congress, entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, which provides: "No lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor." Does it sustain the judgment of the court?

Mortgage of homestead.

When a person does everything that is necessary to entitle him to a patent for a tract of public land, he becomes the equitable owner thereof. The land is segregated from the public domain, ceases to be the property of the goverment, and, in the absence of limitations and restrictions legally imposed, becomes subject to private ownership and all the incidents and liabilities thereof. *Simmons* v. *Wagner*, 101 U. S., 260; *Deffeback* v. *Hawke*, 115 U. S., 392; *Wirth* v. *Branson*, 98 U. S., 118; *Carroll* v. *Safford*, 3 How., 441; *Myers* v. *Croft*, 13 Wal., 291. Section 4 of the homestead act was certainly not intended for any such restriction or limitation. But it was intended for the protection of the settler, and as an inducement to him to settle upon, cultivate and improve the public land, by assuring him that he should not be disturbed, and his land taken from him by his creditors, by virtue of legal process founded on any debt contracted before his patent was issued. The language of the section is: "No lands acquired under the provisions of this act shall in any event become *liable*, etc. Shall become "liable," that is, subject to be taken without express or tacit stipulation under the rules of law or equity. It was not intended as a prohibition upon the right of the settler to

alienate by deed or mortgage, after he becomes entitled to a patent. It would illy comport with the spirit of the act to place such a restriction upon the power of the settler. The tendency of it would be to defeat the object of the act by making the acquisition of land thereunder less desirable. For it is well known that patents do not issue in the usual course of business in the general land office until several years after the final receipt, or certificate of entry, is given; and such a restriction would, for many years, deprive the settler of a source of credit which might, in many cases, be valuable. In short, it would be an injury to the prudent and necessitous settler and serve no important purpose of public policy.

The limitation on the right to alienate, imposed by the homestead act, is confined to the period which expires when the settler becomes entitled to a patent. In order to prevent him defeating the object of the act, he is required to make an affidavit, upon applying, and before he is permitted to enter, that his application to enter is made for his *exclusive* use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either *directly or indirectly*, for the use or benefit of any other person; and, after the expiration of five years, to prove by two credible witnesses that he has resided upon or cultivated the land entered by him, for the term of five years immediately succeeding his entry, and make an affidavit that no part of the land has been alienated, except for church, cemetery, or school purposes, or for right of way for railroads. After this there is no express limitation in the act upon the right of the settler to alienate. This clearly indicates that the intention of the act is that he shall be free to dispose of the land as he wishes after he becomes entitled to a patent to the same.

Our conclusion is that a creditor cannot in any manner acquire an involuntary lien on land acquired by his debtor under the homestead laws of the United States to secure a debt contracted before the issuance of the patent, but that the owner of the land can mortgage it, after he becomes en-

titled to a patent, to secure such debts. *Cheney* v. *White*, 5 Neb., 261; *Jones* v. *Yoakam*, *id.*, 265; *Nycum* v. *McAllister*, 33 Iowa, 374; *Newkirk* v. *Marshall*, 10 Pac. Rep., 571; *Webster* v. *Bowman*, 25 Fed. Rep., 889; *Lewis* v. *Wetherell*, 31 N. W. Rep., 356.

The judgment of the court below is reversed, and the cause is remanded with instructions to sustain the demurrer to the appellees' answer, and for other proceedings not inconsistent with this opinion.

WORTHEN *v.* THOMPSON.

Decided January 24, 1891.

1. *Replevin—Stolen property.*

   A sheriff who has paid money to recover stolen property is not entitled to reimbursement therefor, as for "expenses incurred in the preservation thereof." (Mansf. Dig., secs. 2418–19.)

2. *Promise to pay for stolen property—Consideration.*

   A promise by the owner of stolen property to pay for its surrender is without consideration.

APPEAL from *Pulaski* Circuit Court.

JOSEPH W. MARTIN, Judge.

Thompson was robbed of a gold watch. Worthen was sheriff of the county at the time. Learning where the watch was and believing it would be a valuable clue in aiding to capture the robber, he bought it for $90. The robber was never captured, and afterwards Worthen offered to deliver it to Thompson upon repayment of the above sum. At first he agreed to do so; afterwards he declined to pay it, and, upon Worthen's refusal to deliver the watch, brought this suit. The court upon these facts rendered judgment for the plaintiff.

C. B. Moore for appellant.

1. Worthen as sheriff was entitled to the amount paid by him for the recovery of the watch, under secs. 2416–19

of Mansf. Digest. The $90 was paid for the *preservation* of the watch *to the owner.*

2. When appellee was informed of all the circumstances, *he promised to repay* the amount. This was based upon a *valuable* consideration, with knowledge of all the facts. 1 Pars. Cont. *p. 446; 5 Pick., 384; 71 Me., 596; 102 Mass., 60; 3 Ind., 41; 121 Mass., 529–30; 57 Iowa, 307; 3 Scott, 250.

Thomas B. Martin for appellee.

1. One who buys stolen property, other than money or negotiable paper, acquires no title against the owner. Mansf. Dig., secs. 2416–19, confer no right of possession.

2. The promise to repay, if any was made, was *nudum pactum.* 1 Pars. Cont., p. 429.

1. Replevin —Stolen property.

HEMINGWAY, J. One in possession of stolen property cannot hold it against the rightful owner, or exact as a condition of its surrender the payment of money which such holder paid to obtain it, although he made such payment in good faith with no knowledge of the theft. The sum thus paid is not an expense incurred in the preservation of the property, and for that reason, if for no other, it does not come within the purview of the statutes of this State that regulate in certain cases the disposition of stolen property. Mans. Dig., secs. 2416–19.

2. Consideration.

A promise by such holder to surrender the stolen property to its owner, being an undertaking to do only what the law exacts, is not a consideration that will support a promise to pay money therefor. 3 Am. & Eng. Enc. of Law, 831, and cases cited; *Killough* v. *Payne*, 52 Ark., 174.

The answer disclosed no defense to the action, and the judgment will be affirmed.

WOOSTER *v.* CAVENDER.

Decided January 24, 1891.

Mortgage—Release by mistake—Equitable relief.

Where a senior mortgagee in good faith and without culpable negligence satisfied the lien of his mortgage on the record, in ignorance of the existence of an intervening mortgage on the same premises, and took a second mortgage as a substitute, equity will restore the lien of the first mortgage, provided it can be done without working hardship or injustice to innocent parties. Where the junior mortgagee made further advances, after the first mortgage appeared satisfied of record, but with full notice that it was satisfied only by the execution of the second, he could not have been misled by the satisfaction.

APPEAL from *Faulkner* Chancery Court.

DAVID W. CARROLL, Chancellor.

King mortgaged to Wooster property on which he had given a prior mortgage to Cavender & Greer. The latter, subsequently and without knowledge of Wooster's intervening lien, released their lien and took a new mortgage thereon for the same debt. This suit was brought to restore the priority of the first mortgage. From a decree granting this relief, defendants, Wooster & King, have appealed.

Samuel R. Allen for appellant.

Appellees have no statutory rights under act of March 9, 1887 (Mansf. Dig., p. 875), and their right depends solely upon their mortgage.

Upon the satisfaction of a mortgage the property *revests* in the mortgagor, thus making the junior lien of Wooster *prima facie* paramount. Mansf. Dig., sec. 4747. The indorsement on the record is evidence that the debt is paid and security released. 42 Ark., 57. While a renewal is not a payment, it does not affect innocent parties. 36 *id.*, 71. Our statutes of registration differ from those in other States, and the effect of recording is different. 40 Ark., 536; 9 *id.*, 112; 18 *id.*, 105; 20 *id.*, 190; 22 *id.*, 136; 36 *id.*, 453; 35 *id.*, 67, 365; 25 *id.*, 156; 41 *id.*, 186. Appellees are estopped to deny knowledge of Wooster's mortgage, be-

cause it was on record. Our statutes prescribe no method of release or satisfaction, except it shall be done on the margin of the record by the mortgagee. *Qui facit per alium, facit per se.* Even when the statute gives a form of cancellation, an instrument can be lawfully cancelled on the paper itself, as in this case. 18 Mo., 90; 20 Iowa, 363; 26 Cal., 595; 89 Am. Dec., 540. Appellees by their acts misled Wooster to his injury, and he should not suffer for their ignorance or mistake.

E. A. Bolton for appellees.

1. The mortgage was never in fact cancelled. The debt was never discharged or paid. 55 Texas, 365.

2. The satisfaction must be in writing, by one authorized in writing. Mansf. Dig., sec. 3943 *et seq.*

3. Appellant's mortgage recited the mortgage of appellee, and *excepted it from its operation.* He had no lien on the mules, and could acquire none until the purchase money was paid. Nothing short of the payment of the debt it secured would in equity entitle him to the possession of the mules. 48 Ark., 260; Jones on Ch. Mortg., 2d ed., secs. 488–491. See also 55 Tex., 365.

Release of mortgage by mistake.

HEMINGWAY, J. The appellees released the lien of a prior mortgage and took a second mortgage to secure their debt. They were ignorant that an intermediate mortgage, covering the same property, had been made to the appellant. They would not have released their prior mortgage if they had known of the one intermediate. The evidence discloses that they acted in good faith without culpable negligence. The appellant made some advances under his mortgage, before the second mortgage of the appellees was executed, and while their first mortgage appeared upon the records as a paramount lien; as to those advances he understood at the time that they had the paramount lien. He made further advances after the first mortgage appeared satisfied of record, but with full notice that it was satisfied only by the execution of the second; and he could not have been mis-

led by such record satisfaction, nor have believed that the appellees intended to postpone their lien to his. As the appellees acted in good faith and without culpable neglect under a mistake as to a material fact, it is within the ordinary powers of a court of equity to grant them relief, provided it can be done without working hardship or injustice to innocent parties. 1 Story, Eq., sec. 110; 2 Pom. Eq., sec. 849.

In cases in all respects like the present, courts of equity have extended their aid and restored the lien of the satisfied mortgage; such action, we think, is sustained by correct principle as well as by the authority of adjudged cases. *Bruse* v. *Nelson*, 35 Ia., 157; *Hutchinson* v. *Swartsweller*, 31 N. J. Eq, 205; *Cobb* v. *Dyer*, 69 Me., 494; *Campbell* v. *Trotter*, 100 Ill., 281; Jones on Mortg., sec. 971; *Corey* v. *Alderman*, 46 Mich., 540; *Young* v. *Shauer*, 35 N. W. Rep., 629; *Robinson* v. *Sampson*, 23 Me., 388; *Geib* v. *Reynolds*, 35 Minn., 331.

The judgment is affirmed.

HENDRICKSON *v.* GODSEY.

Decided January 24, 1891.

1. *Usury—Gift.*

   A loan of money at the highest lawful rate of interest, made under the inducement of a promise by the borrower that he would make a valuable gift of personal property to the lender, is usurious.

2. *Usury—Bonus paid to agent of lender.*

   When a daughter, in effecting a loan for her mother, reserved to herself a bonus in excess of the highest lawful interest, without her mother's knowledge and under circumstances from which such knowledge can not be reasonably presumed, the loan is not usurious.

3. *Mortgage—Consideration partly usurious.*

   Where part of the consideration of a mortgage is usurious, the whole security is void.

APPEAL from *White* Chancery Court.

DAVID W. CARROLL, Chancellor.

Suit by Mary and Julia Godsey against Hendrickson to foreclose a mortgage on land. The defense of usury was interposed. The court decreed that the lien be foreclosed. Hendrickson has appealed. The facts necessary to its understanding are stated in the opinion.

W. R. Coody for appellant.

The transaction was usurious and void. The reservation need not be in the form of interest. It may be included as principal, or paid as a bonus. See Tyler, Usury, pp. 102, 368; 2 Barb., 56; 29 How. Pr., 280; 32 N. Y, 119; 2 Halst. (N. J.) Chy., 73; 4 Bibb, 327; 51 Ark., 544; *ib.*, 548; Tied. on Com. Paper, sec. 196. A note usurious in its inception cannot be validated by crediting the usury. 35 Ark., 277. No corrupt agreement is necessary if it was the intention to reserve more than 10 per cent. 41 Ark, 339. The whole transaction is void. Mansf. Dig., sec. 4736; 48 Ark., 479.

The appellees *pro se*.

The present to Julia was a mere gift and not a bonus. No corrupt agreement, device or shift to cover usury is shown. 25 Ark., 191; 41 Ark., 331. Appellant obtained the money by strategy and deception, and is entitled to no protection, and should be held responsible for his own act. He is estopped by his own acts. 30 Barb., 628; 37 N. Y. Sup. Ct. (5 J. & S.), 285; 3 Barb. App. Dec., 285; 35 How. Pr., 478.

1. Usury—Gift.

HEMINGWAY, J. A loan of money at the highest lawful rate of interest, made under the inducement of a promise by the borrower that he would make a valuable gift of personal property to the lender, is usurious. The gift is such only in name; in law and in fact it is a part of the price paid for the use of money. The loan by Julia Godsey of money, a part of which belonged to her and the remainder to Mary Godsey, was induced by the promise that Hendrickson would pay the highest rate of interest allowed by law, and

in addition thereto permit Julia to take from his store merchandise of a value equal to interest on the sum lent at the rate of 5 per cent. per annum. She afterwards got from his store merchandise in excess of that amount; no charge was made against her for such goods up to an amount equal to 5 per cent. on the money loaned, but the excess was charged to her account.

2. Bonus paid to lender's agent.

It appears that Mary Godsey had no knowledge of, and received no part of, the excessive charge; and there was nothing in the written contract, or in the character of the transaction, to give her notice thereof. She was a very old woman, and her money was lent by her daughter. She had a right to expect that the daughter would make the loan for her without compensation. Therefore the loan of that part of the money that belonged to her was not affected by the usurious taint. *Vahlberg* v. *Keaton*, 51 Ark., 534; *Thompson* v. *Ingram*, 51 Ark., 546. But the loan of Julia's money was made in violation of law, and one note and one mortgage taken to secure the entire sum lent. In a suit founded on that note and mortgage can Mary recover the amount lent by her? This question must be answered in the negative, for if any part of a consideration is illegal, the whole consideration is void. 1 Pars. Con., p. 457. "If a statute declares that any security taken for a matter prohibited shall be void, and an action is brought on a security taken for that which is unlawful but is blended with that which is lawful, the whole security is void, because the letter of the statute makes it void and is a strict law." *Yundt* v. *Roberts*, 5 S. & R., 139.

3. Consideration of mortgage partly usurious.

In an action on the case upon several promises, in which the first count was laid upon a bill of exchange drawn to cover a sum lost at play and also a sum lent, and the second upon a promise to pay the money lent, it was held that no recovery could be had on the bill, because a part of the consideration was illegal, but that a recovery could be had on the promise to pay the money lent. *Robinson* v. *Bland*, 2 Bur., 1077. As the securities in this case were given for an

entire consideration, we think they are void under our constitution; and, as it does not appear by the pleadings or proof what amount of the money lent belonged to Mary Godsey, she cannot recover in this suit upon the contract for money lent.

The judgment will be reversed and the bill dismissed; but the dismissal will be without prejudice to the right of Mary Godsey, if any she have, to bring such other action as she may be advised.

HARKEY v. JONES.

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Decided January 24, 1891.

Chattel mortgage—Sufficiency of description.

A mortgage of a "brindle cow about three years old" is sufficient, although the mortgagor has two cows answering to such description.

APPEAL from *Perry* Circuit Court.

JAMES B. WOOD, Judge.

J. F. Sellers for appellant.

HUGHES, J. The controversy in this case is over the sufficiency of the description of property conveyed by a mortgage to appellant, and which appellee afterwards purchased from the mortgagor, one Clark, the attention of the appellee having at the time of the purchase been called to the fact that the property was mortgaged. The description of the property in the mortgage was "a brindle cow about 3 years old and her increase."

Appellant was plaintiff below, and his action was replevin for the possession of the property. Over the objection of appellant, the court instructed the jury in effect that if they believed from the evidence that Clark, the mortgagor, owned two cows at the time of the execution of the mortgage, both of which would suit the description of the cow

described in the mortgage, they should find for the defendant; to which the appellant accepted.

The appellant asked the court to instruct the jury in effect that if the mortgage was recorded and the appellee knew at the time he bought the cow that she was mortgaged to appellant, appellant was entitled to recover, although Clark, the mortgagor, at the time, had another cow substantially of the same description. This the court refused, to which the appellant excepted. After motion for new trial was overruled, appellant brought the case here by appeal.

Sufficiency of description in mortgage.

The description in the mortgage, though general, was sufficient to put a party intending to purchase it on inquiry, and the appellee purchasing from the mortgagor was bound to ascertain whether the property he bought was the same covered by the mortgage. *Johnson* v. *Grissard*, 51 Ark., 410; *Lightle* v. *Castleman*, 52 Ark., 278.

There was error in the instruction given by the court to the jury, and in the court's refusal to give the instruction which the appellant asked it to give.

The judgment is reversed, and the cause remanded for a new trial.

RAILWAY COMPANY *v.* AMOS.

Decided January 31, 1891.

1. *Bill of exceptions—Presumption.*

   Where the bill of exceptions does not purport to set forth all the evidence adduced at the trial, it will be presumed on appeal that there was proof of every fact necessary to sustain the trial court's rulings, wherever evidence adduced at the proper time would justify its action.

2. *Husband and wife—Parties—Competency as witnesses.*

   In an action by a husband and wife to recover damages for personal injuries to each of them, although neither is a competent witness for or against the other (Mansf. Dig., sec. 2859), either is competent to testify in his or her own behalf.

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3. *Railway crossing—Contributory negligence.*

In an action for personal injuries received at a railway crossing an instruction that "*if the plaintiffs drove upon the track in the dark, without stopping to investigate, when by stopping and listening they could have learned that a train was approaching, they were guilty of contributory negligence and could not recover,*" was properly refused, where it ignored evidence that, at a time when no regular train could be anticipated, defendant had removed the watchman and extinguished the light usually kept at the crossing, and that, after plaintiffs drove upon the track, defendant's engine was put in motion without signal of warning and a car standing by the crossing backed against plaintiff's wagon. Whether under such circumstances plaintiffs were guilty of negligence, and, if so, whether such negligence contributed to the injury, were questions for the jury.

APPEAL from *Pulaski* Circuit Court.

JOSEPH W. MARTIN, Judge.

Joint action of John S. Amos and wife against the St. Louis, Iron Mountain and Southern Railway Company, to recover damages for personal injuries.

The complaint alleged that while plaintiffs were with due care driving along a street of the city of Little Rock, and just as they were crossing the track of the defendant, the agents and servants and employes of said defendant were operating and in charge of an engine and train of freight cars a little east of said crossing, and as plaintiffs were immediately on the said track, the said agents, servants and employes, so in control of the said engine and cars, carelessly and negligently backed, shoved and forced the said cars against and over the wagon in which plaintiffs were riding, and bruised, wounded and injured plaintiffs. That by reason of the said wounds, bruises and injuries, the plaintiffs were damaged in the sum of five thousand dollars.

The answer denied that plaintiffs were driving with due care, or that defendant, its servants, agents or employes, were guilty of want of care in the premises, but specifically charged "that the accident was the direct cause and result of plaintiffs' contributory negligence in attempting to cross its said tracks in the night time, immediately in front of its moving trains, without defendant's knowledge, and because

of plaintiffs' failure to stop and listen for the approach of any train, as it was plaintiffs' duty to do before attempting to cross said track."

Dodge & Johnson for appellant.

1. Plaintiffs were guilty of contributory negligence. They neither stopped, looked or listened for signals. The traveler must use due diligence and care, and there must be negligence on the part of the railway company or its employes. Sh. & Redf. on Negl., sec. 481; Pierce on R. R., p. 342; Wharton on Negl., sec. 382; 2 Wood on Rys., sec. 323; 1 Rorer on R. R., p. 533; Cooley on Torts, p. 680; 1 Thomps. on Negl., p. 415; *ib.*, 401; 49 Pa. St., 60.

The traveler must make vigilant use of his senses—a failure to look and listen is negligence. 11 Pac. Rep., 137; 27 N. W. Rep., 514; 31 *id.*, 147; 14 R. I., 102; 6 Atl. Rep., 239; 5 *id.*, 329; 30 Minn., 482; 30 N. W. Rep., 548; 33 Ind., 367; 50 *id.*, 42; 50 *id.*, 65; 25 Mich., 291; 62 Ind., 566; 41 Iowa, 227; 72 Mo., 168; 71 *id.*, 636; 64 *id.*, 480; 4 Atl. Rep., 580, 599.

It is negligence *per se* for a person to cross a railroad track without first listening and looking for a coming train, etc. 2 N. E. Rep., 875; 77 Me., 85; 77 Me., 538; 76 *id.*, 357; 120 Mass., 257; 134 *id.*, 499; 105 *id.*, 77; 10 Allen, 532.

When the view is obstructed the traveler should take greater care. 6 A. & E. R. Cas., 268; 8 *id.*, 208; 27 N. W. Rep., 792.

The following cases sustain this rule: 95 U. S., 702; 95 U. S, 442; 4 Woods, 652; 8 Fed. Rep., 488; 73 Ind., 174; 120 Mass., 257; 91 N. Y., 420; 49 Pa. St., 60; 35 Ohio St., 627; 26 Mich., 255, 261; 81 Ill., 450; 51 Iowa, 419; 22 Minn., 165; 52 Miss., 808; 72 Mo., 50; 42 N. J., 180; 47 Wis., 146; 67 Me., 100; 86 N. C., 224; 2 McCrary, 268; 41 Fed. Rep., 191.

2. This was not a case for exemplary damages. 13 S. W. Rep., 140; Field on Dam., sec. 34; 36 Conn., 182; 51 Ill., 467; 47 Mo., 90; 47 N. Y., 282; 9 W. Rep., 612; 33

A. & E. R. Cases, 407; 1 Otto, 489; 21 How., 213; 2 Wall., Jr., 164; Sutherland on Dam., p. 724; 34 A. & E. Cases, 432; 4 So. Rep., 359; 52 Ill., 451; 46 Tex., 272; 35 Ind., 306; 76 Ala., 176; 62 Md., 301; 40 Cal., 657; 39 Ark., 387, 448; 41 *id.*, 299; 56 N. Y., 44.

3. It was error to give the third instruction for plaintiffs. 12 S. W. Rep., 204; 19 A. & E. Cases, 36.

4. It was error to allow husband and wife to testify in the other's behalf. Mansf. Dig., sec. 2859; 37 Ark., 302; 34 *id.*, 674; 8 S. E. Rep., 826; 31 Gratt., 70; 5 S. E. Rep., 801; 27 A. & E. R. Cases, 333.

5. The verdict was excessive.

Sanders & Watkins for appellees.

1. The bill of exceptions does not contain all the evidence. 38 Ark., 102; 44 Ark., 76.

2. It is not the duty of a traveler to *stop* and examine before attempting to cross. 37 N. W. Rep., 152; 112 Ill., 490; 116 Mass, 540.

3. The instruction as to exemplary damages was properly given. Sh. & Redf. on Neg., sec. 748; *ib.*, sec. 408; 32 N. Y., 597; 28 Wisc., 487: 58 Ill., 83; 55 Ill., 379; 31 Mich., 274; 48 Cal., 409; 6 A. & E. R. Cas., 125, and note.

4. Plaintiffs were competent witnesses, both being interested in the suit. Mansf. Dig., sec. 5339; 52 Ill., 260; 21 Mich., 215; 5 S. E. Rep., 801; 37 Ark., 302.

1. Presumption as to bill of exceptions.

COCKRILL, C. J. The bill of exceptions does not purport to set forth all the evidence adduced at the trial. Our inquiry therefore cannot reach some matters assigned as error by the appellant's counsel. We indulge the presumption that there was proof of every fact which is necessary to sustain the court's rulings, wherever evidence adduced at the proper time would justify its action. Every ruling is presumed to be right, unless the record contains matter which shows affirmatively that it is wrong. *McKinney* v. *Demby*, 44 Ark., 74.

The suit was a joint action by husband and wife against the railway to recover damages for personal injuries sustained by them while crossing the railway track in a wagon at a street crossing, in the city of Little Rock. They recovered a joint judgment for $1200.

2. Competency of husband and wife as witnesses in a joint suit.

The act of 1873, known as the married woman's act, authorizes the wife to prosecute a suit for personal injury in her own right without joining her husband. Mansf. Dig., sec. 4951. Mrs. Amos could have prosecuted her suit for the injury shown in this case independently of her husband. But no objection was made to the joinder, and no question arises upon it now except in its bearing upon the competency of the plaintiffs as witnesses in the cause. It is argued that, as both were plaintiffs and interested in the result, neither was competent to testify in the cause. But either was a competent witness in his or her own behalf, and the rule is settled by the previous decision of this court that, in cases in which a party may be a witness for himself, marriage is not a disqualification as to his interest in the cause, notwithstanding the other party to the marriage is a party to the suit. *Klenk* v. *Knoble*, 37 Ark., 298. Much authority may be cited to the same effect. *Bell* v. *Ry.*, 86 Mo., 599; *Clouse* v. *Elliott*, 71 Ind., 302; *Shantz* v. *Stoll*, 34 La. Ann., 1237.

It is not urged that the court's charge to the jury misstates the law in any respect, but it is argued that it was inapplicable to the plaintiffs' case in two particulars to which exceptions were saved.

One of the exceptions relates to exemplary damages, and the other to the railway's duty to take proper precautions at street crossings to prevent injury to persons upon the highway. The latter exception is futile because the charge was applicable to the case made by the appellees; and the other must fail because it is not apparent that the proof did not call for a charge upon the subject of exemplary damages, inasmuch as the bill of exceptions does not profess to contain all the evidence upon which the court acted.

The defect in the bill of exceptions disposes also of the argument that we should declare as matter of law that the appellees were injured through their own contributory negligence. The presumption upon the record is otherwise.

3. Railway crossing—Contributory negligence.

The court's charge upon the subject of contributory negligence, on the part of the plaintiffs, was satisfactory to the railway, except in the refusal to charge that it was the plaintiffs' duty to *stop* their wagon before entering upon the track, to ascertain whether a train was approaching. A series of prayers for instructions embodying that idea were rejected by the court, and that is assigned as error. There was evidence tending to show that the engine was put in motion after the plaintiffs entered upon the track, and backed upon the cars, which were standing near the crossing, without giving any warning of the move. There was also testimony, the purport of which was that the train was moving toward the crossing with bell ringing when the plaintiffs approached.

In the rejected twelfth prayer the court was requested to charge that if the plaintiffs drove upon the track in the dark without stopping to investigate, when by *stopping* and listening they could have learned that a train was approaching, they were guilty of contributory negligence and could not recover.

The prayer required the jury to find for the railway, notwithstanding they might believe from the evidence that the train approached the crossing without sounding whistle or bell, and that if such signals of warning were given, the plaintiffs would have been as likely to hear them without stopping as otherwise. *Railway Co.* v. *Slattery*, 3 App. Cas., 1166. It was not for the court to exclude those matters from the consideration of the jury, and to say to them in effect, as the prayer required, that it is not the part of a prudent man to rely upon the railway to perform its known duty in giving signals of warning at a crossing only because it is dark. If it is true, as the testimony set out in the bill of exceptions tends to establish, that the railway had withdrawn its watchman from the crossing, and allowed the

lights, which usually aided the traveler to extricate himself from their labyrinth of tracks in the highway, to become extinct at a time when no regular train could be anticipated, it could not be asserted as a matter of law that a prudent man traveling upon the highway would not be led to believe that the company intended that he should rest in security against an attempt to back a train over the public crossing without signaling its approach. It is not error to reject a prayer for a charge which excluded from the jury's consideration evidence which might exert an influence on their verdict. *Claiborne* v. *State*, 51 Ark., 88; 2 Thompson, Trials, sec. 2328. The rejected prayer was subject to that objection, and the court's ruling was right.

The appellant's other rejected prayers for instructions were properly refused either because the substance was embodied in the charge, or for the reason given for the rejection of the twelfth prayer.

As we are unable to say that we have all the evidence relating to the injury before us, we can not consider the objection that the verdict is excessive.

Affirm.

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DEYAMPERT *v.* JOHNSON.

Decided January 31, 1891.

1 *Specific attachment—Surrender of property—Liability of sheriff.*

A sheriff, who surrenders property, seized by him under a writ of specific attachment, to a claimant, without authority of the court or the parties concerned and without taking a bond as required by the statutes, is guilty of a breach of duty and responsible to the party aggrieved in an action of damages.

2. *Burden of proof—Measure of damages.*

The burden of proof in such case is upon the sheriff to show that he is not responsible for actual damages; if he shows that the property was not subject to the lien of the writ, he will be liable for nominal damages merely.

3. *Error as to nominal damages—Costs.*

A case will not be remanded for a new trial where the only error is a failure to award the appellant nominal damages; but if he was entitled to costs also, the judgment will be modified to that extent.

APPEAL from *Chicot* Circuit Court.

CARROLL D. WOOD, Judge.

DeYampert sued Barringer to enforce his landlord's lien on certain cotton, and procured a writ of specific attachment to be issued and placed in the hands of the sheriff, the defendant Johnson. The sheriff seized the property, but subsequently released it to a claimant without requiring any bond. DeYampert procured judgment for his debt and sustaining his lien. An execution being returned unsatisfied, he brought this suit upon Johnson's official bond, alleging that he had released the property without authority. Against the objection of plaintiff, defendants introduced evidence tending to show that, on the day the attachment was sued out and before the writ came into the hands of the sheriff, the cotton was sold to one who had no notice of plaintiff's lien. The court sitting as a jury dismissed the complaint at plaintiff's cost.

Plaintiff appealed.

C. H. Carlton and *W. S. McCain* for appellant.

The attachment was *special*, not general, and it was the sheriff's duty to seize and hold the particular property mentioned. 3 Wall., 334; 102 U. S., 689. The writ was a protection to him. It was for the court, not for the sheriff, to determine the rights of strangers claiming the property.

Admitting by his return that he had found the cotton and levied on it, he is estopped from pleading that he released it without the consent of plaintiff or an order of court, Drake on Att., secs. 188–9.

James F. Robinson and *John G. B. Simms* for appellees.

Sec. 4461 Mansf. Dig. precludes by necessary implication the right of a sheriff to levy on cotton when found in the hands of a purchaser *without notice.* 31 Ark., 131; 34 *id.*, 691. See Drake on Att., sec. 197.

The only effect of a release was to cast the burden on him to show that the title had passed to an innocent purchaser without notice. Drake, Att., sec. 195; Freeman on Ex., sec. 275.

1. Liability of sheriff for surrender of property attached.

BATTLE J. When a valid order to attach specific property is delivered to the proper sheriff, it is his duty to seize the property described in the order and hold the same subject to the order of the court, or until the attachment is dissolved, or he is required by the statute to deliver the same to another person upon his executing a bond. He can use no discretion or judgment, and has no right to determine to whom the property that he is ordered to seize belongs. If he surrenders it upon a claim of right to the same, without authority of the court or parties concerned, or taking a bond as required by the statutes, he becomes responsible to the party aggrieved in a civil action for damages.

2. Burden of proof.

In actions like this the measure of damages is the actual injury sustained, the actual injury being so much of the debt as was lost by the misconduct of the sheriff. The breach of duty being clear, the burden of showing that he is not responsible for actual damages is upon the defendant. He can do so by proving that the cotton seized was not subject to a lien for rent, because it had been sold and was in the possession of a purchaser without notice of the lien before the action was commenced. But this is not sufficient to relieve him of all liability for damages, but only goes in mitigation.

In this action plaintiff had a legal right to have the cotton attached in a former suit held until it was released according to law. He claimed a lien on it as a security for the payment of his debt, and caused it to be seized in that suit for the purpose of having his alleged lien foreclosed. As to the existence, validity and extent of that lien, he was entitled to the judgment of the court in the action brought by him. He was entitled to have the cotton held for that purpose. The surrender of it upon the demand of a claimant was a

wrong done to him, for which the defendants in this action are liable for nominal damages, it having been shown that no actual injury was sustained. Sedgwick on the Measure of Damages (6th ed.), pp. 50–51, 633–642; *Rich* v. *Bell*, 16 Mass., 294; *Brown* v. *Richmond*, 27 Vt., 583; *Dow* v. *Humbert*, 91 U. S., 294.

But this court will not remand a cause for new trial when it is apparent that the appellant cannot recover more than nominal damages. *Buckner* v. *Railway*, 53 Ark., 16; 3 Graham and Waterman on New Trials, 1356; *Robertson* v. *Gentry*, 2 Bibb, 542; *Haven* v. *Beidler Mfg. Co.*, 40 Mich., 286.

3. Error as to nominal damages.

But inasmuch as it appears from the pleadings and the evidence adduced by both parties that appellant is unquestionably entitled to nominal damages, the judgment of the court below will be reversed, and judgment will be entered here in favor of appellant against appellees for all costs that have accrued in this action in this and the court below; and it is so ordered.

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CRUDUP *v.* RAMSEY.

Decided January 31, 1891.

1. *Limitation—County warrant.*

   The bar of the statute of limitations may be pleaded to a petition for mandamus to compel a county treasurer to pay a county warrant.

2. *Period of limitation—Warrants under seal.*

   The period of limitation in such an action is five years from the delivery of the warrant, although the clerk has, without authority, affixed thereto the county seal.

APPEAL from *Franklin* Circuit Court.

HUGH F. THOMASON, Judge.

Mandamus to compel Ramsey, treasurer of Franklin county, to pay certain county warrants under seal lawfully issued and antedating the present constitution. Defendant answered, first, that the warrants were barred by certain

orders of the county court, dated respectively May 1, and August 11, 1884, calling in county warrants for cancellation and reissue (under Mansf. Dig., secs. 1147-9); and second, that they were barred by the five years limitation on instruments in writing not under seal (Mansf. Dig., sec. 4483). The circuit court held that the warrants were barred both by the orders of the county court in 1884, and by the five years limitation. Plaintiff has appealed.

Ed. H. Mathes and *J. V. Bourland* for appellant.

1. The treasurer cannot plead the five years statute of limitation. 36 Ark., 487; *ib.*, 114.

County warrants are not notes. They are in the nature of executions on judgments, and yet not executions. They are issued on judgments, the limitation on which is ten years. In any event the plea of limitation cannot avail in this case. Mansf. Dig., sec. 4487; 39 Ark., 262.

They are under seal, and bear date prior to the present constitution; hence the limitation is ten years. 33 Ark., 709; 32 *id.*, 410. They were reissued in 1880, and the statute would run, if at all, only from that time.

The appellee *pro se.*

HEMINGWAY, J. That the statute of limitations runs in favor of counties against their ordinary indebtedness, is the rule in this State. *Gaines* v. *Hot Spring Co.*, 39 Ark., 262; *Desha Co.* v. *Jones*, 51 Ark., 524. That it runs against county warrants, follows, unless there is something in the law authorizing their issuance that takes them out of its operation.

1. Limitation —County warrant.

The law provides that whenever an allowance is made by the county court, and an order therefor entered upon the records, the clerk shall, when requested by the person in whose favor the allowance is made, issue a warrant for the amount of the allowance, Gantt's Dig., sec. 605 (Mansf. Dig., sec. 1415); and that warrants shall be signed by the clerk and numbered progressively throughout the year. *Id.*, sec. 605. It further provides that all warrants shall be

paid out of any money in the treasury not otherwise appropriated, or out of the particular fund expressed therein, and shall be received, irrespective of their number and date, in payment of all taxes and debts accruing to the county. *Id.*, sec. 610 (Mansf. Dig., sec. 1420). Under this provision this court held that it was the duty of the sheriff and of the treasurer to receive warrants offered in payment of taxes or dues to the county, without regard to the time that had elapsed since their issuance. *Daniel* v. *Askew*, 36 Ark., 487; *Whitthorne* v. *Jett*, 39 Ark., 139; *Howell* v. *Hogins*, 37 Ark., 110. The decision in those cases was placed upon the language of the act, to-wit: That "such warrants, irrespective of their number and date, should be received in payment of taxes and dues to the county." And in the case of *Daniel* v. *Askew* it was remarked by the court that the law provided two modes for the payments of warrants; the first, out of any money in the treasury not otherwise appropriated, and the second, in payment of taxes and dues to the county.

It will be observed that the provision that they shall be received, irrespective of date and number, applies to the latter mode only, and does not by its terms extend to the mode provided by payment of money out of the treasury. This case is therefore not within the reason that controlled in the cases cited; and if the statute of limitations does not apply, a reason for the exception must be found elsewhere. There is nothing in the act that suggests to us a reason for such exception. None has been pointed out by counsel, and we think that none exists.

We are not willing to disturb the rule in so far as it is announced in the cases cited; but it may be seriously doubted whether the legislature ever intended to require county officers to receive in payment of taxes and dues to the county warrants against which the statutes had fully run. The provision that warrants should be received in payment of taxes and dues to the county comes from the revised statutes (Rev. St., chap. 41, sec. 33); but the provision that they should be received, irrespective of date and number, was

first enacted in 1851. This is a part of an act which provided that warrants should be paid in the order of their number, and that no warrants should be paid until all of a prior date had been paid or provided for. Gantt's Dig., chap. 147, sec. 55. Then followed the provision that all county warrants, irrespective of date and number, should be received in payment of taxes and dues to the county. *Id.*, sec. 56. Its manifest purpose was to provide that warrants should be received in payment of taxes and dues to the county, even though there were prior warrants not paid nor provided for. It was designed to make the date of a warrant, in so far as it was later than others, immaterial when it was offered in payment of taxes and dues—nothing more. It is not probable that the legislature had in mind or intended to save warrants from the bar of limitation. And when the provision is relied on as authorizing the payment of such taxes and dues in warrants otherwise barred, the conclusion is inevitable that it is given a more extended operation than its authors contemplated. We say this much, not to shake the rule now fixed, but as a reason for declining to extend it to cases not clearly within it.

2. Limitation as to warrants under seal.

The five years statute applies in this case. The law does not require or authorize the issuance of warrants under seal, and the clerk could not, after drawing them as the law directs, add to their dignity or effect by the unauthorized affixing of the seal. As warrants are payable on demand, the statute begins to run from the date of their delivery. Our views are sustained by the rule of the circuit court of the United States of this district, as announced by Judge Caldwell, upon a consideration of all the authorities, in a very clear and satisfactory opinion. *Goldman* v. *Conway Co.*, 10 Fed. Rep., 888.

If it be conceded that the warrants in suit were renewed when they were called in and reissued, that could not avail the petitioner, for the statute would begin to run from the date of the reissue, and the bar would have been complete when this action was commenced. As the warrants were

On page 171, top line, for "1851" read *1846;* and, in fourth line from top, for "Gantt's" read *Gould's.*

barred by limitation, it is unnecessary to consider the questions argued as regards the effect of the proceeding in the county court in 1884, calling in outstanding warrants for reissue or cancellation.

Affirm.

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WOOD v. WOOD.

Decided January 31, 1891.

1. *Divorce—Residence of plaintiff.*

The statute which provides that the plaintiff, to obtain a divorce, must allege and prove a residence in the State for one year next before the commencement of the action (Mansf. Dig., sec. 2562) contemplates *actual*, not constructive, residence on the part of the plaintiff, and applies to actions for divorce from bed and board, as well as from the bonds of matrimony.

2. *Alimony—Residence.*

The condition of a year's residence on the part of the plaintiff is prescribed in actions for divorce only; not in the independent action for alimony.

3. *Alimony—Statutory action.*

An independent action for alimony will lie in this State. Whether the remedy existed at common law or not, the section of the code (sec. 2559 of Mansf. Dig.) which provides that "the action for alimony or divorce shall be by equitable proceedings" sufficiently manifests a design to incorporate such an action into the system of remedies in use in the State.

APPEAL from *Pulaski* Chancery Court.

DAVID W. CARROLL, Chancellor.

Suit for divorce by Mary J. Wood against Henry Wood. The complaint alleged (1) indignities to plaintiff's person which rendered her condition intolerable, and (2) desertion without cause; and that plaintiff had been an actual resident of the State and county for two months, and that defendant had been a resident of the State for several years. Prayer for divorce from bed and board and for alimony. The complaint was dismissed for lack of actual residence for the statutory period on the part of the plaintiff, who has appealed.

Caruth & Erb for appellant.

1. The domicile of the wife follows the husband. 4 Dutch., 516; 11 Pick., 410; 5 Cold., 60; 27 Miss., 704; 36 Me., 428; 8 Greenl., 203; 11 Allen, 199; 2 Bish., Mar. & Div., secs. 129, 157 (5th ed.); 30 Ill., 180; 3 Cal., 312; 20 Ala., 629; 9 Wall., 108.

2. The year's residence is not necessary in a suit for separation from bed and board. Sec. 2562, Mansf. Dig. See also sec. 2559 *et seq.* Under these sections a separate suit for alimony may be maintained, as to which the year's residence is not requisite. 80 Ky., 364. Our law has changed since 24 Ark., 533.

J. M. Moore for appellee.

1. Mansf. Dig., sec. 2562 contemplates a year's *actual* residence. The suit must be brought in the county of the wife's residence. Sec. 2558. The rule that the domicile of the wife follows that of the husband does not apply to proceedings for divorce. 14 Pick., 181; 2 Jones, Eq., N. C.; 35 N. H., 474; 34 *id.*, 518; 4 R. I., 107–8; 39 Wisc., 657; 24 Ind., 359; 21 How., 582; 9 Wall., 123–4; 13 N. J. Eq., 280; 9 Greenl., 140; 6 Mo. App., 50; 25 Mo., 68; Bish. Mar. & Div. (5th ed.), secs. 125, 128.

2. Alimony has no common law existence as a separate independent right. It is an incident to some other proceeding, as for divorce. 24 Ark., 533; 38 *id.*, 125; 2 Bish. Mar. & D., ch. 23, sec. 350 *et seq.*; 3 Pom. Eq.

3. The statutes of this State cannot be construed so as to give courts of equity jurisdiction of suits for alimony separate from proceedings for divorce. Mansf. Dig., ch. 52; 4 Litt., 206; 3 Dana, 29; 80 Ky., 364. Section 2562 applies equally to proceedings for divorce *a miculo* and *a mensa et thoro.*

HEMINGWAY, J. On motion of the defendant, the court below dismissed this action, for the reason that the plaintiff had not been a resident of the State for one year next before its commencement. The plaintiff contends that the judg-

ment was wrong for three reasons: 1st. Because the defendant had been a resident of the State for one year next before the commencement of the action, and in law his residence was her residence. 2d. Because the condition of residence prescribed by the statute applies only to actions for divorce from the bonds of matrimony. 3d. Because the plaintiff was entitled to maintain her action for alimony alone, irrespective of her place of residence.

1. Residence of plaintiff in suit for divorce.

The statute provides that proceedings for divorce shall be in the county where the complainant resides. Mansf. Dig., sec. 2558. We think it contemplates actual, and not constructive, residence. The contention of the plaintiff would make the statute mean that all actions for divorce shall be prosecuted in the county of the husband's residence. If the legislature had intended that such should be the law, it would have manifested its intent in more direct terms. It would not have reached that result by providing for the proceeding in the county of the plaintiff's residence, with the idea that, when the wife sued, her residence would be fixed by that of her husband. We cannot attribute to it an intent to express its will in terms so indirect. Most laws regulating the action for divorce, from wise considerations of public policy and a just regard for the proper preservation of the relation of marriage, provide that the proceeding shall be had in the county where the complaining party has a fixed residence, of duration in time deemed sufficient to furnish evidence of the merits of the complaint and of the integrity of life of the complaining party. Such was the purpose of our statute.

The prescribed condition of residence, by the express terms of the statute, applies to all actions for divorce, and is not confined to those prosecuted to dissolve the bonds of matrimony.

Can the plaintiff prosecute an independent action for alimony without divorce?

2. Residence in suit for alimony.

Alimony is defined to be the allowance which a husband, by order of the court, pays to his wife, being separate from

him, for her maintenance. 2 Bish., Mar. & Div., sec. 351. It has been extended by statute to include an allowance made by the court on dissolving the bonds of matrimony.

It was provided in the revised statutes that the circuit court in chancery "shall have jurisdiction in all cases of divorce and alimony, or maintenance," meaning divorce and alimony, or divorce and maintenance. Rev. Stat., chap. 51, sec. 3. While the jurisdiction was thus regulated, this court held that a wife could not maintain an independent action for alimony, but that the right existed and could be enforced only as an incident to some other right which she was asserting, as for instance a right to divorce. *Bowman* v. *Worthington*, 24 Ark., 522. Such ruling was in harmony with the language of the statute which conferred jurisdiction of cases of divorce and alimony, only mentioning alimony as an incident to the action for divorce and as definitive of its scope.

Although that ruling was in harmony with the statute, and followed in the line of many English and American cases, it antagonized others; for there were some English and very many American cases that recognized a broader jurisdiction in courts of equity, and sustained the right of the wife to sue in equity for alimony alone, where her husband separated himself from her without cause and without furnishing for her a reasonable support. The good sense and reason of the latter cases so commended their doctrine to Judge Story, that he recorded his regret that it had not been generally adopted. 2 Story, Eq., 1423a. Mr. Schouler, who seems to have found the doctrine more generally received than Judge Story thought it, says as to it: "In general, if a wife is abandoned by her husband, or refused cohabitation, without fault on her part, and being left without adequate means of support, a bill in equity will lie to compel the husband to support her, without asking for or procuring a decree of divorce." Schouler, H. & W., sec. 485. The right to maintain the independent action has been sometimes affirmed, but generally denied, in the chancery courts of England. It is said by some courts that the denial has been occasioned

by an excess of caution on the part of the chancery courts, lest they trench upon the jurisdiction of the ecclesiastical courts. The courts of Maryland sustained the jurisdiction before the independence of the States, and other courts adopted the rule as cases were presented that called for expression. Such jurisdiction has been entertained, on the ground that it is the duty of a husband to provide suitable maintenance for his wife, and the law affords no remedy to enforce a performance of the duty. *Glover* v. *Glover*, 16 Ala., 440; *Butler* v. *Butler*, 4 Litt. (Ky.), 202; *Purcell* v. *Purcell*, 4 Hen. & Mun., 507; *Jelineau* v. *Jelineau*, 2 Des. (S. C.), 45; *Prather* v. *Prather*, 4 *id.*, 33; *Garland* v. *Garland*, 50 Miss., 694; *Verner* v. *Verner*, 62 Miss., 262; *Galland* v. *Galland*, 38 Cal., 265; *Graves* v. *Graves*, 36 Ia., 310; *Jamison* v. *Jamison*, 4 Md. Ch. Dec., 289; *Hewitt* v. *Hewitt*, 1 Bland (Md.), 101; *Dailey* v. *Dailey*, Wright (Ohio), 514; *Bascom* v. *Bascom*, Wright, *sup.*, 632; *Richardson* v. *Wilson*, 8 Yerg. (Tenn.), 67; Stewart, Mar. & Div., sec. 179; Browne's Div. & Alimony, p. 268.

In Canada and a number of the American States, statutes have been adopted that authorize the independent action where a wife, without fault on her part, is left without means of support.

This much is said of the state of the law, not with the view of considering the merits of the question on which the courts have divided, but to gain whatever light may be reflected from it upon provisions, cognate to the matter, enacted with the code of civil procedure. It provides (sec. 456) that "The action for alimony or divorce shall be by equitable proceedings." The next section, referring to the proceeding for divorce only, provides that the statements of the complaint shall not be taken as true because of the defendant's failure to answer. The next section relates only to the conditions upon which a plaintiff may obtain a divorce. The next provides that during the pendency of an action for divorce or alimony the court may allow maintenance, etc. And the act continues with provisions that could have no proper

place in proceedings for alimony, and are proper in proceedings for divorce, and they are by their terms made applicable only to the action for divorce. It thus appears that the act vests in courts of equitable cognizance the jurisdiction of actions for alimony or divorce; that its provisions which would be properly applicable only to actions for divorce are in express terms thus restricted; while those that would properly apply in either action are by their terms made to extend to each. For example, the provision that the allegations of a complaint shall not be taken as true for want of an answer, is confined to actions for divorce; it is not extended to the action for alimony, for the reason, as we may infer, that it is necessary, as a matter of public policy, in one action, and wholly unnecessary in the other. In one action marriage ties might be too lightly severed if proof were not exacted; in the other there is no danger that the undutiful or improvident husband will fail to deny all false allegations prejudicial to his interests, or that his interests or the interests of society will suffer if undenied allegations are taken as true without proof. So as to the action which prescribes a year's residence in the State as a condition of the right to sue—it only applies to the action for divorce, and its reasons would extend it no further. It is manifestly good policy to close the portals of our courts against strangers who would come into them only to cast off marital obligations that weigh heavily or rest uneasily upon them; but it would conserve no useful policy to exclude from our courts those who seek the enforcement of marital obligations without any impairment of the relation. So the provision that regards the comfort of the wife pending the action extends to each action, for its reason operates equally in each. It thus seems that the act contemplated two separate actions, and that the legislature did not use the term, "action for alimony or divorce," as the equivalent of action for divorce, or action for divorce and alimony.

3. Statutory action for alimony.

The act plainly confers jurisdiction of the action for alimony on courts of equity, and the allotment of the jurisdic-

tion implies that there is such an action as that alloted. Does the act give the independent right and provide a remedy for its enforcement?

It might be argued that the act manifests a legislative mistake as to the law, but that this does not change the law to conform to the mistaken conception. But we think it does more; it not only implies an opinion that an independent action existed, but manifests an intent that such action shall exist and be prosecuted by equitable proceeding.

In a case involving a similar question, the Supreme Court of the United States, through Mr. Chief Justice Marshall, said: "It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit court, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law does not make law. But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. *Postmaster General* v. *Early*, 12 Wheat., 136–48; Endlich., Int. Stat., secs., 372–76; *State* v. *Miller*, 23 Wis., 634.

Courts of equity have jurisdiction to allow alimony, if not in an independent proceeding, at least in actions for divorce. There is no doubt as to their power to grant the relief, and the only question is as to the proceeding to obtain it. It is a rule in this State, long and well established, that where a limited jurisdiction is conferred by statute, the construction ought to be strict as to the extent of the jurisdiction, but liberal as to the mode of proceeding. *Russell* v. *Wheeler*, Hemp., 3. Moreover, the code fixes the rule for its own construction, as follows: "The provisions of this code, and all proceedings under it, shall be liberally construed, with a view to promote its object and to assist the parties in obtaining justice." Mansf. Dig., sec. 6362.

When we consider the question in accordance with that rule, the legislative intent to confer jurisdiction of an inde-

pendent action appears sufficiently manifest to become effective as the law. We think the act was designed to incorporate the action for alimony into the system of remedies in use in this State, and that by the term, "action for alimony," was intended the action then in use in those chancery courts that held that such an action was maintainable in equity.

It follows that the judgment dismissing the bill was erroneous, and that the plaintiff was entitled to prosecute her action for alimony to a final hearing.

The judgment will be reversed, and the cause remanded for further proceedings.

CROSS *v.* FOMBEY.

Decided January 31, 1891.

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1. *Deed of trust—Record.*

A deed of trust executed for the purpose of securing a debt, to be void upon payment of the debt, is a mortgage, within the meaning of the statute which makes a mortgage a lien on the property from the time it is filed for record, and not before. (Mansfield's Digest, sec. 4743.)

2. *Attachment—Unrecorded mortgage—Priority.*

An order of attachment is a lien upon the defendant's property in the county subject to execution from the time it is delivered to the proper officer; and when perfected by levy and judgment sustaining the attachment, it will take precedence of the lien of a mortgage executed before, but not recorded until after, the order came into the officer's hands.

APPEAL from *Columbia* Circuit Court.

CHARLES W. SMITH, Judge.

B. F. Askew and *Sam W. Williams* for appellant.

1. The title passed at once to the trustee without any act on his part, and courts of equity never permit a trust to fail for want of a trustee. 4 Ark., 302; 18 *id.*, 65; 11 *id.*, 94; 15 *id.*, 60. Replevin was the proper remedy. Hill on Trustees, p. 188; 36 Conn., 10; 5 Wait, Ac. & Def., 472; 40 Ark., 75; 35 *id.*, 218.

2. While a deed of trust is like a mortgage in effect, it is not a mortgage within the provisions of sec. 4743 Mansf. Dig., as construed in 9 Ark., 112, but stands as at common law, affecting all who have notice. 18 Ark., 65; 49 Ark., 63; 27 Ark., 61. A strict construction of the word mortgage will not take in a deed of trust. Endlich on Int. Stat., secs. 127, 128, 341, 343.

3. Possession before the writs were levied obviated the necessity of registration, and left nothing subject to levy. Freeman on Eq., sec. 195; 49 Ark., 279; 33 *id.*, 329; 16 *id.*, 543; 15 *id.*, 73; 32 Ark., 478; 43 *id.*, 504.

Smoote, McRae & Arnold, and *J. M. Kelso* for appellees.

1. The instrument relied on was a mortgage within the provisions of sec. 4743 Mansf. Dig., and note *b*; 18 Ark., 105–6; 31 *id.*, 437.

2. Not being recorded, it was not effective against creditors. A writ of attachment binds the property of defendant from the time it comes to the hands of the officer. Mansf. Dig., sec. 325; 29 Ark., 85; 34 *id.*, 339; *ib.*, 97; 9 *id.*, 112; 18 *id.*, 105; 20 *id.*, 191; 33 *id.*, 87; 32 *id.*, 453; 35 *id.*, 67; 40 *id.*, 537; 42 *id.*, 140.

HUGHES, J. Appellant brought replevin for twelve bales of cotton and two hundred bushels of corn. Appellees answered that Fombey, as constable, and Sewell, as sheriff, of Columbia county, held the corn and cotton by virtue of certain writs of attachment placed in their hands in said county, which became liens on the same, and were levied thereon before the deed of trust under which appellant claimed was recorded. The evidence was, substantially, that on the 14th day of March, 1888, Bailey Baker conveyed in trust to J. R. Owsley to secure certain indebtedness to A. J. Brewer, which was to become due January 1, 1889, certain land and twenty-five bales of lint cotton, to weigh 500 pounds each, to be raised on his place in Columbia county, Arkansas, and also all the cotton and corn which he might make or cause to be made that year in said county.

Owsley refused to act as trustee, and appellant was appointed to act.

On the trial the appellant, Cross, proposed to testify that he took possession of the property before the defendants levied on it. Objection was made by appellees and the court sustained the objection, to which appellant excepted. The objection was properly sustained because "an order of attachment binds the defendant's property in the county, which might be seized under an execution against him, from the time of the delivery of the order to the sheriff or other officer," and not merely from the time of its levy, The lien upon the property is completed by execution of the order in the manner directed by the statute. Sec. 325, Mansf. Dig.

The appellant then offered to ask witness, J. M. Johnson, whether the cotton was turned over to him; if so, by whom and for what purpose and at what time it was turned over to him by Bailey Baker; and whether the same was turned over to him before the writs of attachment were issued; and whether this cotton turned over to him was the cotton described in the deed of trust; and what day the cotton was turned over to him by Bailey Baker for A. J. Brewer, the beneficiary in the trust deed. To all this an objection upon the part of appellees was sustained, to which appellant excepted. It is sufficient to say in reference to this, that there is no evidence that Johnson was the agent, or authorized to take possession of the cotton for Brewer or the trustee; and there is no evidence of notification to either of them of his taking possession of the cotton for him until after the orders of attachment came to the hands of the officers, and the liens thereof had attached.

The evidence for appellees identified the property as that levied upon, and showed that on the 6th of December, before appellant reached the place where the cotton was, the attachments had been levied upon it. On the 17th day of December, the day following the day on which the attachments were levied, the deed of trust conveying the property in controversy to appellant was filed for record.

The court refused to give to the jury, at the request of the appellant, the following instructions:

"2. If the jury believe from the evidence that the beneficiary in the mortgage, his agent or trustee, took possession of the property mentioned in the complaint before it was attached, for it or the proceeds thereof to be applied to the extinguishment of their debt, then they should find for the plaintiff.

"3. If the jury believe from the evidence that the mortgagor, Bailey Baker, delivered the cotton and corn, or any part thereof, mentioned in the complaint to J. M. Johnson to be delivered to A. J. Brewer, or his agent. in satisfaction of a debt then subsisting between the parties and secured by mortgage, and before the attachments were issued, then they should find for the plaintiff, at least to the extent of such delivery.

"4. If the jury believe from the evidence that A. J. Brewer had a valid mortgage or deed in trust against Bailey Baker, made in good faith and not satisfied or paid, on the property mentioned in the complaint, and that the plaintiff is trustee in said mortgage or deed in trust, they should find for the plaintiff, nevertheless the mortgage was not recorded until after the attachments were issued."

The court refused to give these instructions, or any of them, and plaintiff excepted. The defendant then asked the following instructions, which were given against plaintiff's objections, and exceptions were saved.

"1. The court instructs the jury for the defendant, that the trust deed, under which the plaintiff claims title as trustee herein, is, as to the cotton sued for, void for uncertainty, and as matter of law the plaintiff cannot recover said cotton in this action under said trust deed; and if they find from the evidence that the plaintiff, W. A. Cross, has no other title to said cotton, they will find for the defendants as to said cotton.

"2. The jury is further instructed that an order of attachment binds the property of the defendant, and consti-

tutes an attachment lien thereon, from the time such order comes to the hands of the sheriff or other officer for execution, if same is afterwards levied; and if they find from the evidence that orders of attachments came to the hands of the officer for execution in actions in favor of Fombey & Co., J. E. Smith, J. G. Kelso and C. M. Fombey against Bailey Baker, before the trust deed under which plaintiff claims was filed for record, they will find for defendant for corn as well as for said cotton herein sued for, even if said orders or either of them were levied after the filing of said deed of trust for record."

There were a verdict and judgment for appellees, a motion for a new trial, saving all points overruled, and an appeal.

The first of these rejected prayers (No. 2) was properly refused for the reason already mentioned in connection with the evidence offered by appellant and rejected; that is, because there was no evidence that the property was delivered to Brewer or his agent or the trustee or his agent befeor the attachments were delivered to the appellees. There was no evidence offered to show that Johnson was the agent of Brewer or the trustee at the time the cotton was delivered to him, or that either of them ever sought by ratification to adopt his acts, until after the orders of attachment were received by the officers and had become inchoate liens upon the property, which liens were afterwards perfected by the execution of the orders of attachment upon the property. The above statement disposes of the rejected prayers numbered two and three.

The rejected prayer number four presents the main question in this case; that is, whether a deed of trust, made in good faith and unsatisfied, takes precedence of the lien of an order of attachment, which comes to the hands of the officer after the execution of the deed, but before the deed is recorded.

1. Deed of trust—Record.

It is contended for appellant that, upon the execution of the deed of trust, the title to the property passes at once to

the trustee, without any act on his part; and that while a deed of trust is like a mortgage in effect, it is not a mortgage within the provisions of section 4743 of Mansf. Dig., which is as follows: "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Though good between the parties until filed for record, under this statute, the lien of a mortgage as to third parties has no existence, and is not binding upon them, though they have actual notice of it. *Main* v. *Alexander*, 9 Ark., 112; *Jacoway* v. *Gault*, 20 Ark., 190; *Hannah* v. *Carrington*, 18 Ark., 105; *Dodd* v. *Parker*, 40 Ark., 540; and the Arkansas decisions *passim*.

Does this statute apply to a deed of trust of the same character as the one in this case?

It is said of a similar conveyance in *Hannah* v. *Carrington*, *supra*, that it "falls within Mr. Kent's definition of a mortgage with a power of sale. * * * The character of the instrument is the same, whether the power of sale be vested in the mortgagee, or a third person as trustee." It purports only to be a security for a debt, with a defeasance clause that it shall be void upon payment of the debt. "Where 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 where the 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 obligations according to its terms, instruments of this class are also, but less technically, called deeds of trust, but in substance they are mortgages, with specific powers of foreclosing or barring the equity of redemption." * * * "The attributes of a deed of trust for such purpose and a mortgage with power of sale are the

same, both are intended as securities, and, in a legal sense, are mortgages." *Turner* v. *Watkins*, 31 Ark., 437.

2. Priority—Attachment and unrecorded mortgage.

In *Mayham* v. *Coombs*, 14 Oh., 428, it was held that "An unrecorded mortgage must be postponed to the lien of a judgment recovered after the date of the mortgage." *Jackson* v. *Luce*, *ib.*, 514. We have no hesitation in saying that, under the statutes of this State, an order of attachment becomes a lien upon the property of the defendants, subject to seizure on execution for the debts of the defendant in the county, from the time the order comes to the hands of the officer, and that, by levy of the attachment and judgment sustaining the same, such inchoate lien is perfected, and takes precedence of the lien of a mortgage executed before the order of attachment came to the hands of the officer, but not recorded till afterwards.

There was no error in the court's refusal to give the fourth instruction asked for by the appellant, and no error prejudicial to him in the instructions given by the court.

The judgment is affirmed.

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HEASLET *v.* SPRATLIN.

Decided February 7, 1891.

Accord unexecuted—Part payment.

The acceptance of part payment of a debt, witnessed by a due bill, in full satisfaction thereof, but without surrender of the instrument, is an agreement for a release which is based upon no consideration, and therefore void.

APPEAL from *Arkansas* Circuit Court.

JOHN M. ELLIOTT, Judge.

Heaslet, as administrator of Mills, brought suit against Spratlin on a due bill for $150. The latter in defense testified that, after the instrument was executed, Mills agreed to take $125 in full payment of the debt; that he paid this amount and took Mill's receipt therefor, which is as follows:

"OCTOBER 22, 1887.

"Received of E. J. Spratlin ($125) one hundred and twenty-five dollars, as payment on due bill held by me.

"P. B. MILLS."

The cause was tried without a jury, and judgment was rendered for defendant. Plaintiff appealed.

Gibson & Holt for appellant.

1. The testimony of appellee was inadmissible. Sec. 2, sched. to const. 1874; 48 Ark., 133; 52 *id.*, 550.

2. The receipt, if admissible at all, only showed a *part* payment after *the note was due*, and only extinguished the note *pro tanto*. 2 Dan. on Neg. Inst., sec. 1289, p. 309; 33 Ark., 572.

W. H. HalliBurton for appellee.

1. The testimony of appellee pertained to the genuineness of the receipt, and not to transactions with appellant's intestate, and is not within the constitutional prohibition.

2. The receipt showed, and was intended as, an accord and satisfaction, and a discharge of the entire indebtedness, and is binding. 2 Ark,, 209; 44 *id.*, 349; 33 *id.*, 572; 21 Am. L. Reg., N. S., 637.

COCKRILL, C. J. As the suit was by an administrator to recover a debt claimed to be due to his intestate, the defendant was not a competent witness to testify to transactions with and statements made by the intestate in reference to the matter in controversy. Sec. 2, schedule to const. of 1874. See *Nunnally* v. *Becker*, 52 Ark., 550. But the record does not disclose that objection was made to the introduction of the testimony, and it cannot be raised here for the first time.

Accord unexecuted—Part payment.

The judgment for the defendant cannot be sustained, however. The receipt for money paid to the intestate, which was the foundation of the defense, does not purport to be in full payment or a release of the debt which the defendant owed. The due bill which represented his debt was not surrendered to him, and the partial payment was made

in money after the debt was due. The case stands, then, only upon the defendant's testimony of the parol release. But that, by all previous decisions of the court, was not an executed release, but only an agreement for a release based upon no consideration and therefore void. *Gordon* v. *Moore*, 44 Ark., 349.

Reverse and remand.

54 187
55 310

STEWART *v.* SCOTT.

Decided February 7, 1891.

1. *Set-off—Unliquidated damage.*

   Unliquidated damages, even when arising from a breach of contract, are not the subject of set-off. Appellee sold appellant certain timber, to be delivered at the stump at a fixed price per thousand feet and the expense of cutting. Appellant subsequently, with appellee's acquiescence, volunteered to cut the timber himself, and did cut about half the agreed quantity, but refused to take the residue. In an action upon a note for merchandise by appellant against appellee, the latter sought to set-off damages arising out of the breach of the above contract. *Held*, That, as to the residue of the timber, the contract was executory; that appellee, having made no offer of the delivery of the timber at the stump and having retained the trees in their natural state, could recover, not the contract price of delivered timber, but only the damages sustained by reason of appellant's breach of contract; but that such damages, being unliquidated, could not be pleaded as a set-off.

2. *Contract against public policy—Trespass by mortgagor.*

   A contract to sell timber to be cut from mortgaged premises, made by the mortgagor in possession but without the mortgagee's consent, is not against public policy as being in contravention of the statutes which prescribe a punishment for trespassers who cut timber upon the lands of another (Mansf. Dig., 1658 *et seq*).

3. *Illegal contract—Sale of mortgaged property.*

   A contract to sell timber to be cut from mortgaged premises, made with intent to defraud the mortgagee, is illegal and void, under Mansf. Dig., sec. 1693, as amended by acts 1885, p. 120.

APPEAL from *Clark* Circuit Court.

RUFUS D. HEARN, Judge.

Stewart sued Scott upon a note and account given for merchandise and supplies aggregating about $3900. Scott pleaded a set-off for $5200 for the purchase of certain standing timber which he had sold to plaintiff, to be delivered at the stump. Some of the timber had been delivered when the suit was brought, but about half of the timber was still standing. At the time this contract was made there was a subsisting and unsatisfied mortgage from Scott to Shattuck & Hoffman, of New Orleans, covering the land upon which the timber was standing. They neither knew of nor consented to the cutting of the timber from the land.

There was a verdict and judgment for $545 in favor of Scott on his set-off. Stewart has appealed.

J. H. Crawford for appellant.

1. Defendant's claim sounds in damages, growing out of an unexecuted contract, in its nature uncertain and unliquidated; and it cannot be made the subject of a set-off. Mansf. Dig., sec. 5036; 4 Ark., 527; 30 Ark., 50, 55; 31 Md., 12; 100 Am. Dec., 49; 12 Or., 169; 6 Pac. Rep., 766; 118 Ill., 612; 9 N. E., 201; 4 Johns. Chy., 287; 2 Edw. Chy., 73; Newm. Pl. & Pr., p. 584; 48 Mich., 218; 12 N. W., 167.

2. The contract was void, being against the law. Mansf. Dig., secs. 1658–1662. The trustee or mortgagee was the owner of the lands. 2 Johns. Chy., 148; 1 Wall., 53; Boone on Mortg., sec. 102; 11 Ark., 104. Contracts that contravene the law are void. 25 Ark., 209; 32 *id.*, 631; 1 Bin., 110; 2 Am. Dec., 417; 29 Ark., 386; 11 Wh., 271; 4 S. & R., 157; 8 Am. Dec., 682, and note; 10 Am. Dec., 491; 25 *id.*, 71; 53 *id.*, 742; 62 *id.*, 564; 87 *id.*, 527; 3 Am. Rep., 706; 25 Am. Rep., 106, and note; 1 Hill. on Cont., p. 344 *et seq.*

Murry & Kinsworthy for appellee.

1. The set-off does not sound in damages. Appellee sold appellant the timber on 900 acres of land at 50 cents per 1000. He is not suing for a breach of the contract, but for the amount due him under the contract which can be

reached by a mere calculation. It is a debt due by contract, and is a proper set-off.

2. Appellee sold the timber subject to the deed of trust, and this he had a right to do. 43 Ark., 499, 504; 30 *id.*, 407; 5 Am. St. Rep., 790; 10 Paige, Chy., 49; 38 Kans., 363. As between mortgagor and mortgagee the legal title is in the mortgagee; but as to all others it is in the mortgagor, and may be conveyed by him, subject to the mortgage. 32 Ark., 478; 7 Cow., 71; 9 L. C. ed. N. Y. Ct. App., 280. Scott conveyed to Stewart the same right that he had, and it was no crime as against public policy for him to buy it. Tied. Real Prop., par. 318, 333; 7 Johns., 278; 9 Paige, Chy., 132. It was no offense under secs. 1658–1662, Mansf. Dig., if appellee had cut the timber and appellant merely succeeded to appellee's rights. A party cannot, while retaining the profits of a transaction, allege that it was without legal validity. 13 Cent. Rep., 305; 85 Ala., 158; 23 N. Y. S. R., 912.

1. Set-off—Unliquidated damages.

COCKRILL, C. J. It is conceded that the only questions arising upon this appeal relate to Scott's set-off to Stewart's action against him. The set-off is based upon an agreement for the sale of timber to be delivered at the stump by Scott, the vendor, to Stewart. The purchase price was to be the cost of cutting and an agreed sum per thousand feet. The contract was in writing. After its execution, Stewart concluded that he could have the timber cut cheaper than Scott could, and expressed a determination to undertake it. Scott acquiesced. Stewart cut and appropriated about one-half of the quantity agreed upon, and refused to take the residue. The court, against Stewart's objection, received evidence of the number of feet of timber in the trees covered by the contract which were rejected by Stewart and left growing upon the land; and charged the jury that they might return a verdict against him for a sum equal to the contract price of the timber they contained. These rulings are assigned as error.

Without laying stress upon the want of a certain description, in the written contract, of the lands upon which the trees stood, it is enough to say that it was an executory contract to sell timber which (in part) was never completed by delivery. After the vendee refused to proceed in execution of the contract, the vendor did not make an offer of delivery in accordance with the terms of the written contract, but retained the trees in their natural state. The measure of his recovery therefore would not be the contract price of delivered timber, but the damages sustained by reason of the vendee's breach of contract. But these damages are unliquidated, and unliquidated damages, even when arising from breach of contract, are not the subject of set-off, though they may be recouped in a proper case. *Gerson* v. *Slemons*, 30 Ark., 50; *Bloom* v. *Lehman*, 27 *ib.*, 489; *Clause* v. *Printing Company*, 118 Ill., 612; *Holland* v. *Rea*, 48 Mich., 218; *Carter* v. *Jaseph*, *ib.*, 615.

The court erred in admitting the testimony and giving the instruction referred to.

2. Trespass by mortgagor.

When the contract for the sale of the timber was entered into, Scott, the owner, was in possession of the land, but there was a subsisting mortgage upon it, executed by him to secure a debt due to a non-resident firm. It is argued that the contract of sale is void, and that no recovery can be had, because it was made in contravention of the statute enacted to punish persons who fell trees upon another's land without his consent. Two provisions of the law are appealed to, to sustain the contention, viz., sections 1658 and 1659 *et seq.*, Mansfield's Digest. But it is not apparent that the legislature intended that either provision should embrace a mortgagor in possession. One section is directed at "every person who shall wilfully commit any trespass * * * upon the lands of any other person" (sec. 1658, *sup.*); and the other against those who, "without lawful authority, wilfully and knowingly enter upon lands belonging to this State," or to any corporation or person, other than the party accused. Secs. 1659, 1663, *supra.*

The mortgagee is in common entitled to the possession of the mortgaged lands; but until he takes it legally, the possession of the mortgagor is not illegal, and his entry is not in itself a trespass. He is not therefore within the letter of the statute. Moreover, the expressed intent of the legislature is to visit punishment only upon those who cut trees upon *the lands of another.*

In popular acceptation the mortgagor remains the owner of the land, and the popular belief is not far from legal accuracy.

It is common to say that the legal title vests in the mortgagee, but his interest is regarded as a title only for the purpose of enforcing his equities. It lacks many of the essentials of a title. He has no interest that can be sold on execution, and his widow does not take dower in his interest in the land, notwithstanding the statute makes every substantial interest in real estate subject to sale under execution, and the subject of dower. A power to sell is not necessarily a power to mortgage, nor is a power to mortgage a power to sell, and it is held that giving a mortgage upon land by one who has already conveyed his title by deed is not disposing of the land, within the meaning of a statute which made it a felony to make a fraudulent second sale. *People* v. *Cox*, 45 Cal., 342. Payment of the debt at its maturity destroys the estate, without a reconveyance or release by the mortgagee. *Schearff* v. *Dodge*, 33 Ark., 340. Equity always regards the mortgagor as the owner of the land, and the mortgagee as holding a security only for his debt; and a court of law, in a controversy between the mortgagor and a stranger to the mortgage, does not regard the mortgage as a conveyance. For example, in a suit by the mortgagor for possession, it is no answer for a stranger to say that the title is in another by virtue of the mortgage. "It is an affront to common sense," said Lord Mansfield in *Rex* v. *St. Michaels*, 2 Doug., 632, "to say the mortgagor is not the real owner." If then, in popular and legal acceptation, the mortgagor is the owner of the land, there is no

reason for attributing to the legislature the intent to punish him under the provision of the law referred to.

There is a limit upon his right, as against the mortgagee, to cut trees growing upon the mortgaged premises, but the statute does not purport to punish waste as distinguished from trespass. A rational construction of the act does not require an expansion of its terms to meet that class of cases.

3. Illegal contract to sell mortgaged property.

It is a statutory crime also to sell mortgaged property with intent to defraud the mortgagee. Mansf. Dig., sec. 1693, as amended by Acts 1885, p. 120. As the mortgage lien continues to bind the trees grown upon the land after they are severed from the soil, a sale of them made for the purpose of defrauding the mortgagee would be in the face of the statute. A contract for that purpose would therefore be void, and the courts would refuse to enforce it. *O'Bryan* v. *Fitzpatrick*, 48 Ark., 487.

But there was no evidence at the trial which conclusively stamps the transaction as a fraud upon the mortgagee. It was proved only that 1560 acres of land had been mortgaged to secure a debt of $2500. The value of the land without the timber may have been so greatly in excess of the mortgage debt that no intent to defraud the mortgagee could be presumed. The court was not asked to direct the jury to consider the question of fraud; and there was no error in the refusal to charge, as requested, on the theory that the contract contravened the other sections of the statute first cited above. But for the errors indicated it is ordered that the judgment be reversed, and the cause remanded for a new trial.

SIMS *v.* PHILLIPS.

54 193
f79 400

Decided February 7, 1891.

Fraudulent conveyance—Exempt property.

A mortgage of all a debtor's property cannot be fraudulent if it be less in value than he is entitled to hold exempt from execution.

APPEAL from *Sebastian* Circuit Court.

J. H. EVANS, Special Judge.

Phillips, being a constable, levied upon certain personal property, including 300 bundles of fodder, under an execution against Sampson in favor of Tatum. Sims brought replevin for the property, claiming under a mortgage from Sampson. It was shown that the mortgage covered all of the property owned by Sampson, and that it was less in value than $200. Among other things, the mortgage embraced 150 bushels of corn and 300 bundles of fodder. At the time the mortgage was executed Sims consented that Sampson should use and consume the fodder and corn. The court charged the jury:

"If Sims took the mortgage given in evidence upon corn, fodder, or other property which must perish in the using, and consented that the same should remain in the possession of Sampson and be used and consumed by him, the mortgage would be entirely fraudulent and void as to creditors, and you should find for defendant."

There was verdict and judgment for the defendant. Plaintiff has appealed.

The appellant *pro se*.

The mortgage in this case cannot be in fraud of creditors, unless the appellee shows that if said mortgage had not been given the property would have been subject to seizure and sale under execution. 31 Ark., 556; 43 *id.*, 434; 52 *id.*, 547.

The appellee *per se*.

1. The burden of proof in this case was on appellant to show that the property was not subject to seizure and sale

before it was mortgaged. 52 Ark., 547; 13 S. W. Rep., 139. It is not shown that Sampson was a resident of the State, or that he was entitled to claim the property as exempt.

2. The mortgage being fraudulent was void as to creditors. 4 Yerg., 541; Bump, Fr. Conv. (2d ed.), secs. 476–7; 41 Ark., 190.

Fraudulent sale—Exempt property.

COCKRILL, C. J. There was testimony which would have warranted the jury in finding that Sampson, the mortgagor, was entitled to claim his exemptions under the laws of this State; that the property covered by the mortgage was all the personal property owned by him at that time; and that its value was less than the exemptions allowed by law. The charge of the court excluded the consideration of these facts from the jury, and instructed them that the mortgage was void if executed with the intent to hinder and delay a creditor of the mortgagor, provided the mortgagee participated in the fraud. That was error, for if the mortgage had not been made, and the facts were as we have stated, the creditor could not have taken the property in satisfaction of his debt, and no transfer of it could be in fraud of his rights. *Erb* v. *Cole*, 31 Ark., 554; *Blythe* v. *Jett*, 52 *id.*, 547.

We have considered no other phase of the charge, but as the error indicated pervades the whole charge upon the subject of fraud, the judgment must be reversed, and the cause remanded for a new trial.

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BARNETT *v.* HUGHEY.

Decided February 7, 1891.

1. *Conveyance—Breach of warranty—Damages.*

In an action upon a covenant of warranty in a deed to land the measure of damages for the loss of the land is the consideration paid and interest thereon from the date of the deed. (Whether the covenantor would be liable for *interest* if the covenantee has occupied the premises without accounting for rents and profits, is not involved in this case.—REPORTER.)

2. *Consideration—Parol evidence.*

In such an action parol evidence is admissible to show that the actual consideration was greater or less than expressed in the deed; but not to defeat the deed or a recovery on the covenants.

3. *Trustee's deed—Warranty—Liability.*

A trustee conveying land with covenant of warranty is personally responsible for its performance.

4. *Consideration in trustee's deed.*

In an action for a breach of such a covenant, the trustee is liable for the actual consideration paid by the covenantee, though received by his *cestui que trust.*

5. *Liability of covenantor to assignee of covenantee.*

In an action for breach of covenant for title against a covenantor by an assignee of his covenantee, the measure of damages for the land is the consideration which the assignee paid to the covenantee with interest from the date of the deed to such assignee, with the limitation, however, that the assignee cannot recover more damages from the covenantor than the covenantee was liable for to him.

6. *Case stated.*

H conveyed land with covenant for title to S, to hold in trust for himself. At his request S conveyed the land with covenant to B for a consideration paid by B to H. Being ejected by a paramount title, B brought suit against S and H upon their covenants. HELD: B is entitled to recover of H and S, on their respective covenants of warranty, the consideration paid to H.

APPEAL from *Jefferson* Circuit Court.

JOHN A. WILLIAMS, Judge.

Dr. J. R. Barnett brought suit against W. L. Strickland and W. W. Hughey, to recover damages for a breach of a covenant of warranty in a deed of land. Judgment was rendered for defendants, and plaintiff appealed. The facts are

stated in the opinion. This case grew out of the decision in *Hughey* v. *Bratton*, 48 Ark., 167.

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

The measure of recovery is the purchase money, or consideration of the deed and interest. The true consideration may be shown by parol evidence. Rawle, Cov. for Title, 5th ed., sec. 175; 5 Gray, Mass., 518. The true consideration of the deeds was $350, and for this plaintiff should have had judgment.

Bell & Bridges for appellees.

The measure of damages for breach of covenant is the purchase money and interest. 1 Ark., 313. Now Hughey received no consideration for his deed to Strickland, and Strickland received no consideration from Barnett. So no consideration passed on the execution of either deed, and hence there can be no recovery. Parol evidence is admissible to show no consideration, though one is recited in the deed.

1. Damages for breach of warranty in deed.

BATTLE, J. In an action by a grantee against his grantor, on a covenant of warranty contained in a deed to land executed by the latter to the former, the amount recoverable on account of the breach of the covenant is limited by the consideration of the deed and interest. *Logan* v. *Moulder*, 1 Ark., 313; Rawle on Covenants for Title (5th ed.), secs. 157-164.

2. Parol proof of consideration.

In such actions, parol evidence is admissible, on the part of the plaintiff, to show that the actual consideration was greater than that expressed in the deed, for the purpose of increasing the damages, and, on the part of the defendant, to show that it was less, for the purpose of diminishing them; but not for the purpose of defeating the deed or a recovery on the covenants. *Estabrook* v. *Smith*, 6 Gray, 578; *Bloom* v. *Wolfe*, 50 Iowa, 286; Rawle on Covenants for Title, secs. 173-174.

3. Liability of trustee upon his warranty.

In this case the facts in respect to the consideration, as shown by parol evidence, are as follows: In 1873 W. W. Hughey, to defeat a debt for which he and J. R. Barnett

were sureties, conveyed certain lands to W. L. Strickland by a deed containing the covenant of warranty upon which this action was in part brought. Strickland paid nothing for the land. In 1876 Barnett satisfied the surety debt by paying $700. After this Hughey agreed with Barnett to cause Strickland to convey the land to Barnett in satisfaction of the one-half of the debt paid by Barnett, for which he was liable, which was $350. In performance of this agreement Strickland conveyed the land to Barnett by deed containing the other covenant of warranty sued on, stating in the deed that the consideration of the conveyance was $350. No money was paid to Strickland. He "received the first deed and executed the second as a mere favor to Hughey, who was his brother-in-law."

According to the foregoing facts, Strickland undertook to hold and convey the land in trust. He was under no obligation, moral or otherwise, to enter into any covenant other than that he had done no act to encumber the premises. But instead of this he conveyed the land to Barnett, and made with him one of the covenants of warranty in question. In conveying the land he executed the trust that he had undertaken when Hughey conveyed to him; and in making the covenant made himself personally responsible for its performance. This covenant was based upon a valuable consideration, and is valid and binding upon him. *Bloom* v. *Wolfe*, 50 Iowa, 286.

4. Consideration in trustee's deed.

What was the consideration of Strickland's covenant of warranty? We have already seen that, in conveying the land to Barnett, he was discharging a trust which he had undertaken when Hughey conveyed to him, and was executing a contract which Hughey had made with Barnett. The consideration of that contract was the payment and satisfaction of Hughey's liability to Barnett for one-half of the surety debt, and that was $350, which was made and recited in the deed to be the consideration thereof and of the covenants therein contained, and was the real consideration of the deed. *Hodges* v. *Thayer*, 110 Mass., 286. The

measure of damages then for which Strickland is liable to Barnett for the breach of his covenant of warranty is the $350 paid by Barnett to Hughey and lawful interest thereon from the date of his deed. *Bloom* v. *Wolfe*, 50 Iowa, 286.

5. Liability of covenantor to assignee.

Hughey conveyed the land in fee simple to Strickland, and covenanted with him, his heirs, executors, administrators and assigns, that he and his heirs would "warrant and defend the same to Strickland, his heirs, executors, administrators and assigns forever, against the lawful claims of all persons whomsoever." This covenant ran with the land. When Strickland conveyed, he transmitted it to Barnett, and Barnett thereby became substituted in the place of Strickland as to his right of indemnity for damages sustained by reason of the defect of title, and entitled to recover damages sustained by a breach of the covenant. But he cannot recover of Hughey more damages than Hughey was liable for to Strickland, or than Strickland is liable for to him. Hughey's liability for damages was not increased by reason of the conveyance to Barnett. It is limited by the real consideration of his deed to Strickland, and lawful interest thereon from the date of the deed. *Crisfield* v. *Storr*, 36 Md., 150; *Dickson* v. *Desire*, 23 Mo., 166; *Williams* v. *Beeman*, 2 Dev., 483; 2 Sutherland on Damages, 296.

6. Case stated.

What, then, was the consideration of the deed of Hughey to Strickland? Nothing was paid for the land by Strickland. He only undertook to hold and convey as Hughey directed. Whatever Hughey should receive in consideration of a conveyance that Strickland should make in pursuance of his directions and requests, was the consideration of Hughey's deed; that was the inducement which caused him to convey the land; that was the $350 paid by Barnett.

It follows, then, that Barnett was entitled to recover of Hughey and Strickland, on their respective covenants of warranty, the sum of $350 and lawful interest from the date

of Strickland's deed; but he is not entitled to more than one satisfaction.

Reversed and remanded.

RAILWAY COMPANY *v.* WHITLEY.

54 199
56 632

Decided February 7, 1891.

Statute of frauds—Cattle guards.

An agreement of a railway company to keep and maintain cattle-guards on each side of a person's land is limited by the time it should operate its road over his land, and need not be in writing under the statute of frauds requiring agreements not to be performed within one year to be in writing.

APPEAL from *Monroe* Circuit Court.

M. T. SANDERS, Judge.

John C. Palmer for appellant.

Sanders & Watkins for appellees.

BATTLE, J. This was an action for damages that were caused by a breach of a verbal agreement entered into by appellant and appellees in 1872. The agreement was that appellees would permit appellant to build its railroad across their land, and that appellant would in consideration thereof construct, keep and maintain good and sufficient cattle guards across its road on each side of appellees' land to prevent stock running at large from trespassing on their fields. In pursuance of this agreement the road was built over the land, but good and sufficient cattle guards were not kept and maintained. Appellant insists that the action cannot be maintained because the agreement comes within the statute of frauds. This is the only question presented for our consideration.

Statute of frauds—Cattle guards.

It is insisted that the agreement comes within the statute, because it was not to be performed within one year after it was made, and no note or memorandum thereof was made.

Section 3371 of Mansfield's Digest, upon which this contention is based, provides: "No action shall be brought * * * to charge any person upon any contract, promise or agreement that is *not to be performed* within one year from the making thereof, unless the agreement, promise or contract upon which such action shall be brought, or some note or memorandum thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized."

Substantially the same clause in 29 Car. II. c. 3, sec. 4, was considered, a short time after its enactment, by all the judges in *Peter* v. *Compton*, Skinner, 353. In that case the action was upon an agreement, by which the defendant, for one guinea, promised to give the plaintiff so many at the time of his marriage. The marriage did not occur within the year, and the question was, did the agreement come within the statute? The decision of the question depended upon the meaning of the words, "*upon any agreement that is not to be performed within the space of one year from the making thereof*," in the statute. A majority of the judges held that it did not, and that "where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within a year." Since then the same question has generally been decided in England and America as held in *Peter* v. *Compton*. 1 Smith's Leading Cases, Pt. 1 (8th ed.), 614, and note.

In *Fenton* v. *Emblers*, 3 Burr., 1278, the defendant's testator promised the plaintiff "that if she would become his housekeeper, he would pay her wages after the rate of £6 *per annum*, and give her, by his last will and testament, a legacy or annuity of £16 by the year, to be paid yearly. The plaintiff, on this agreement, entered into the testator's service, and became his housekeeper and continued so for more than three years." The court held that the contract, though by parol, did not come within the statute; for the contin-

gency upon which it depended might have happened within a year.

In construing the one year statute of fraud, in *McPherson* v. *Cox*, 96 U. S., 404, Justice Miller, in delivering the opinion of the court, said: "The statute of frauds applies only to contracts which, by their terms, are not to be performed within a year, and do not apply because they may not be performed within that time. In other words, to make a parol contract void it must appear that it was the understanding of the parties that it was not to be performed within a year from the time it was made." In that case it was held that a contract to pay an attorney at law for his services to be rendered in suits concerning land a specific sum of money out of the proceeds of the sale of the land, when it was sold by the client, did not come within the statute, for it might have been performed within the year. *Walker* v. *Johnson*, 96 U. S., 424.

In determining when contracts come within the one year statute of frauds, courts have been governed by the words, "*not to be performed.*" They have treated them as negative words. In construing them it is said: "It is not sufficient to bring a case within the statute that the parties did not contemplate the performance within a year, but there must be a negation of the right to perform it within the year." According to this rule of construction it is well settled that the statute only includes those contracts or agreements which, according to a fair and reasonable interpretation of their terms in the light of all the circumstances which enter into their construction, do not admit of performance in accordance with their language and intention within a year from the time they were made; and that it includes no agreement, if, consistently with its terms, it may be performed within that time. Accordingly, it is also well settled that agreements which contain no stipulation as to time, but depend for performance, either expressly or by reasonable implication, upon the happening of a certain contingency which may occur within the year, do not come within the

statute; as, for instance, promises to pay money on the day of the promisor's marriage, or on the death of a third party, or during the promisee's life, to work for another during his life, to board the promisee during his life, to educate a child, are not within the statute. "And so, of course, whatever else be the contingency, provided it may happen within a year." *Roberts* v. *Rockbottom Co.*, 7 Met., 46; *Lyon* v. *King*, 11 Met., 411; *Foster* v. *McO'Blenis*, 18 Mo., 88; *Lapham* v. *Whipple*, 8 Met., 59; *Artcher* v. *Zeh*, 5 Hill, 200; *Lawrence* v. *Cooke*, 56 Me., 187; *Peters* v. *Westborough*, 19 Pick., 364; *Ellicott* v. *Peterson*, 4 Md., 487; *Blair Town Lot Co.* v. *Walker*, 39 Iowa, 406; *Plimpton* v. *Curtiss*, 15 Wend., 336; *Russell* v. *Slade*, 12 Conn., 460; *Rogers* v. *Brightman*, 10 Wis., 65; *Jilson* v. *Gilbert*, 26 Wis., 637; *Meyer* v. *Roberts*, 46 Ark., 84; Browne on Statute of Frauds (4th ed.), secs. 273, 283, and cases cited; 1 Smith's Leading Cases, Pt. 1 (8th ed.), top pages 619, 623, and cases cited.

In this case the duration of appellant's promise to keep and maintain good and sufficient cattle guards was limited by the time it should maintain and operate its road over appellees' land. If the road should cease to be used for railroad purposes, or be removed from the lands of appellees to other lands, as has occurred in other cases, it would be unreasonable to require the cattle guards to be maintained, the reason therefor no longer existing. In that event the time of the performance of the agreement would expire. This might well have happened within a year, consistently with the understanding and rights of the parties. As its performance depended on an implied contingency which might have occurred within one year after it was made, it does not come within the statute of frauds.

Affirmed.

THOMPSON *v.* WHIPPLE.

Decided February 7, 1891.

False imprisonment—City council—Ejection of member by order of mayor.

The mayor of a city, as president of its council, has no inherent authority, according to the usages of deliberative bodies, to order a member to be forcibly excluded from a council meeting for disorderly or indecorous behavior which does not threaten personal injury nor arrest the progress of business. For the execution of such an order, he and the officer executing it will be responsible in an action for a false imprisonment.

APPEAL from *Pulaski* Circuit Court.

JOSEPH W. MARTIN, Judge.

Action for assault and battery and false imprisonment. The court overruled a demurrer to the answer. Plaintiff rested and appealed. The substance of the answer is stated in the opinion.

Compton & Compton and *Blackwood & Williams* for appellant.

The council is a deliberative body, with certain well-defined legislative functions. They have the right to determine their own rules of procedure, etc. Mansf. Dig., sec. 806, 823. No statutory authority in the premises is conferred upon the mayor, beyond that to preside over the deliberations of the body (*ib.*, sec. 807); and if he had any such power as is exercised here, it must be conferred by the rules of the body itself, or arise inherently by virtue of his position under the general parliamentary law of the country. The powers and duties of the president of a deliberative body are summed up in Jefferson's Manual, sec. 18. See also Cushing, Par. Law, secs. 652-3, etc., 1765. The powers of parliamentary bodies are discussed in 103 U. S. 168. The case in 17 Wend., 522, is not in point. That was not a *deliberative* body, but a town meeting; and the justices were empowered by statute to see that the meeting was orderly and regularly conducted. 1 R. S. N. Y., secs. 11, 12; *ib.*, sec. 137.

Eben W. Kimball and *Morris M. Cohn* for appellees.

The mayor is the presiding officer of a body authorized to determine the rules of its proceedings; by ordinance "the president shall preserve order and decorum," etc. Mansf. Dig., secs. 806, 807; Digest of City Ordinances, 1882, pp. 51 and 58, rule 44. See also Jefferson's Manual, p. 163; Cush. Law and Pr. of Leg. Assemblies, secs. 290–1. The mode of proceedings is regulated by the *general rules* which govern *other* deliberative and legislative bodies. 1 Dillon, Mun. Corp., sec. 288. From these authorities it is obvious the mayor has plenary power to preserve order, and this power carries with it all powers necessary to its proper exercise, such as suppressing *disorder.* The case of 17 Wend., 522, seems to be directly in point, and justifies the action of appellee in this case. 1 Dillon, Mun. Corp., sec. 272, note 2. See 6 Am. Dec., 303; 18 *id.*, note 440.

HEMINGWAY, J. The answer admits the imprisonment of the plaintiff, and seeks to justify it. The defendants, Whipple and Botsford, were respectively the mayor and chief of police of the city of Little Rock, and the plaintiff was an alderman of the city. By virtue of their offices the plaintiff was a member of the city council, defendant Whipple its president, and defendant Botsford its executive officer. The circumstances of justification set up in the answer are that the plaintiff, at a meeting of the city council, "conducted himself in an unparliamentary, disorderly, boorish and insulting manner towards its presiding officer and the council;" that he addressed the council while in his seat, replied to a remark of the mayor in a disrespectful tone and manner, and asked "What are you going to do about it?"; that he kept his hat on his head during the meeting; and that, while retaining his seat, "in a loud and defiant tone" he seconded a motion that the mayor preserve order. Other like acts of disorder are alleged, and that plaintiff was called to order by the defendant Whipple, and admonished as to his misconduct; that he failed to observe the admonition and continued to be disorderly; that he was on

that account conducted out of the council chamber by the chief of police under an order from the mayor; that an ordinance of the city then in force authorized the mayor "to preserve order and decorum and to decide all questions of order, subject to an appeal to the council."

The legal sufficiency of the answer is the only question in the case.

False imprisonment—Ejection of member of city council.

The statute provides that the mayor shall be *ex-officio* president of the council, and shall preside at its meetings during the term for which he shall have been elected. Mansf. Dig., sec. 807. It does not define the character or extent of his powers or duties as president of the council, but necessarily implies that they shall be such as are ordinarily incident to the position, and such as may be prescribed by any proper rules of procedure that the council shall adopt. Mansf. Dig., sec. 806. The only rule of the council pleaded provides that "the president shall preserve order and decorum." It does not define the means that the president may employ to preserve order and decorum, but leaves that subject to be determined by the usages that prevail in deliberative assemblies. So that if the circumstances relied on justify the exclusion of plaintiff from the council chamber, it is because such authority is inherent in the office of president, according to the laws that regulate the proceedings of such bodies. The ordinance is only declaratory of the common law; it neither in terms nor spirit increases or extends the duties or powers usually pertaining to the position. What then are such duties and powers according to the general usages of deliberative bodies? They comprise the duty and power to preserve order and decorum during the deliberations of the body. It is said to be the privilege of any member, and the special duty of the presiding officer, to take notice of any offense during deliberation, and to call the attention of the assembly to it. In such cases the president declares to the assembly that a member named is guilty of irregular or improper conduct, and specifies it. When it has been stated

by the president, the member is entitled to be heard in exculpation. The matter is thus fairly presented to the house for its consideration and action, pending which the member should withdraw. Delicacy and custom requires that he withdraw, in order that the matter may be fully discussed and considered, free from any restraints of his presence. If a sense of propriety does not constrain him to withdraw, the house may order that he do so; but his failure to do it is a matter for the action of the house. If the member disregards its order, the president may enforce it. Thus far and no further can we find that the president is authorized to order that a member be excluded. Cushing's Rules of Pro. and Deb., secs. 40 and 41, and Laws and Practice of Legislative Assemblies, sec. 664. When the president has called an offending member to order, and stated the matter of the offense to the house, it seems that he has fully discharged his duty and exhausted his power in the premises. He thereby transmits the further disposition of the matter to the house. The power to punish is not among his prerogatives; that belongs exclusively to the house, and he can never exercise it save as it is expressly ordered by the house. If he has other powers, the fact has escaped the recognition of writers. They treat him as the servant of the house, vested with powers to act in ordinary cases, but authorized only to execute the will of the house in unusual or extraordinary cases. It is said that the power of the speaker is well stated by Mr. Speaker Lenthall, who, when Charles I came into the house of commons and asked him whether any of five members that he came to apprehend were in the house, whether he saw them, and where they were, replied: "May it please your majesty, I have neither eyes to see, nor tongue to speak, in this place, but as the house is pleased to direct me, whose servant I am."

But it is argued that the president may enforce the exclusion of an offending member, not by way of punishment, but for the purpose of putting an end to existing disorder.

To sustain this view we are cited to the case of *Parsons* v. *Brainard*, 17 Wend., 522. The decision in that case was controlled by a statute of New York, and no reliance is placed by the opinion upon any principle of force out of that State.

Mr. Cushing says that, when in the course of proceedings a quarrel arises between members, which the speaker sees may lead to injurious results, it is his duty to interfere at once, without waiting for the previous order of the house, and, by means of a retraction or apology, compel such members to settle their quarrel immediately, or, by ordering them into the custody of the sergeant-at-arms, prevent them from leaving the house until they pledge themselves that the quarrel shall go no further; that the propriety of this course is more manifiest where the members resort to violence. And that the speaker may, instead of proceeding at once, wait for the house to indicate such course as it may think proper; that in such cases immediate action by the speaker has been the rule in England, while the rule in this country has been to await the action of the house. Cushing's Law and Practice of Legislative Assemblies, sec. 666. It will be observed that the arrest is made in such cases to prevent the impending commission of personal violence, and to detain the offending member in the house to be dealt with by it after it has heard a statement of his offense and his statement in exculpation. Both reasons would be without force in a case of forcible exclusion for disorderly and indecorous behavior, not threatening personal injury; for there is no threatened violence to be prevented, and the exclusion of the member precludes a hearing and order of the house as to the offensive matter. Besides, when the president orders an arrest to prevent an injury being done to another member, he does no more than any other person would be justified in doing anywhere. We find no authority for the arrest of a member by order of the president, except as we have stated. If noise or tumult in the house, breaches of good order and decorum in the

course of proceeding, or an exhibition of disrespect and contempt for the president, would justify a forcible exclusion by him of an offending member, it cannot be that the history of proceedings in deliberative bodies would furnish no instance of the assumption of such power. Such history furnishes many instances of such offenses at times when feeling was more potent in the assembly than reason, and when the president, partially at least under its sway, did not decline the exercise of all his conceded powers; but if any president has ever thus sought to check raging disorder or command respect for his person, the instance is not called to our attention. As occasions for the exercise of such authority, if justified by usage, have often arisen, under circumstances favorable to its exercise, and as it does not appear to have been exercised on such occasions, we conclude that it does not exist.

It does not appear by the answer that plaintiff's conduct in the council meeting threatened personal injury to any of its members; therefore the case does not come within the rule referred to, that might authorize his arrest by the order of the mayor.

In the light of the answer, it appears that the council might have taken such action as it saw fit with reference to plaintiff's misconduct, without hazarding the personal security or safety of its members; it might then and there, upon presentation of the matter, have ordered his suspension or expulsion, if that was deemed necessary to stop or punish his misconduct. There was no such violence as to arrest the progress of business, or to require the exclusion of plaintiff, in order that his offense might be dealt with, His imprisonment was therefore unnecessary and illegal.

The judgment will be reversed, and the cause remanded, with directions to sustain the demurrer to the answer.

RAILWAY COMPANY *v.* HOPKINS.

Decided February 14, 1891.

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1. *Negligence—Sidewalk—Overhanging sign.*

One who maintains a heavy sign overhanging a sidewalk in a much frequented part of a city is bound to use ordinary care in keeping it securely fastened; if a passer-by be injured by its falling, negligence will be presumed, in the absence of proof that it happened out of the ordinary course.

2. *Negligence—Case stated.*

Appellant maintained an overhanging sign. In putting in some electric light wires the servants of an independent contractor, with appellant's knowledge, cut the wires which fastened the sign and neglected to restore them. Two months afterward the accident occurred. *Held*, appellant was guilty of negligence in failing to see that the fastenings were safely restored.

3. *Act of God—Wind.*

An instruction that the defendant would not be liable for the injury if the sign fell from the act of God was properly refused where the only evidence on that point was that it fell on a windy day in March. It was the defendant's duty to take such precautions in fastening the sign as to make it secure against the force of such winds as might be expected in the regular course of the seasons.

APPEAL from *Pulaski* Circuit Court.

JOSEPH W. MARTIN, Judge.

Dodge & Johnson for appellant.

1. The placing of the sign was the work of an independent contractor for whose negligent acts defendant cannot be held liable. 13 S. W. Rep., 333.

2. The sign, placed as it was, was not a nuisance *per se;* and it was error to refuse defendant's second prayer. 92 N. Y., 588; 97 N. Y., 571; 46 Barb., 561; 4 Exch., 244; 14 N. Y., 524; 1 S. & R., 219; 1 Lans., 64; 37 Barb., 207.

3. The company was not liable for the "act of God," or the acts of third persons over whom it had no control, and without their knowledge or consent, and the court erred in refusing the third, fourth and fifth prayers of defendant.

4. Negligence is never to be presumed, but must be proven by competent evidence. 49 Mich., 153; S. C., 8 A. & E. R. Cas., 383; 57 Penn. St., 374; 17 Ga., 624. In

regard to the performance of a lawful act, the presumption exists that at least ordinary care is used. 37 Barb., 15. And where negligence is affirmatively charged, it must be proved. This court has not broadened the rule to the extent set out in plaintiff's first prayer. 34 Ark., 624; 74 Ind., 462; 11 C. L., 30. Fault or negligence are not presumed without some evidence upon which to predicate it. 27 Vt., 693; 23 A. & E. R. Cases, 318. Plaintiff must show an injury which *prima facie* resulted from some fault on the part of defendant. 31 N. Y., 314; 22 Barb., 574; 19 A. & E. R. Cas., 36, 142; 45 Mich., 51; 32 A. & E. R. Cas., 128.

5. When one contracts to do a thing not necessarily a nuisance or dangerous, and he can do that thing without wrong or injury to anybody, yet, in so doing, by his negligent acts, injures another or creates a nuisance, the principal is not liable, but the contractor is. 25 A. & E. R. Cas., 144; 31 *id*, 134; 15 *id.*, 100; 2 Cent. Rep., 439; Sh. & Redf. Neg., secs. 4, 12; Thomps. on Negl., secs. 12 and 34; 98 Mass., 215; 10 A. & E. R. Cas., 754; 17 W. Va., 190.

T. J. Oliphint for appellee.

Erwin, in painting and putting up the sign, and the Electric Company, in putting up the wires, were independent contractors. But the injury did not occur while they were engaged in doing the work, *and that is the test.* When the contractor's work is done, *then liability begins for maintenance*, with the added duty to see that the work is properly done in the first instance. Wharton on Negl., sec. 181; 2 Cent. Rep., 429; 13 S. W. Rep., 333; 114 Mass., 156; 9 Allen, 17; 101 Mass., 251; 112 Mass., 96; 9 M. & W., 710; 69 Mass., 349; 130 *id.*, 414; 3 Gray, 349; 125 Mass., 232; 112 *id.*, 96; 7 H. & N., 826; 17 N. Y., 107; 72 Am. Dec., 437. The doctrine of the liability of an independent contractor has no place in this case, nor has the act of God, nor the officious acts of third persons without the knowledge of defendant.

2. The appellee's first instruction on the subject of presumptive negligence properly given. Whittaker's Smith

on Negl., p. 427; 57 N. Y., 567; L. R., 8 Q. B., 161; 5 Eng. Rep., 169; L. R., 6 Q. B. 761; 39 N. Y., 227; 18 N. Y., 534; 34 Ark., 613, 624; 54 Am. Rep., 544; 51 *id.*, 239; 59 *id.*, 428; 50 *id.*, 550; 95 N. Y., 562; 109 Mass., 398; 94 Penn. St., 351; 94 Ill., 598; 25 Am. Rep., 744; 38 *id.*, 597; 11 Hun., 46; 86 N. Y., 408; 38 Oh. St., 462; 47 N. Y., S. Ct.

3. The sign was a nuisance. Wood on Nuisances, sec. 275; 101 Mass., 251; 106 *id.*, 194; 99 *id.*, 282; 23 Wend., 447; 3 H. L., 330; 94 Mass., 75; 18 N. Y., 18.

COCKRILL, C. J. The appellant maintained a ticket office in the city of Little Rock, and advertised the fact by means of a large wooden sign fastened to the wall over the entrance from the street, fifteen feet above the sidewalk. The sign fell upon the appellee and injured him without fault of his, while he was upon the sidewalk. This appeal is prosecuted to reverse a judgment for damages in the sum of $750, recovered by the appellee for the injury.

When the sign-board was first put up, it was securely fastened. Its weight was supported by brick projections from the wall. Subsequently the servants of an electric light company removed it from its fastenings in order to run electric wires into the railway office. That fact was known to the railway agent in charge of the office. He had been warned at the outset, by the contractor who put the sign in the position, that the electric light workmen would be compelled to loosen the fastenings if they were permitted to follow instead of preceding him in their work. The sign was replaced in position by the electric light workmen, and two months thereafter fell and injured the plaintiff. An inspection of it after the accident showed that the wires which were used to hold it on two of the three hooks which held it in position had been cut with scissors close to the sign. The supposition of all the witnesses was that the cutting was done by the electric light workmen. There was no positive proof of that fact. The sign fell in the month of March. There was testimony

tending to show that the usual March winds of this latitude prevailed at the time, while other witnesses thought there was no disturbance of any object on the street by the wind.

The railway complains of the following part of the charge to the jury: "If you find from the evidence that the defendant caused the sign mentioned in this action to be placed on the side of and in front of its ticket office in the city of Little Rock, and over and above the sidewalk, which is a public highway, and that while the plaintiff was on said sidewalk and under said sign, the same fell of its own weight from its place and upon the plaintiff and injured him, you are instructed that the fact of the falling of said sign in the manner aforesaid raises a presumption of negligence in maintaining said sign, and you should find for the plaintiff, unless you should find that said presumption is overcome by a fair preponderance of evidence going to show that a proper degree of diligence had been exercised by defendant."

It is argued that the charge directs the jury to presume negligence without finding proof of it.

1. Negligence—Sign overhanging sidewalk.

If it had left the jury to find against the railway, merely upon proof that the plaintiff had been injured by the falling of a sign from a building in which the railway was an occupant, it would be subject to the objection urged, and therefore erroneous. But the charge must be read in the light of the admitted facts and of the hypothesis upon which it is based. They are as follows:

The sign was placed in a position where it was sure to fall upon the sidewalk, if it should fall at all, in a much frequented part of the city; it was maintained there by the defendant solely for its convenience; it was heavy and required precaution in fastening it in position to prevent it from falling; it fell "of its own weight," that is, because of insufficient fastenings to hold it under ordinary circumstances, and thereby an injury was inflicted upon one who was rightfully in the public street.

Upon such a case found, negligence is an inference of law. The reason is as follows: The defendant was under a duty to the public to exercise common prudence to place and keep its sign in such position as not to endanger the safety of pedestrians in the street. As long as it performed that duty, no injury would be inflicted in the ordinary course of things. The happening of the accident is evidence therefore of the neglect of the duty, in the absence of proof that it happened out of the ordinary course. *Mullen* v. *St. John*, 57 N. Y., 567; *Kearney* v. *London Ry. Co.*, L. R., 6 Q. B., 759; 10 Central L. J., 261, and numerous cases cited.

2. Negligence.

It is argued that the defendant is not liable because the evidence shows that the sign fell, not from insecurity of the original fastening, but because the sustaining wires had been cut by a third person. We must take it as settled by the verdict that the wires were cut by the electric light company's workmen. The testimony furnished no reasonable probability that it was done by another. The managing agent of the defendant's office knew that it was necessary for these workmen to cut or loosen the fastenings in order to complete the work the railway company desired to be done in its office, and knew that the sign had been removed for that purpose. It was the company's duty therefore to see that the fastenings were safely restored. In no other manner could it guard against the danger to which the public would otherwise be exposed, and it is liable for the consequences of having neglected to do so. *Gray* v. *Boston Gas Co.*, 114 Mass , 149–153.

The fact that the electric light company was an independent contractor, and not the servant of the railway, in performing the work in the prosecution of which the wires were cut, did not relieve the railway of its duty to the public to see that the sign was secure after the contractor had completed his work. *Khron* v. *Brock*, 144 Mass., 516.

If the injury had been inflicted through the negligence of the contractor's servants while in the execution of the contract, no liability would have attached to the railway. *Rail-*

way v. *Yonley*, 53 Ark., 503. But no such case was made by the proof. The court did not err therefore in rejecting the railway's prayer to charge upon the subject of its non-liability for work done by an independent contractor.

3. Act of God —Wind.

The court refused to instruct the jury that the defendant was not liable for the injury if the sign fell from the act of God. There was no testimony to base the charge upon. The strongest testimony for the defendant was that the accident happened on a windy day in March. But it was the defendant's duty to take such precaution in fastening its sign as to make it secure against the ravages of such winds as might be expected in the regular course of the seasons. *Southern Ex. Co.* v. *Texarkana Water Co., ante*, p. 131. An injury resulting from a failure to take such precaution is attributable to its neglect, and not to the act of God.

Other requests to charge the jury preferred by the defendant were rejected, but all they contained that could legally be demanded to go to the jury was submitted in the court's charge. As there is no error, the judgment is affirmed.

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RAILWAY COMPANY *v.* CHAMBLISS.

Decided February 14, 1891.

Railway—Stock killing—Credibility of witness.

In an action for stock killing where plaintiff relied solely upon the statutory presumption of negligence from a killing on defendant's track, the jury may find for plaintiff on such presumption, although defendant's engineer testified that the killing was unavoidable, if his testimony was improbable or inconsistent.

APPEAL from *Nevada* Circuit Court.

C. E. MITCHEL, Judge.

Appeal from a judgment for the recovery of damages for a horse killed by the defendant company's train.

Dodge & Johnson for appellant.

HEMINGWAY, J. The plaintiff proved that her horse was killed by the operation of defendant's cars. She thereby cast upon it the burden of excusing the killing.

If the jury had believed the testimony of the defendant's engineer, its duty would have been plain to find a verdict for the defendant. Was it warranted in disbelieving his testimony?

Stock-killing —Credibility of witness.

As we understand the law, it warrants a jury in disregarding the statements of a witness which it does not believe to be true, whenever such disbelief fairly arises—whether because the statements involve impossibilities, or what, according to common observation and experience in reference to such matters, seems highly improbable, or because they are incoherent and inconsistent in themselves, or because they are inconsistent with the accepted testimony in the cause. *Sellar* v. *Clelland*, 2 Col., 539; *French* v. *Millard*, 2 O. St., 52; *Evans* v. *Lipscomb*, 31 Ga., 71.

It is an established fact in this case that the horse had one fore leg and one hind leg broken—the engineer testified that it was struck in the back by the mail coach of the moving train. He further says that "after he began to slow up" for a water tank and while the train was moving about five miles an hour, he saw the horse run out of the woods on to the right of way, apparently intending to cross the track ahead of the engine; that the engine passed before the horse reached the track, and he turned to see what had become of the horse; that as it reached the train, it whirled its head, turning to run with the train; and as it whirled, the mail car struck it in the back and seemed to kill it; that he did not sound the whistle or ring the bell because he did not have time.

The jury might have believed that a horse running to cross a track in front of a train would not have been passed by the engine running five miles an hour; that, as it came toward the train and whirled to run with the train, it would not have been struck in the back by a car in the train; that a wound in the back would not probably have been evi-

denced by the breaking of two legs; and that an engineer could not have seen as much as he detailed, in a time so short that he could not sound the whistle or ring the bell.

If the jury had thus viewed the improbabilities and inconsistencies of his statement and had honestly reached the conclusion that it did not correctly detail the occurrence, it would have been justified in disregarding it and finding its verdict on the *prima facie* case. We cannot say that such a conclusion was unjustified.

The judgment will be affirmed.

DANIELS *v.* BRODIE.

Decided February 14, 1891.

1. *Contract not to engage in business—Breach.*

   One who has obligated himself not to engage in a mercantile business commits a breach of his contract (1) if he becomes a sole or joint proprietor in such a business, or (2) if, without engaging therein, he induces prospective customers of his obligee to so believe. In the first instance he would be liable to the obligee to the extent of his loss occasioned by the business; in the latter, to the extent of his loss occasioned by that belief among such customers.

2. *Agency—Ratification.*

   An agent's unauthorized act must be ratified or repudiated *in toto.*

3. *Pleading—Absence of file mark—Presumption.*

   A reply to a counter-claim which lacks the clerk's file mark will be treated on appeal as having been filed if it is copied in the transcript, and the parties at the trial have treated the allegations of the counter-claim as at issue.

APPEAL from *Jefferson* Circuit Court.

JOHN A. WILLIAMS, Judge.

On February 19, 1887, Daniels made a contract in writing with Brodie in substance as follows:

Brodie sold to Daniels a stock of general merchandise, as shown by an inventory attached, for four thousand dollars, and, for a certain rent, leased his store-house and fixtures for the term of two years. Brodie agreed "*that he will not in any manner engage in the mercantile business during said*

term of two years" in Jefferson county. Daniels agreed to pay the said sum of four thousand dollars, two years from the date of the contract, in goods of the same class and quality and at the same prices as set forth in said inventory, or at his option to discount the amount of the bill at 25 per cent. off.

On 12th March, 1889, Daniels brought this suit, alleging that Brodie had violated the contract by becoming a partner in the firm of Sallee & Co., in Redfield in said county; that, during the period of the contract, that firm had made a net profit of $3000; that plaintiff would have made this profit if Brodie had not violated his contract. Brodie denied that he was a partner of Sallee & Co., and filed a counter-claim, alleging that the amount of goods delivered to him by Daniels was $1274.62 less in value than the contract called for. A reply to this counter-claim, denying every item thereof except $21.37, appears in the transcript, though not marked "filed."

The testimony showed that, upon plaintiff's electing to return the amount of goods stipulated, defendant appointed one Davis his agent to take an invoice of the goods. In defendant's absence the invoice was made, and Davis accepted them in his behalf. Defendant claimed that Davis had no authority to accept the goods, and that some of the goods were not of the quality and class called for by the inventory. He directed Davis to return certain goods. The rest he sold to Sallee & Co. Plaintiff admitted that the invoice, as accepted by Davis, was short $177.

The court refused to give this instruction asked by plaintiff, viz.:

"Third. The jury are instructed, as a matter of law, that if a person adopts a transaction done in his behalf by an agent who had no authority to do it, he must adopt it in its entirety; he cannot adopt it in part and repudiate it in part. And if the jury believe, from the evidence, that Davis accepted for Brodie the goods offered him by Daniels in February, 1889, and that, when Brodie returned, he accepted

and received a part of the goods so taken by Davis, then this was a ratification of the act of Davis, in accepting all the goods delivered to him by Daniels, and Brodie is bound thereby."

There was verdict and judgment for Brodie for $782 91.

N. T. White, *S. M. Taylor* and *J. W. Crawford* for appellant.

1. The court erred in refusing the third prayer asked for plaintiff. A principal cannot ratify in part and repudiate in part his agent's act. Bish. on Cont., sec. 1110 and cases cited; Sackett on Instr., p. 65, sec. 10 and cases cited; Benjamin on Sales, citing 19 L. J. Ex., 410.

2. Also, in refusing the fifth and sixth. Appellee clearly violated the spirit of his contract, if not its letter. The contract clearly conveyed the "good will," and it was a breach for Brodie to hold himself out as a partner of Sallee & Co.

M. L. Bell and *J. M. & J. G. Taylor* for appellee.

1. No answer was filed to the counter-claim, and defendant was entitled to judgment. 25 Ark., 86.

2. Brodie was not bound by the unauthorized acts of Davis. The agent's doing more than he is authorized will not vitiate what is properly done, if the two are separable; otherwise it will. Bish. on Cont., sec. 1095. Brodie only adopted such part of the transactions of Davis as he was bound to accept under the contract.

3. The profits sought to be recovered by Daniels, under the fifth and sixth instructions, are too contingent and speculative in their nature to be considered. 7 Hill, 62; Wood's Mayne on Dam., sec. 56; Sedgw. Dam., p. 72; 39 Ind., 260; 2 Kernan, 277.

4. The sale did not include the "good will." Bish., Cont., sec. 520. The refusal of the fifth and sixth instructions did not prejudice appellant. 50 Ark., 68; 3 Pars. on Cont., 179.

HEMINGWAY, J. The grounds urged for a reversal arise out of the court's refusal to charge the jury as requested by

the plaintiff. The charge given, as well as the prayers refused, relate to two different matters—the claim of the plaintiff and the counter-claim of the defendant. Without reciting in detail the rejected prayers, it is sufficient to announce our views on the questions involved.

1. What is breach of contract not to engage in business.

The defendant obligated himself not in any manner to engage in the mercantile business in Jefferson county for two years. If he engaged in such business during the term specified, either as a sole trader, or as partner in the firm of Sallee & Co., he is liable to plaintiff in damages for the injury the latter sustained by reason of that business. If in fact he did not engage in such business, but did cause it to be believed among the prospective customers of plaintiff that he was a partner in that firm, this would be a breach of the contract, fairly and properly interpreted. In either case there would be a breach of the same obligation, but the extent of the injury would be different. If the defendant was the sole or a joint proprietor in such business, he would be liable to the extent of the loss occasioned to the plaintiff by that business; but if he was not such proprietor, and only caused it to be belived that he was, the plaintiff's damage would cover only the loss to him occasioned by that belief, and would not include any loss caused by the competing business, independent of that belief.

But in our opinion there was no evidence to sustain a verdict for plaintiff in the latter state of case. The plaintiff testified that he had been damaged by the competing business of Sallee & Co., but that he knew of no loss he had sustained by reason of the fact that the defendant was understood to be a partner in that firm.

The jury found, upon proper instructions in that regard, that the defendant had not really engaged in business and as the evidence discloses no damage to plaintiff growing out of the understanding that he was a partner in the firm of Sallee & Co., there can be no reversal on account of the rejected prayers relating to the plaintiff's claim.

2. Ratification of agent's unauthorized act.

Upon the issue raised by the counter-claim, the court should have given the third instruction asked by the plaintiff. One in whose name an act is done by an unauthorized agent may renounce it if he so elect. But he cannot ratify that part which makes for his interest and renounce that which makes against against it. If the defendant authorized Davis only to take an invoice of goods, he was not bound by Davis' receipt of goods in satisfaction of the plaintiff's contract; but if Davis received them for him without authority, the defendant was bound to ratify or renounce the entire act. He could not take that part of the goods that he wanted, and decline that part he did not want. The appellee concedes that such is the general rule, but contends that it does not apply in this case, for the reason, as he assigns, that the defendant was bound by this contract to accept the goods which he took from Davis, and that his acceptance of them should be referred to this obligation. This reasoning proceeds upon a false premise. The defendant was not bound to accept goods unless a stock of the value of four thousand dollars and of a particular kind was offered to him. He had no right under the contract to demand merchandise. The plaintiff had the option to discharge his obligation either by delivering a stock of goods of the stated kind and value, or by paying the stated sum of money. When he offered the stock he was entitled to demand that it be received, if it met the requirement as to kind and value; if it did not meet that requirement, he had a right to keep all the goods and pay the sum stipulated in lieu thereof. It might be highly prejudicial to him to permit the defendant to cull the stock offered and retain such of it as he desired and return such as was undesirable. When he kept a part of the goods left for him with Davis, he deprived the plaintiff of the option to discharge his obligation either in money or in goods, and did what he was neither obliged nor authorized by his contract to do. Such retention can be referred to no right except that to ratify the act of Davis.

As to the matters involved in the counter-claim, the plaintiff was prejudiced by the court's refusal to give the third of his prayers; but he admits and testifies that he owed the defendant on the settlement February 19, 1889, a balance of one hundred and seventy-seven dollars; and if the rejected prayer had been given, the defendant would have recovered that with interest. If he will remit the amount of his recovery in excess of that, the court's error will be cured.

3. Pleading—Presumption.

We have treated the reply to the counter-claim as filed, for two adequate reasons; in the first place, it is certified to us as a part of the record, and its unchallenged presence among the papers in the cause is evidence of its filing, although it lacks the usual indorsement by the clerk; in the next place, the parties treated the allegations of the counter-claim as at issue in the trial below, and we will treat the pleadings here as they elected to treat them there.

For the error indicated, the judgment will be reversed. If the defendant shall, within fifteen days, remit all of his judgment in excess of one hundred and seventy-seven dollars and interest thereon, from February 19, 1889, at the rate 6 of per cent., a judgment for that amount will be affirmed; otherwise the cause will be remanded for a new trial.

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WESTERN UNION TELEGRAPH COMPANY *v.* DOUGHERTY.

Decided February 14th, 1891.

Telegraph companies—Limitation of liability.

A telegraph company may limit its liability by stipulating that "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message."

APPEAL from *Jackson* Circuit Court.

JAMES W. BUTLER, Judge.

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

1. The stipulation requiring demand to be made within sixty days was reasonable and valid.

The power to make reasonable regulations limiting their liability has been repeatedly recognized. 39 Ark., 148; 44 *id.*, 208; 46 *id.*, 236; 47 *id.*, 97; 50 *id.*, 397. The only limitation is that the stipulation must be reasonable. Greenhood, Pub. Policy, p. 505; 31 Pa. St., 448; 5 H. & N., 867; 21 Wall., 264; 51 Ind., 127; 54 Miss., 566; 76 Mo., 514; 62 Pa. St., 87; 34 N. Y. Sup. Ct., 390; 65 N. Y., 163; 95 Ind., 228; 33 Minn., 227; 57 Wisc., 562; 17 Mo. App., 275; 63 Tex., 27; 18 Pac. Rep., 34; Gray on Telegraphs, sec. 34, p. 62.

The appellee *pro se.*

Telegraph companies cannot by contract relieve themselves from liability for their negligence. 33 Fed. Rep., 632; 38 Kans., 679; 21 Pac. Rep., 339; 4 N. E. Rep., 784; 79 Me., 493; 44 Hun., 532.

HUGHES, J. This is an appeal from a judgment for fifty dollars against the appellant in favor of appellee, to compensate him for damages sustained by the failure of appellant's servants to deliver a telegram sent by appellee from Newport to Clarendon, Ark. There was printed upon the face of the blank form upon which the telegram was written these words: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." The circuit court made the following declaration of law in the case: "The condition in reference to delay in presenting claim has no application to a failure to deliver, caused by the negligence of defendant's agents." The only controversy in the case is over the correctness of this declaration, and the solution of this depends upon the reasonableness and validity of the above stipulation on the blank of the telegraph company upon which the message was written by appellee's agent and sent over appellant's telegraph line.

Telegraph companies—Limitation of liability.

It has been several times held by this court that a common carrier may limit its liability by contract, though it cannot stipulate against its own negligence or the negli-

gence of its servants. The question is not one of power or right to make regulations, but of reasonableness of the regulations. The stipulation that the company would not be liable where the claim is not presented within sixty days was an agreement of the plaintiff with the telegraph company, and was not in violation of any statute, and, if reasonable and not against public policy, was binding upon him. We know of no principle of the common law that would prohibit it. It was not a contract to cover the negligence of the telegraph company. It was a stipulation against the delay and neglect of the plaintiff in presenting his claim, and it does not appear unreasonable. By reason of the character of the business, and the great number of messages sent over the lines of a telegraph company, and the importance of early information of claims to enable the company to keep an account of its transactions, and the impossibility of recalling them all and accounting for them from memory after the lapse of a considerable period of time, it does not appear that a stipulation that a claim for damages should be presented in writing within sixty days from the time the message is sent is unreasonable. *Wolf* v. *West. U. Tel. Co.*, 62 Pa. St., 87; *Young* v. *West. U. Tel. Co.*, 65 N. Y., 163; *Cole* v. *West. U. Tel. Co.*, 33 Minn., 227; *Heimann* v. *West. U. Tel. Co.*, 57 Wis., 562.

Such a condition is not only not a stipulation against the negligence of the company, but it implies that a liability may be incurred for negligence; and it requires that one who seeks to recover damages for such negligence shall present his claim in writing within sixty days or be held to have waived it. "*Conventio vincit legem.*" *Messengale* v. *West. U. Tel. Co.*, 17 Mo. App., 257. "When a definite term is fixed, the question of its reasonableness is to be determined by the court." *Id.* In the above case thirty days was held to be a reasonable time. And twenty days have been held sufficient.

We know of no public policy that would be violated by conceding to a competent person the right to make a rea-

sonable contract; and it is not unlawful for such a person to limit himself to less time than would be allowed by the statute of limitations, within which to assert his claim for damages for violation of a contract. Such a one may renounce a privilege allowed him by law, and such renunciation will bind him. It is said that "Statutes of limitation prohibit, not the limitation of actions, but the indefinite postponement of them." Greenhood on Public Policy, p. 505; *N. W. Ins. Co.* v. *Phœnix Oil Co.*, 31 Pa. St., 448; *Wolf* v. *West. Un. Tel. Co.*, 62 Pa. St., 87; *W. U. Tel. Co.* v. *Ranis*, 63 Tex., 27; see Gray on Telegraphs, p. 62.

The authorities are almost uniform in maintaining the reasonableness and validity of such a stipulation.

The third declaration of law made by the circuit court was erroneous for the reasons above indicated; wherefore the judgment is reversed, and the cause is remanded for a new trial.

FITZHUGH *v.* LEVEE DISTRICT.

Decided February 21, 1891.

Levee tax—Counter-claim.

One against whose lands a levee tax has been assessed, pursuant to the provisions of chapter 95 of Mansfield's Digest, cannot set-off against the assessment a claim which he may have against the levee district.

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

The Cotton Belt Levee District No. 1 of Phillips county, instituted proceedings in equity to charge the lands of Fitzhugh and wife for levee taxes assessed against the lands, in pursuance of chapter 95 of Mansfield's Digest. Defendants set up a counter-claim that, before the construction of the levee for which the assessment was made, they had built a private levee, of which plaintiff had taken possession without their consent and without payment. For its value they asked judgment.

Testimony was introduced to show the value of the private levee. The court disallowed the counter-claim, and rendered a decree for the amount claimed in the complaint.

Palmer & Nichols for appellant.

The court erred in ignoring the counter-claim. Appellants were entitled to compensation for their levee. Hare on Cont., p. 233; 3 Am. & Eng. Enc. of Law, 860; 3 N. H., 384; 1 Chitty on Cont., 79, *et seq.*; 2 Addison on Cont., 584; 1 *id.*, 53–4; 2 Wharton on Cont., sec. 708; 1 Story on Cont., secs. 11, 12, 12a; 8 Ark., 202; 55 Vt., 417; 144 Mass., 65; Anderson, Dict., 248.

Stephenson & Trieber and *P. O. Thweatt*, for appellee.

These special assessments are really nothing but taxes. 21 Ark., 40; 53 Wisc., 178; Cooley, Tax., 416; 52 Ark., 356; Mansf. Dig., sec. 4378; Acts 1887, chap. 95. Taxes cannot be made the subject of set-off or counter-claim; 50 Ark., 384; 32 *id.*, 414.

Levee-tax—Counter-claim.

PER CURIAM. The appellant concedes the right of the levee district to collect the amount assessed against his lands. His only contention is that he is entitled to set-off against the assessment a claim which he asserts against the district. The statute which authorizes the proceeding for raising a fund to pay for levees built in pursuance of its authority, does not provide for nor contemplate that character of relief. The assessment must be paid without regard to any claim for compensation which the appellant may have against the district.

Affirm.

MAY *v.* HUTSON.

Decided February 21, 1891.

Exempt property—Schedule—Amendment.

A schedule of exempt property filed before a justice of the peace, which is insufficient because it does not set out all the debtor's property nor allege that he is a resident of the State, may be amended in the circuit court on appeal.

APPEAL from *Johnson* Circuit Court.

JORDAN E. CRAVENS, Judge.

Appellee in a justice's court filed a schedule of the property he desired to claim as exempt from execution, under section 3006 of Mansf. Dig., but failed to allege that it contained a complete description of his property, or that he was a resident of the State. Upon appeal to the circuit court he offered to amend the schedule. The court refused to permit the amendment, but held the schedule sufficient.

Sol F. Clark for appellant.

The schedule was defective. It does not purport to contain all the debtor's property. Mansf. Dig., sec. 3006; 41 Ark., 249. Nor does it show that he was a resident of the State. 41 Ark., 249.

Amendment of schedule.

PER CURIAM. The petition for a supesedeas filed by the appellee is defective in two particulars, viz., it does not state that he is a resident of the State, or that it contains a description of all the defendant's property, both real and personal. Without the allegations of both facts, it was insufficient to warrant the issuance of a supersedeas. *Brown* v. *Peters*, 53 Ark., 182. The petition is subject to amendment. If the facts justify it, both defects may be cured by amendment.

Reverse and remand for further proceedings.

EVANS *v.* STATE.

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Decided February 21, 1891.

1. *Former conviction—Sufficiency of plea.*

A plea of former conviction is insufficient which does not verify the alleged conviction by the record, nor allege that it was for the same offense the second prosecution was intended to punish.

2. *Liquors—Burden of proof as to license.*

In a prosecution for selling liquor without license it is sufficient to prove that the defendant actually sold the liquor; if he, or one for whom he was acting, had a license, it is a matter of defense.

APPEAL from *St. Francis* Circuit Court.

M. T. SANDERS, Judge.

Evans was indicted for selling whisky without license on the 1st day of April, 1889. He entered a plea of former conviction, as follows:

"Comes the defendant and pleads former conviction, and prays his discharge from further trial, in this cause, because, he says, that on the 16th day of April, 1890, at the St. Francis circuit court, the defendant being then and there charged with the offense of selling whisky without license, etc., on the 1st day of January, 1889, and having then and there entered a plea of not guilty, was put upon his trial and called upon to defend against an indictment containing said charges against him, a copy of which indictment is hereto attached, No. 2350, and upon the trial the State introduced testimony tending to show that within twelve months next before the filing of the indictment in said cause, without naming any special day, the defendant sold whisky as charged, and upon said indictment, defendant was convicted, and the time alleged in this indictment, to-wit: twelve months before the filing thereof, embraces the same twelve months next before the indictment in this cause, and the day alleged in the indictment herein upon which it is charged this defendant sold whisky in said county without license, etc. Therefore defendant prays judgment of former conviction."

The indictment referred to in the foregoing plea, charges that "the said J. J. Evans, on the 1st day of January, 1889, in the county of St. Francis aforesaid, then and there unlawfully did sell ardent spirits," etc. The State demurred in short to the plea, and the demurrer was sustained, the defendant saving exceptions. The defendant thereupon entered a plea of not guilty. From a verdict and judgment of conviction he has appealed.

There was evidence that defendant, a clerk in the drugstore of Evans & Co., sold the whisky. Whether he acted as agent or principal does not appear.No license was shown. The court charged: "If the jury believe from the evidence that defendant did sell whisky, it will be presumed, in the absence of evidence to the contrary, that defendant was the owner of the whisky sold."

Geo. Sibly for appellant.

1. The former conviction was a bar to this indictment, if the plea was true. 43 Ark., 68; Am. & Eng. Enc. of Law, "Jeopardy," p. 939, note 3; 69 Iowa, 544; 11 A. & E. Enc. Law, p. 935, and note, and p. 947; 5 S. W. Rep., 134.

2. It is each *day* and not *each sale* that constitutes an offense. Acts 1879, p. 37, sec. 14; 43 Ark., 69, 70; 48 *id.*, 34; 32 *id.*, 215; 33 *id.*, 131.

3. It was necessary to prove that defendant had some interest in the sale, or derived some profit or benefit from the transaction. 4 N. W. Rep., 14; 3 S. W. Rep., 717.

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

1. The demurrer was properly sustained to the plea of former conviction. It did not allege the identity of the parties and of the offenses. The burden was on him to establish both. 1 Bish. Cr. Proc., sec. 816. See also 27 Mo., 267; 43 Ark., 374.

1. Former conviction.

COCKRILL, C. J. There are two fatal defects in the appellant's plea of former conviction. First, it does not verify the alleged conviction by the record. *Bradley* v. *State*, 32 Ark., 722; *Fluty* v. *State*, 45 *id.*, 97. Second, the plea itself

does not allege that the former conviction was for the offense the second prosecution was intended to punish. That allegation is as necessary in prosecutions for selling whisky as in prosecutions for other offenses. *State* v. *Blahut*, 48 Ark., 34. For aught that appears in the plea, the indictment and proof in the first prosecution may have identified the criminating sale by means other than the time at which it was made; as that it was made to a different person; or, if to the same person, that it was made in another locality or storehouse than that relied upon in the second prosecution. As each sale was a separate offense, the seller could be legally convicted for each. *State* v. *Blahut*, 48 Ark., *supra*. The demurrer was therefore properly sustained to the plea.

2. Burden of proof as to license.

The proof showed that the defendant was the actor in selling the whisky. To justify the sale it devolved upon him to show that he had a license to sell, or, if he was selling as the agent of another, that his principal had license. Without proof of a license to the owner to sell, the ownership of the liquor was immaterial. *Berning* v. *State*, 51 Ark., 550; *Rana* v. *State*, *ib.*, 481; *State* v. *Devers*, 38 Ark., 517.

The charge to the jury was not prejudicial to the appellant, his prayers for instructions were rightfully rejected, the testimony sustains the verdict, and the judgment is affirmed.

ROBSON *v.* TOMLINSON.

Decided February 21, 1891.

1. *Mortgage—When construed to be an assignment.*

To give a deed of trust, which is in form a mortgage, the effect of an assignment for the benefit of creditors, it is not sufficient that the debtor was insolvent, that immediate possession of the property was given to the trustee, and that the debtor could not reasonably expect, and did not intend, to pay the debt at maturity; *the parties must have intended that no equity of redemption should remain in the debtor.*

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2. *Attachment—Conclusiveness of court's finding.*

Upon the trial of an attachment where, from an agreed statement of facts, it may be inferred either that the parties intended to execute a mortgage, or that they intended to make an assignment, the trial court's finding that the former was intended is conclusive.

APPEAL from *Mississippi* Circuit Court.

J. E. RIDDICK, Judge.

Liston, a merchant at Osceola, Ark., conveyed his stock of goods and accounts to Tomlinson, as trustee for Toof, McGowan & Co., creditors at Memphis, Tenn., to secure a note to them for $3700, due five days after date. The instrument of conveyance is in terms as follows:

"This deed, made and entered into this, the 23d day of November, 1889, by and between James Liston, of the county of Mississippi, State of Arkansas, party of the first part, and Toof, McGowan & Co., a firm doing business in the city of Memphis, State of Tennessee, as grocery merchants, parties of the second part, and H. D. Tomlinson of the county of Mississippi, State of Arkansas, party of the third part, Witnesseth, that the said party of the first part, in consideration of the debt hereinafter mentioned and created, and of the sum of one dollar to him in hand paid by the party of the second part, does by these presents bargain, sell, transfer and confirm unto the said party of the third part, the following described realty, goods, wares and merchandise, and all store fixtures, books and accounts, situated and being in my store in the town of Osceola, in the county of Mississippi, State of Arkansas. (Then follows a description of the property, consisting of a stock of goods, a lot in Osceola, and the book accounts of the debtor.)

"To have and to hold the same with all appurtenances to the party of the third part, and unto his successors in the trust deed, to him, his heirs and assigns forever. In trust, however, for the following purposes: Whereas, the said party of the first part has this day made, executed and delivered to the said party of the second part his note of even date herewith, by which he promises to pay to the

said party of the second part or order, for value received, the sum of $3711.86 in five days after date. Now, therefore, if the said party of the first part, or anyone for him, shall well and truly pay off and discharge the debt and interest expressed in said note, and every part thereof, when the same becomes due and payable, according to the times, terms, date and effect of said note, then this trust deed shall be void and the property herein transferred and conveyed shall be released at the cost of the party of the first part; but should the said first party fail or refuse to pay the said debt or any part thereof when the same shall become due and payable, as aforesaid, then this trust deed shall remain in full force and effect, and the said party of the third part, or, in case of his death or refusal to act, the acting sheriff of said county of Mississippi, State of Arkansas, at the request of the holders of said note, shall proceed to sell the property hereinbefore described, or any part thereof, at private or public sale, as he may deem best for the interest of the parties of the second part, at the store where they now are, or in some other store in the town of Osceola, Ark. He will sell for cash whether he sells at private or public sale; he may keep the goods in said town of Osceola for cash for the period of six months, unless he should sooner sell the same, or a sufficient amount thereof to satisfy said debt and interest and the expenses incident to the execution of this trust. At the expiration of which time, in the event that all of said debt or said expenses are not paid, and any part of said property described herein remains unsold, then he shall sell the same, or so much as may be necessary to satisfy said debt and expenses in administrating this trust, to the highest bidder for cash, after first giving notice of the time, terms and place of sale of the property to be sold in some newspaper printed in said county of Mississippi; and should he sell at public outcry or at auction at any other time, he shall first give the notice required above; and he is further authorized to receive the proceeds of such sales as he may make, and to execute

proper receipts; and should he sell out this lot of goods, wares, store fixtures, books and accounts, notes, merchandise, or any part thereof, he may employ such desired assistance as may be necessary to properly carry on such retail business, but in no event shall he employ more than two clerks; and should he sell all or any part of said property at public sale he may employ an auctioneer to make the sales; and the said party of the third part is hereby given immediate possession of the above described property. And such trustee shall, out of the proceeds of the said sales, pay first the cost and expenses of executing this trust, including legal compensation to the trustee for his services, and next shall apply the proceeds remaining over to the payment of said debt and interest, or so much thereof as remains unpaid, and the remainder, if any, to the party of the first part; and the said party of the third part covenants faithfully to perform and fulfill the trust herein created, not being liable for any mischance beyond ordinary care of the said property.

"In witness whereof, the said parties have hereunto signed and set their seals the day and year first above written. All erasures and interlineations herein were made before the signing and reading thereof.

JAS. LISTON, [L. S.]
TOOF, MCGOWAN & CO.
By E. L. McGowan. [L. S.]
H. D. TOMLINSON." [L. S.]

Robson, Block & Co., creditors of Liston, brought suit and caused an attachment to be levied upon the stock of goods. Tomlinson interpleaded, and set up a claim under the foregoing conveyance. The cause was tried upon an agreed statement of facts, the substance of which is as follows:

1. Tomlinson, the trustee, took possession of the property on November 23, 1889, and proceeded to sell some of the goods before maturity of the note, to-wit, November 28, 1889, but without the knowledge and consent of Toof, McGowan & Co.

2. At the time of the execution of the instrument Liston owed about $20,000; the sheriff's inventory showed the stock of goods and other property to be nominally worth $10,000. Liston was insolvent at the time the conveyance was executed.

3. On November 28, one of his creditors offered to compromise at 40 cents on the dollar; Liston replied that his hands were tied so fast that he could not pay 10 cents on the dollar, and that it was useless to talk about compromising.

The court found in favor of the interpleader, and dissolved the attachment. Plaintiffs have taken an appeal.

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

1. The instrument in this case was an assigment and void. 11 S. W. Rep., 960; 13 *id.*, 423; 5 Ohio St., 218; 53 Ark., 101.

S. S. Semmes for appellee, *McDowell & McGowan* of counsel.

1. The instrument is a trust deed in the nature of a mortgage, containing an express defeasance clause. It shows on its face that it is not an absolute conveyance to raise a fund to pay debts, and hence is not an assignment. 31 Ark., 437; 52 Ark., 41; Burrill on Assignments, pp. 33–4; 11 Humph., 283; 2 Johns. Ch., 283; 11 S. & M. (Miss.), 469; 4 Ala., 469; 43 Ark., 504; 18 *id.*, 166; 41 *id.*, 189; 32 *id.*, 478; 52 Ark., 48–50; 13 S. W. Rep., 424.

1. When mortgage construed to be assignment.

COCKRILL, C. J. The instrument relied upon by Tomlinson, the interpleader, is in form a mortgage, and not an assignment for the benefit of creditors. The presumption, until overcome by proof, is that the parties intended it to have the effect the law gives to a mortgage—that is, that it should stand as security for a debt. The fact that it provides that the mortgagor should surrender immediate possession to the trustee for the mortgagee does not convert it into an assignment. To accomplish that result, it must be shown that it was the intention of the parties that the debtor

should be divested, not only of his control over the property, but also of his title. *Bank* v *Crittenden*, 66 Iowa, 237.

The equity of redemption may be mortgaged or sold, and so be of value to a debtor who has not the pecuniary ability to redeem; and he has a right to reserve it in dealing with his creditor, regardless of his solvency. The insolvency of the debtor, and the fact that the instrument authorizes the trustee to take immediate possession and proceed to sell the goods at so short a period after its execution that it seems unreasonable that the debtor could have expected to exercise his right of redemption or derive a benefit from it, are circumstances which, in connection with other facts, may tend to show that the parties intended to make an absolute appropriation of the goods to raise a fund to pay debts, and so to make an assignment. *Box* v. *Goodbar*, *ante* p. 6. But they are not conclusive of that intent. Neither the possession of the goods, nor the unreasonableness of the debtor's expectation of paying the debt at maturity, nor his intent never to pay, is the criterion for distinguishing a mortgage from an assignment. The controlling guide, according to the previous decision of the court, is, Was it the intention of the parties, at the time the instrument was executed, to divest the debtor of the title and so make an appropriation of the property to raise a fund to pay debts? *Richmond* v. *Miss Mills*, 52 Ark, 30; *Fecheimér* v. *Robertson*, 53 *ib.*, 101; *Box* v *Goodbar*, *ante* p. 6.

If the equity of redemption remains in the debtor, his title is not divested, and an absolute appropriation of the property is not made. In arriving at the intent of the parties, therefore, the question is, not whether the debtor intended to avail himself of the equity of redemption by payment of the debt, but was it the intention to reserve the equity? If so, the instrument is a mortgage, and not an assignment.

2. Conclusiveness of court's finding.

The cause was submitted to the court without a jury, and it found that the facts adduced in evidence were not sufficient to overcome the intention of the parties as expressed

in the mortgage. It is sufficient to say that the finding is not in the face of the proof. The finding of the court in this class of cases is as conclusive as the verdict of a jury. *Hanks* v. *Andrews*, 53 Ark., 327; *Riggan* v. *Wolf*, *ib.*, 537. The case stands then as though the court had declared the law in the appellant's favor, and a jury had returned a verdict against them upon evidence which we cannot say is insufficient to sustain it. *Wolf* v. *Gray*, 53 Ark., 75. The fact that the cause was tried upon an agreed statement of the facts and circumstances affecting it does not alter the rule in that regard, because a jury would have been warranted in drawing from the whole case the conclusion that the parties were actuated by a motive consistent with the legal import of the instrument.

Affirmed.

Ex parte COLEMAN.

Decided February 21, 1890.

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Attorney at law—Petition for license—Minority.

A male citizen under the age of twenty-one years cannot be admitted to practice law in the courts of this State, although his disability to transact business in general has been removed by an order of the circuit court, pursuant to section 1362 of Mansfield's Digest.

Ex parte petition for license to practice law.

BATTLE, J. Charles T. Coleman asks that he be "licensed as an attorney at law and solicitor in chancery," and says that he is not over twenty-one years of age, "but that his disabilities have been removed generally by an order of the Pulaski circuit court."

The statute which prescribes the qualifications of a person entitled to be admitted to practice law in the courts of this State says he must be a male citizen of the State and of the age of twenty-one years. Coleman is not twenty-one years old, but says that the disability of minority has been re-

moved from him by an order of the Pulaski circuit court. The statute under which this order was made, in defining the jurisdiction of the circuit courts, says: "They shall have power to authorize any person who is a resident of the county, and under twenty-one years of age, to transact business in general, and any particular business specified, in like manner and with the same effect as if such act or thing was done by a person above that age; and every act done by a person so authorized, shall have the same force and effect in law and equity as if done by a person of full age." Mansfield's Digest, section 1362.

Under this statute and the order of the Pulaski circuit court, Coleman is authorized to transact business in general in like manner and with the same effect as he could do if he was twenty-one years old. But does it entitle him to practice law, if he has the other qualifications?

Attorney—Minority.

Attorneys at law are officers of the courts, and, if qualified, are valuable auxiliaries in the administration of justice and the enforcement of the laws. They are as essential to the successful workings of the courts as the clerk or sheriff, and sometimes as the judges themselves. Their utility and importance have ever been recognized by the laws of this State, and qualifications to practice law have been prescribed to protect the courts, the public and the profession against the admission of incompetent or unworthy members. Under the laws of this State, no one except a male citizen of the age of twenty-one years or over, of good moral character, possessing the requisite qualifications of learning and ability is entitled to be admitted. Every applicant, before his admission, is required to be examined in open court touching his knowledge of the law, and to produce to the court by sworn petition, satisfactory proof of his qualifications, and to take an oath to support the constitution of the United States and of this State, and faithfully to discharge the duties of the office upon which he is about to enter. Mansfield's Dig., secs. 406-408.

The statutes prescribing the qualifications of those who shall be admitted to practice law are special statutes. They prescribe the qualifications of persons allowed to follow a particular vocation. These qualifications are required in every case. The statute under which the Pulaski circuit court made the order, under which Coleman claims his disability was removed, was enacted subsequently to the statutes prescribing the qualifications of those who can be admitted to practice law, and is a general statute, and does not expressly repeal or modify the special statutes fixing the qualifications of attorneys and counselors at law. There is no invincible repugnancy between them. It is obvious that the legislature did not have in mind the special statutes or the qualifications of an attorney at law, nor intend to repeal or modify the special statutes when the general was enacted. The general statute was intended to give to circuit courts jurisdiction to authorize minors to do business in the same manner as adults could do without special license, and not to change any of the qualifications required by the special statutes. According to the rule stated in *Chamberlain* v. *State*, 50 Ark., 132, these statutes should be interpreted together, and the specific provisions of the special should be treated as exceptions and qualifications to the general.

In *Hershy* v. *Latham*, 42 Ark., 305, it was contended that the act of April 28, 1873, "for the protection of married women," which empowers them to sue alone and in their own names, on account of their separate property, repealed by implication the saving clause in their favor in the seven years statute of limitations. But this court said: "The wording of our statute limiting the time for the bringing of the action for the recovery of real property is peculiar. It gives the married woman three years after discoverture; that is, after the release from the bonds of matrimony by the death of the husband, or by divorce. If the language had been 'three years after the removal of her disability,' we might very well hold that her disability could be removed

by an act of the legislature as well as by the husband's death. But to declare that it was the intention of the legislature or the necessary consequences of the married woman's act to shorten the period for bringing such actions, is to assume that the only consideration which operated on the law-making power, in making an exception in her favor, was her disability to sue at common law without joining her husband. Doubtless this was the principal reason. But we are not sure this was the sole reason."

So in this case other considerations doubtless operated upon the law-making power in denying to the person under the age of twenty-one years the right to practice law, besides his presumed incapacity to make intelligent and beneficial contracts and manage his own affairs. In considering the statute giving the circuit courts jurisdiction to authorize minors to do business, in *Doles* v. *Hilton*, 48 Ark., 305, this court said: "The object of the common law in making minors incapable of binding themselves absolutely and irrevocably by contract is to protect them from improvident engagements; but inasmuch as there are minors capable of making intelligent and beneficial contracts and managing their own affairs, the legislature in its wisdom saw fit to authorize the probate and circuit courts to remove the disabilities of such minors. Its intention was to authorize the removal of disabilities only in those cases where the limitation upon the capacity of the minors to contract worked a hardship, and the reason for the limitation does not exist. If such had not been its intention, its object could and would have been more easily accomplished by an act removing the disabilities of all minors."

Such were the considerations which moved the legislature to pass the general statute. In the enactment of the special, it was doubtless governed by other reasons. In requiring the applicant for license to practice law to be twenty-one years old before he can be licensed, it doubtless intended he should possess that judgment, discretion, experience and other qualifications which can only be acquired

in a life of twenty-one years or more. The objects of the statutes being different, the requirements of the same necessary to accomplish the objects are necessarily different; and there is no repugnancy between them, and all are in force.

The right to practice law in the courts is a privilege, and not an absolute right. The legislature has the right to prescribe the qualifications of those who exercise it, and has done so, and left to the courts no discretion as to the same. They must be twenty-one years old. Mr. Coleman does not possess this qualification, and for this reason alone his application is denied.

HEMINGWAY, J., dissented.

MILLINGTON *v.* HILL.

Decided February 21, 1891.

1. *Judicial sale—Purchase by party—Subsequent reversal.*
   A purchase of land at a judicial sale by a party to the suit will be void if upon appeal the decree under which it is made is "vacated and set aside."

2. *Void judicial sale—Charges and credits.*
   One who has acquired possession of land under a void judicial sale, but having a valid lien thereon, will be charged with rents and profits accruing therefrom and credited with the value of such repairs made by him as were necessary to keep the property in the condition it was in when he took possession, and with taxes paid by him.

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

Supplemental complaint to vacate a sale of lands under a decree which had been reversed. The facts are stated in the opinion.

W. M. Randolph and *Leland Leatherman* for appellant.

1. The court erred in not holding the sale void. The sale was on a credit of twelve months, a longer time than authorized by statute. Mansf. Dig., sec. 5171; 27 Ark.,

292; 31 id., 229, 236; 49 *id.*, 21. A purchaser at his own sale is not an innocent purchaser. 34 Ark., 85; 33 *id.*, 621. The sale may be set aside or held void. 6 Ark., 425; 29 *id.*, 307; 13 *id.*, 300; 18 Wall., 373; 14 Cal., 680; 13 Ill., 486; 8 N. Y., 144; 1 Cow., 644.

2. A subsequent reversal of the judgment or decree under which plaintiff purchases defeats his title. Freeman on Judgments (4th ed.), secs. 482–3, and note; 41 Mo., 416; 27 Iowa, 239; 61 Ala., 299.

3. The former decree was *reversed*, and this invalidated the sale.

4. The sale being void, or vacated by the reversal, Mrs. Millington was entitled to charge Hill, Fontaine & Co. with the rents and profits. Mansf. Dig., sec. 1317; 36 Ark., 17; 9 Wallace, 605; 11 Paige, 66; 4 Lea, 710.

J. E. Bigelow for appellees.

The decree of this court only *modified* the decree of the court below. The decree below not being superseded, the court below proceeded to execute the decree by selling the lands, and approving the sale. This decree, not being appealed from, became final after the lapse of the term. 36 Ark., 513; 33 *id.*, 106; 14 *id.*, 203; 6 *id.*, 100.

HUGHES, J. On a former appeal in this case by the appellant, Mrs. Wade Millington, the decision in which is reported in 47 Ark., 301, under the style of *Millington* v. *Hill, Fontaine & Co.*, this court, on the 2d day of October, 1886, affirmed the decree of the circuit court, with the modification that the claim of W. B. Galbreath which had been allowed by the court below should be disallowed.

Upon the 23d of the same month, upon a motion for reconsideration, the court adjudged and decreed that the claim of B. F. Grace, as administrator of the estate of Seth W. Bolton deceased, be disallowed, and "that the decree of this court in this cause, rendered on the 2d day of October, 1886, be and the same is hereby vacated and set aside;" and the judgment further proceeded: "It is the opinion of

the court that there is error in the proceedings and decree of said court in chancery in this cause; that said circuit court erred in condemning the land to be sold on twelve months credit, and also in allowing the claims of W. B. Galbreath and B. F. Grace, as administrator of the estate of Seth W. Bolton deceased; but that in other respects said decree is correct. It is therefore ordered and decreed that the said decree of the circuit court in chancery in this cause rendered be and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs, and that this cause be remanded to said circuit court in chancery, with directions to modify the decree by disallowing the claims of W. B. Galbreath and B. F. Grace, as administrator of the estate of Seth W. Bolton deceased, and for further proceedings consistent with the opinion herein delivered."

Pending the cause on appeal in this court, the lands condemned were sold under the decree of the circuit court (which was not superseded) and were purchased by Hill, Fontaine & Co., the appellees in that case and in this also. The sale was reported to the court and confirmed.

On the 5th of February, 1889, Mrs. Millington filed in the circuit court an amended and supplemental complaint, setting up the reversal of the judgment, the sale and purchase pending the appeal, and asking that the sale and deed thereunder to appellees, Hill, Fontaine & Co., be set aside and annulled, and that they be charged with rents, and that the rents be credited on their debt, which was a lien upon the lands; and that a master and receiver be appointed, etc. The circuit court found that the decree approving and confirming the sale and deed had not been appealed from and remained in full force and virtue, and denied the motion by appellant to set aside the same, and disallowed the claims of Galbreath and Grace, as administrator. The court then proceeded to decree distribution of the proceeds of the sale of the lands, which had been retained by Hill, Fontaine & Co. Mrs. Millington appealed to this court.

1. Void judicial sale.

It is contended that the judgment of this court, in the cause on the first appeal was not a judgment of reversal, but of modification only. The language of the decree does not warrant such a conclusion. This court found that the court below erred in ordering the lands sold on twelve months credit. Besides this, it found that there was error in allowing the claim of W. B. Galbreath, which was a large one, to enforce payment of which the original bill in this cause was filed. This claim, before decree in the circuit court, had been transferred, pending the suit, to Hill, Fontaine & Co., the appellees. By the decree of the circuit court in chancery this claim was declared to be a lien upon the lands, which were condemned to be sold to satisfy it, with the other claims, in the order of priority. Said decree on the first appeal was a decree of reversal, which annulled and rendered of no effect the decree of the Desha circuit court in chancery and the proceedings thereunder, including the sale and conveyance of the lands to appellees.

2. Charges and credits.

The decree in this cause, rendered in the Desha circuit court in chancery, is reversed, and the cause is remanded, with directions to said court to render a decree for the appellant, Mrs. Millington; to charge appellees, Hill, Fontaine & Co., with the rents and profits of the lands, and to credit them with the value of repairs made by them necessary to keep the property in such condition as it was in when they took charge, and with taxes paid by them upon the lands; and that the net rents be credited upon the debt of Hill, Fontaine & Co., as of the date of their maturity, and that the lands be sold according to law to satisfy any balance due the appellees upon their decree.

JACKSON *v.* STATE.

Decided February 21, 1891.

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1. *Criminal law—Continuances.*

In criminal, as in civil cases, continuances are within the sound discretion of the court. In this case a continuance for absent non-resident witnesses was properly refused, because it was not shown where the witnesses resided, or why they were not present, why their depositions were not taken, or whether the desired facts could not be proved by other witnesses.

2. *Pleading—Petition for a change of venue.*

A motion for a change of venue, alleging that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein, verified by the defendant's affidavit, is a sufficient "petition," within the meaning of section 2196 of Mansfield's Digest.

3. *Supporting affidavit—Rebuttal.*

Where an affidavit is filed in support of a petition for a change of venue, counter affidavits may be introduced to show that the person making it is not a credible person, or he may be examined orally in open court, in order to ascertain his credibility.

APPEAL from *Sebastian* Circuit Court, Fort Smith District.

T. C. HUMPHRY, Judge.

The appellant *pro se.*

J. B. McDonough, Prosecuting Attorney, and *W. E. Atkinson,* Attorney General, for appellee.

MANSFIELD, J. Will Jackson was tried in the circuit court of Sebastian county for the Fort Smith district on an indictment for murder in the first degree, committed by taking the life of Ida Dean. The jury found him guilty as charged, and he moved for a new trial. This having been denied, judgment of death was pronounced against him, from which he has appealed.

Of the assignments of error made in the appellant's motion for a new trial, only two have been argued and insisted upon here. These relate to the action of the court in refusing to grant the defendant a continuance and in denying his appli-

cation for a change of venue. The killing occurred in the city of Fort Smith, on the 2d day of June, 1890, and the indictment was found two days later. On the 11th day of the same month, the gentlemen through whose services this appeal has been prosecuted were assigned as the defendant's counsel in the court below. On the day following their appointment they filed a motion asking the court to continue the cause until the next term. The grounds of this application, as stated, were that the defendant's counsel had not had sufficient time to prepare for his trial, and that four material witnesses in his behalf were absent. The motion stated that in the summer of 1888 the defendant suffered a severe sunstroke, which at times, and especially when he was under the influence of strong stimulants, rendered him so far unconscious that he was wholly unable to distinguish right from wrong; that, at the time of the killing, and prior thereto, he was under the influence of beer and whisky to such an extent that by reason of the effect of said sunstroke he became wholly unconscious of the nature of his acts; that he expected to prove by the absent witnesses, whose names were given, and who, it was stated, resided in the Indian territory, that he received the sunstroke referred to, and that at times since then they had known him to become apparently unconscious—sometimes from overheat, and several times after having used apparently but a small quantity of liquor. The application concluded with a statement that it was true, and that the defendant believed he would be able to procure the testimony of the absent witnesses by the next term of the court, and that he knew of no other witnesses by whom he could "so well prove the foregoing facts." The motion, which was sworn to by the prisoner, was filed and overruled on the 12th day of June. The cause was not, however, then called for trial, but was set for trial on the 20th day of the same month.

1. Continuances in criminal cases.

In *Thompson* v. *State*, 26 Ark., 323, it was held that continuances in criminal as well as in civil cases are, as a general rule, within the sound discretion of the court, and that a

refusal to grant a continuance "is never ground for a new trial, unless it clearly appears to have been an abuse of such discretion, and manifestly operates as a denial of justice." In this case the appellant's application does not state how far the absent witnesses resided from the place of trial, and there is nothing in the record to show that their testimony might not have been procured in the interval between the day when the continuance was refused and that on which the trial began, nor whether any effort was made to secure it. It is true that the application states that the witnesses were beyond the jurisdiction of the court in which the indictment was pending. But one of the witnesses, George Brown, subsequently appeared, and testified on the hearing of the application for a change of venue, and if the voluntary attendance of the others could not have been procured, and they were as stated non-residents, their depositions might have been taken under the statute. (Mansf. Dig., sec. 2146; *Giboney* v. *Rogers*, 32 Ark., 462). And if remoteness of residence or other circumstance existed to prevent the appellant from obtaining their depositions, that fact might also have been submitted for the consideration of the court by setting it forth in the motion. It will also be observed that the motion does not say that there were not other witnesses by whom the same facts could be proved, but only that defendant knew of no others "by whom he could so well prove them." George Brown was present on the day the trial began, and does not appear to have been called as a witness, except to testify on the application for a change of venue. Four other witnesses, all of whom state that they had known the appellant for a number of years, testified as to his sanity. As to the first ground stated in the motion for a continuance, namely, that counsel had not had sufficient time to make the necessary preparation for the appellant's trial, there is nothing to show that it was not removed by the additional time allowed by setting the case for trial on the 20th day of June. We are unable then to see from this record that the court abused its discretion in refusing the

application for a continuance, or that such refusal operated as a denial of justice, or was even prejudicial to the appellant. It therefore furnishes no ground for disturbing the verdict of the jury.

2. Change of venue—Petition.

On the same day on which the motion for continuance was filed (the 12th day of June) the defendant also filed his motion for a change of venue. Omitting the caption, that motion is in the form following: "Comes the defendant, Will Jackson, and moves the court for a change of venue, and for cause says: That the minds of the inhabitants of Sebastian county are so prejudiced against him that he cannot obtain a fair and impartial trial of this cause therein." This was signed and sworn to by the defendant and supported by the affidavit of Green Hogan. The prosecuting attorney introduced the counter-affidavit of eight persons which, omitting the caption, is as follows: "We, the undersigned persons, state on oath that we do not regard Green Hogan a credible person." The court heard the application on these affidavits and, having found that Hogan was not a credible witness, refused to make the order.

The statute (Mansf. Dig., sec. 2196) provides that the order for the removal of a criminal cause from the circuit court where it is pending to the circuit court of another county "shall be made on the application of the defendant by petition setting forth the facts, verified by affidavit." And that "the truth of the allegations in such petition," shall be supported "by the affidavit of some credible person." It is contended here on the part of the State that no *petition*, within the meaning of the statute, was in fact filed to obtain the change of venue sought by the defendant; and that if the paper which he presented can be treated as a petition, it is insufficient because it states no facts, but only a conclusion of law. It is argued that the defendant's application was therefore properly refused because of its informality.

The practice which has prevailed in this State with reference to the form of an application for a change of the venue in a criminal case has been extremely liberal; and as no ob-

jection to the form of defendant's petition appears to have been made in the court below, we think it would be unjust to him to entertain it on this appeal. Our opinion however is that the paper filed in this case and treated as a petition in the court below is in its form a substantial compliance with the statute. It does indeed state the conclusion to be drawn from the facts to be investigated, rather than the facts themselves. But the statement is of such nature that no one was likely to be misled by it.

3. Rebuttal of supporting affidavits.

On the other hand, counsel for the appellant earnestly contended that it was not competent to assail the credibility of Green Hogan by an affidavit which can be properly construed as only containing a vague expression of the affiants' opinion of his credibility. But we think this objection is entitled to no greater consideration than the one just disposed of. It was not urged below, and it does not appear that any prejudice resulted to the appellant from the form of the counter-affidavit. By the word "regard," in the connection in which the affiants used it, the court no doubt understood them to express an opinion of Hogan's credibility based upon their knowledge of his general reputation. And it is not probable that they were understood in any other sense by either the appellant or his counsel. We cannot therefore say that their affidavit was not sufficient to support the finding of the court against the credibility of Hogan.

On the 20th day of June, the appellant filed an amended application for a change of venue. This was supported by the affidavits of Joe W. Smith, Charles O'Brien, and George Brown. The court caused these witnesses to be examined orally in open court, with the view of ascertaining their credibility. It does not appear that any objection to this examination was made by the defendant at the time it took place; but it is now insisted that it was error. We are of the opinion that it was within the discretion of the court to receive the oral testimony of these witnesses as to facts affecting their own credibility, and their testimony, as set

forth in the bill of exceptions, is such as we think amply supports the finding of the court that they were not credible witnesses.

It follows that the court did not err in denying either of the appellant's applications for a change of venue.

No question can reasonably arise on this record as to the sufficiency of the evidence to support the verdict of the jury. The instructions of the court were not unfavorable to the defendant.

Finding no error in the judgment of the court below, it is affirmed.

SMITH *v.* STATE.

Decided February 28, 1891.

Intoxicating liquors—Original packages.

Under the rule established by the Supreme Court of the United States, one who imports whisky from another State may sell it in the form and shape in which it was imported without impediment from the State license laws; but when the package is broken and its contents distributed, the import becomes a part of the common mass of property of the State and subject to its regulations.

APPEAL from *Woodruff* Circuit Court.

M. T. SANDERS, Judge.

N. W. Norton for appellant.

The right of appellee, under the Federal constitution, to import *and sell* goods cannot be practically destroyed by a requirement that he shall sell them without unpacking. One who imports liquor from another State has a right to sell same whether he has a license or not, and without reference to the package, original or not. 10 S. C. Rep. Reporter, 681; 5 How., 504; 42 Fed. Rep., 546; 12 Wheat. 419. An imported article only passes beyond the control of Congress and becomes subject to State laws:

1. When it ceases to be an article of commerce—as where the importer procures it for his own use.

2. Where the importer disposes of it.

3. Where he has converted it into something else by manufacture. And it is not subject to State laws, until sold by the importer, if he keeps it for sale in the course of trade, *i. e.*, if it is an article of commerce in his hands. He may break and sell in packages, but he cannot keep a saloon or dram shop. Cases *supra*, and 37 Ark., 356; 91 U. S., 275; 102 *id.*, 123. No significance can be allowed to attach to the package. Art. 6, const. U. S.; art 1, sec. 8.

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

The Supreme Court of the United States only goes to this extent: the right of an importer to sell continues so long as the article remained an "unbroken package," or in the shape in which it was prepared for shipment. So long as it remains in this state, it retains its character as an import, and is not the subject of State laws. But as soon as the package is sold or broken or otherwise affected, congressional protection ceases, and it becomes subject to State regulation. 9 Wheat., 1; 12 *id.*, 419; 135 U. S., 100; 125 *id.*, 506; 135 *id.*, 161; 114 *id.*, 622; 43 Fed. Rep., 762; 5 How., 504. The boxes, and not the bottles, are the "original pacakages." 43 Fed. Rep., 372.

COCKRILL, C. J. This is an appeal from a judgment convicting appellant for a sale of whisky without a license. The whisky was the property of a citizen of the State of Tennessee, and was sold by the defendant as his agent. Neither the principal nor agent had license to sell. The liquor was received by the Arkansas agent from his Tennessee principal in packages containing several dozen quart bottles each. Some of the packages were boxes without tops, from which the bottles could be removed without breaking the box; others comprised closed boxes, and had to be broken open before the bottles could be removed. The appellant removed the bottles from some of the boxes, placed them upon shelves in a store-house, and entered upon the sale of liquor by the quart—that is, in the original bottles. There was testimony tending to show that he sold

bottles from the closed as well as the unclosed boxes, and the appellant has set up no claim that there was any legal distinction to be drawn from the sale of bottles taken from the one or the other. His position upon the legal aspect of the cause is that the protection afforded the importer by the constitution of the United States against interference by the State authorities would be practically destroyed by a requirement that he should sell the imported articles without unpacking them, and that such a restriction cannot be placed upon his right to sell.

"Original packages" defined.

The rule established by the Supreme Court of the United States in such cases goes no further than this: the importer may sell the article imported in the form and shape in which it was imported without impediment from State laws.

The State's undeniable right to tax and regulate can be interfered with only in so far as the prohibition of the constitution of the United States necessarily applies, and that requirement is satisfied when the importer is afforded a fair opportunity to sell his import in the case or package in which it is imported at the place where the transportation terminates. When he breaks the package and distributes the contents, he has so acted upon the import as to make it a part of the common mass of property of the State into which it is imported, and it becomes subject to the unimpeded control of the State.

These conclusions are deducible from the language of Chief Justice Marshall and of the other judges who delivered the opinions of the Supreme Court of the United States in the earliest cases upon the question, and they have been uniformly accepted as the settled law by the Federal and State tribunals. *Low* v. *Austin*, 13 Wall., 29; *Leisy* v. *Hardin*, 135 U. S., 100; In re *Harmon*, 43 Fed. R., 372; *Wynne* v. *Wright*, 1 Dev. & Bat. (N. C.), 19; *King* v. *McEvoy*, 4 Allen (Mass)., 110.

The appellant cites us to the language of the opinion in *Leisy* v. *Hardin*, *supra*, wherein it is said that by the act of sale alone the liquor would become mingled with the com-

mon mass of property within the State, and relies upon it as sustaining his position (135 U. S., p. 124). But it must be borne in mind that the language is used in reference to the sale of an original package only; and when confined to its proper connection, it can mean no more than that the property would not become amalgamated with the common mass except by sale, if left in the original package. But even that might be shown to exclude some considerations which may enter into the determination of the question as to when the impress of the import ceases and the State's right of control begins.

The charge was right, the evidence sustains the verdict, and there is no other question presented by the record.

Affirm.

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CHISM *v.* PRICE.

Decided February 28, 1891.

1. *Swamp land act—A present grant.*

   The swamp land act of Congress of September 18, 1850, was a present grant of all lands coming within the description of the act; and when they are properly identified, the State's title relates back to the date of the grant.

2. *Conflict between swamp and railroad grants—Compromise act of 1879.*

   The act of March 13, 1879, "to authorize the Commissioner of State Lands to settle by compromise the conflict of title between the State and the railroad companies to selected and unapproved swamp and overflowed lands," did not confirm the title to swamp lands which had been sold by the railroad companies. It was an offer to make a compromise which was never accepted by the companies.

3. *Fraud in procurement of patent—Remedy.*

   While a stranger or occupant without right cannot assail a patent for fraud practiced against the State, a settler upon swamp land, having a preferred right of purchase, may attack a patent issued in fraud of his right, and, upon refunding the purchase money and interest, demand a conveyance from the patentee.

4. *Swamp land—Settler's pre-emption—Act of 1879.*

A settler upon land, which had been selected by the State as swamp and overflowed, and reported to the general land office prior to the passage of the act of Congress of March 3, 1857, but which has not since been approved or patented to the State, has a preferred right to purchase such land, under the act of March 18. 1879.

5. *Authority of United States to dispose of swamp lands.*

The act of the legislature approved January 11, 1851, empowering the board of swamp land commissioners to demand of and receive from the United States indemnity "for any swamp and overflowed lands within this State which have been sold or disposed of by the United States since the 28th day of September, 1850, or which may hereafter be sold or disposed of by the United States," did not authorize the United States to grant to railroad companies lands embraced within the swamp land grant.

6. *Railroad grant—Exception as to swamp lands.*

The railroad grant act of Congress of 1853 did not include swamp and overflowed lands previously granted to the State.

7. *Construction of act locating Little Rock and Fort Smith Railroad.*

The act of the Legislature approved January 19, 1855, "fixing the line of the Little Rock and Fort Smith branch of the Cairo and Fulton Railroad, and granting the lands donated by Congress to the State in aid thereof," did not convey to the railroad any lands embraced within the swamp land grant.

8. *Construction of act of December 14, 1875.*

The act of the legislature of December 14, 1875, which ratified and confirmed the titles to lands selected by the State as swamp and overflowed which had been disposed of by the United States either for cash or in payment of military or county warrants or scrip, does not apply to lands granted by the United States in aid of railroads.

9. *Estoppel—Authority of Governor to bind State.*

The act of the Governor in transmitting to the general land office the list of lands claimed by the railroad under the railroad grant does not estop the State to claim swamp lands included in such list.

10. *Railroad's selections—Conclusiveness of the land department's approval.*

The approval by the general land department of the railroad's list of selected lands was not a determination that the lands embraced had not passed to the State by the swamp grant. The failure of the land department to determine this question leaves this matter open for judicial determination.

APPEAL from *Conway* Circuit Court in Chancery.

G. S. CUNNINGHAM, Judge.

S. N. Williams and *E. B. Henry* for appellant.

The swamp land grant of September 28, 1850, was a grant *in presenti.* 20 Ark., 100; *ib.*, 337; 29 *id.*, 56; 110 U. S., 695; 121 *id.*, 488. The railroad grant was approved February 9, 1853. *Prior in tempore potior est in jure.* The act of March 3, 1857, perfected the title to the selection of swamp lands which had been certified (as this land had) to the Commissioner of the General Land Office. 7 Otto, 345. The proviso in sec. 4232, Mansf. Dig., does not apply to this case. It only applies to land *not approved*, because of a conflict. *Benedict* v. *Harton*, Fed. Reporter, decided by Judge Caldwell. This act, March 13, 1879, was passed to meet difficulties and "conflicts" that arose in regard to selections, made by the State, *after the passage of the act of March 3, 1857.*

Ratcliffe & Fletcher and *G. W. Shinn* for appellee.

It is not disputed that the act of September 28, 1850, was a grant *in presenti*, but it required identification to render the title perfect. 121 U. S., 488. So the act of July 9, 1853, was a grant *in presenti.* The identification of these lands was fixed when the line of railroad was established; and when so identified, the grant took effect from its date. 103 U. S., 739; 112 *id.*, 720. The legislature of Arkansas, January 19, 1855, granted the lands embraced in the act of Congress of February 9, 1853, to the Little Rock and Fort Smith Railway, and adopted the survey made of said road. This fixed the limits and identified the lands. At this time these lands had not been selected by the State, and there was no identification of the same as inuring to the State under the swamp land grant. When the State subsequently selected these lands and reported the same to the United States land department, there at once arose a conflict. If the land was of the character embraced in the swamp land grant, it belonged to the State; if not, to the railroad. The power to settle this conflict was vested in the United States land department. That department, by the approval of the land to the railroad, settled the conflict in favor of the railroad; and its decision is conclusive. The swampy character of the land

from that time was no longer open to inquiry. 33 Ark., 836–7; 46 *id.*, 23; 13 Wall., 72; 93 U. S., 169; 6 Sawyer, 79; 7 *id.*, 48; 52 Iowa, 429. The act of March 3, 1857, could not interfere with any right acquired previously by the railroad. That act simply confirmed in the State the selections previously made, "*so far as the same remain vacant and unappropriated.*" This land had already been appropriated. See Acts 1855, pp. 149, 169; Acts 1856, p. 4–7, But the act of 1879, Mansf. Dig., secs. 4231–2, and the proviso thereto, settles all controversy and quiets the title to the purchaser. The State has always treated these lands as unconfirmed. Gantt's Dig., secs. 3860 *et seq.;* Mansf. Dig., secs. 4192 *et seq.* Chism's deed recites the fact that the land "still remains unapproved and unpatented to the State," and he cannot be heard to dispute the recitals in his deed. 39 Fed. Rep., 70. The swamp lands claimed by the State have never been treated as confirmed until certified to the State by the general land office. 33 Ark., 836. The State should now be estopped to claim the land. 7 Sawyer, 48; 3 Pick., 224; 17 Wall., 42; 7 Cal., 528. Under Mansf. Dig., secs. 4221 and 4226–30, appellee had the preference right to purchase from the State, and Chism in his affidavit perpetrated a palpable falsehood and fraud upon appellee; and whatever title he acquired will be held by him as trustee for appellee. 24 Ark., 40; 34 *id.*, 220. If Chism was not a pre-emptor, or had no improvement on the land, the Commissioner had no power to sell same without first advertising and offering at public sale. 24 Ark., 402; 39 Fed. Rep., 66.

Dodge & Johnson filed a brief for appellee on the motion for a rehearing.

HEMINGWAY, J. The plaintiff claims the land in suit as part of the swamp land grant made by Congress, September 28, 1850, and the defendants as a part of the railroad land grant made by the government, February 9, 1853.

1. The swamp grant was *in presenti.*

The rule is well established that the act of 1850 made a present grant of all lands coming within the description of

the act; and when they are properly designated, the conveyance relates back to the date of the grant. *Hendry* v. *Willis*, 33 Ark., 833.

By the terms of that act, it was made the duty of the Secretary of the Interior, as soon as practicable after its passage, to make out an accurate list and plat of the lands granted, and transmit the same to the Governor, and, at the request of the Governor, to issue a patent to the State. The law indicated no method by which the Secretary should ascertain and designate the lands, but a practice grew up whereby the agents of the State selected the lands and transmitted lists thereof to him, through the Commissioner of the Land Office, whereupon he certified back to the Governor a list and plat of such as he approved as coming within the description of the grant. The Secretary was designated by the act to determine what lands came within it, and his conclusion was manifested as above indicated. In the operation of the system great delay arose in procuring his approval of the lists forwarded; and on the 3d of March, 1857, Congress passed an act providing that all selections theretofore made and reported to the Commissioner of the Land Office, in so far as the same were vacant and unappropriated, and not interfered with by any actual settlement under any existing law of the United States, should be confirmed. By that act all lands previously so selected and not appropriated or settled on, as therein indicated, were brought within the provisions of the original act, without ascertainment by the Secretary. The State's selection of the land in suit had been made and reported to the Commissioner, and this act impressed upon it the character of swamp lands, and brought it within the operation of the granting act, unless it came within the exception as land previously appropriated or settled under some existing law. The railroad filed its selection of this land after the passage of the act of 1857, but it does not appear that it had appropriated it or settled on it before that date. The Secretary of the Interior approved its selection, but such approval was made expressly subject

to conflicting claims. He never adjudged that it was appropriated or settled by the railroad prior to March 3, 1857, or that the railroad, prior to that time, or any other time, was entitled to appropriate or settle upon it against the swamp land grant. There is no adjudication by the Secretary of the Interior; and upon the proof in this case we hold that the land did not come within the saving clause of the act of 1857. It may therefore be conceded that either grant would have conveyed the land if the other had been out of the way, in which case the elder would be held to prevail. *Martin* v. *Marks*, 7 Otto, 345.

2. Construction of the act of March 13, 1879 —Offer of compromise.

The defendant contends that although the State took this land as a part of the swamp land, the plaintiff cannot recover. As a reason therefor he urges that the State was the owner until 1881, and that, by the act of March 13, 1879 (Acts 1879, p. 64), it was provided that where any lands claimed by the State and the railroad company under the acts first referred to had been sold by the State or the railroad prior to said date, the title of the purchaser should be confirmed and quieted.

The act appealed to was entitled, "An act to authorize the Commissioner of State Lands to settle by compromise the conflicts of title between the State and railroad companies to selected and unapproved swamp and overflowed lands." It provided that in all cases where lands had been selected by the State and a railroad company, and, because of such conflict, had not been approved or patented to either the State or the company, the Commissioner of State Lands should be authorized and empowered to compromise such conflict with the company, and agree which of the lands should go to the State, and which to the company; and if any legal point should arise upon which the Commissioner and the company could not agree, the Commissioner should be authorized with the company to make an agreed state of facts and submit the same to the chancery court to decide the legal points arising thereon, with the proviso that in all cases where such lands had been sold by the State or the

company, the title of the purchaser should not be disturbed, but should be confirmed and quieted. The plaintiff contends that the land in controversy does not come within the provisions of this act, because this land had been approved to the State by the act of Congress of March 3, 1857, and the State act applied only to lands selected but not approved or patented. The defendant replies that the act of March 3d did not approve lands selected; but, in so far as they had not been appropriated or settled upon under existing laws, confirmed them, and expressly provided that they should be approved and patented according to the original act as soon as it might be practicable; and that the Secretary of the Interior had never approved or patented them to the State, as was thus provided, and had failed to do so because of the railroad's claim that it had previously appropriated them. Why the Secretary failed to certify the list and plat of this land to the Governor and to make a patent for it, is not disclosed by the record; but the fact of such failure appears. It is not necessary to determine the matter of difference stated, for in our opinion the act relied on is inapplicable for another reason. As its title and context clearly discloses, the act treated alone of the authorized proceeding between the Commissioner and the railroads to compromise conflicting claims. In the first place it authorizes the Commissioner to make a compromise on behalf of the State; it then provides that he may submit any difference of law between himself and the railroad for the decision of the chancery court, clearly intending any difference that might arise in the course of a compromise and that the court shall decide the legal questions submitted. Then follows the proviso that the title of all persons who had purchased either from the State or the railroad should be quieted. The legislature did not intend by that act to confirm and quiet titles of purchasers from the State to lands belonging to the railroad, for that was beyond its power. It cannot be thought to have intended to relinquish absolutely the State's claim to its lands that had been sold by the railroads, for that would be a bestowal

of a bounty out of public lands upon the purchasers of another with no compensating returns. The proviso was intended to indicate and limit the Commissioner's authority in compromising the conflicting claims, and to prescribe a rule of decision to govern the chancery court in determining matters submitted to it. It prescribed terms upon which such claims might be submitted to compromise; and if the railroads agreed to a submission, they accepted these terms. If, in the course of the compromise, it should be ascertained that the State had sold lands belonging to the railroad, or that the railroad had sold lands belonging to the State, it was fixed by the terms of submission that the title of purchasers from each should be confirmed. The State thus gave up its lands sold by the railroad, in return for a relinquishment by the railroad of its right to its lands sold by the State. It may well have been considered that the losses on each side would be compensated in concessions by the other. But there is no proof that the railroad ever submitted to the conditions of the act, and therefore its purchasers can claim no benefits dependent on such submission.

3. Remedy for fraudulent procurement of patent.

It is next contended for the defendant that the plaintiff cannot recover because, at the time of the latter's purchase from the State, the former was, and the latter was not, entitled to purchase the land; that the plaintiff obtained his patent by means of a false affidavit, and thereby deprived the defendant of his right to obtain a patent. This, it is insisted, was a fraud on the defendant, and entitled him to demand a conveyance from the plaintiff.

A stranger or occupant without right cannot assail a patent for fraud practiced against the State; but an occupant with a right to purchase may attack a patent issued in fraud of his rights, and upon equitable terms may demand a conveyance from the patentee. *Lee* v. *Johnson*, 116 U. S., 48; *Paty* v. *Harrell*, 24 Ark., 40; *McIver* v. *Williams*, 24 Ark., 33; *Sparks* v. *Pierce*, 115 U. S., 408; *Bohall* v. *Dilla*, 114 U. S., 47; *Smelting Co.* v. *Kemp*, 104 U. S., 636; *Frisbie v. Whitney*, 9 Wall., 187; *Garland* v. *Wynn*, 20 How. (U. S.), 6.

The plaintiff obtained his patent by means of a false affidavit in which he alleged that he was in possession of the land, when in fact he was not but the defendant was in possession. The evidence shows that the defendant's grantors entered upon the land as early as 1871, held actual possession and made improvements; that the defendant purchased in 1880, went into possession, and made further improvements. The plaintiff purchased the land from the commissioner in 1881 as unconfirmed swamp lands, and brought this suit nearly seven years later. Did the defendant have a superior right to purchase it? If he did, he was deprived of it by the fraud of the plaintiff.

4. Settler's preemption.

He insists that he had a right of pre-emption, and relies upon the act of March 18th, 1879, being section 4227 of Mansfield's Digest. It is as follows: "Pre-emptors and settlers on the selected and unconfirmed swamp lands of the State, and their legal representatives or assigns, shall have a preference right to purchase such lands by making satisfactory proof to the Commissioner of State Lands of their rights as such pre-emptors and settlers." To guard the preference right thereby conferred, the statute further provides that any person not a pre-emptor or settler, who shall apply to purchase any of such lands, shall make and file with the Commissioner an affidavit stating that the land applied for has no improvement on it, and that no person is residing upon it or claims it by virtue of any pre-emption certificate. A more jealous care of the interests of the settler could not have been manifested.

But does the defendant come within the provisions of the act? It relates to settlers on selected and unconfirmed lands only; and it may be insisted that this is not unconfirmed lands, but that it is confirmed land. It therefore becomes necessary to determine what the legislature meant by the term "unconfirmed lands." If the meaning is to be gathered from the significance of the same term in the act of Congress of March 3, 1857, it must be construed against

the defendant; for, as already stated, it is provided by that act that the title to this land be confirmed.

The word "confirmed" was employed in the earliest State legislation with reference to swamp lands. Gould's Dig., p. 717, sec. 3; *ib.*, p. 719, sec. 7. In the earlier acts the authority of the State's officers to make sales was confined to the confirmed lands, while the right of settlement and pre-emption was provided for the unconfirmed lands. So at one time the Governor was authorized to issue a patent only upon being satisfied that the lands were confirmed. And in the case of *Hendry* v. *Willis*, 33 Ark., 833, a patent issued by the Governor was attacked on the ground that the lands were not confirmed when it issued. In determining when the lands were confirmed within the meaning of that act, the court said: "The selections have been, in fact, made by the agents of the State, sent to the Secretary of the Interior, through the Commissioner of the General Land Office, approved and returned to the Governor. * * * When those lists so approved have been transmitted to the Governor, they have been treated in our legislative and official acts as confirmed, and so we must understand the word." That such is the accepted significance of the word in the land department of the State, is evidenced by the fact that the land in suit was carried on the Commissioner's books as unconfirmed, and so sold and described in plaintiff's patent, although the State's selection of it was on file with the Commissioner of the General Land Office on the 3d of March, 1857, and it was, within the meaning of the act of Congress of that day, then confirmed to the State. Then, in interpreting its meaning in the act relied on, shall we give it its meaning in the act of Congress, or its meaning as understood in the State land office, as used in prior acts of the legislature, and as accepted by this court? In which sense did the legislature intend it? It seems the more reasonable to conclude that it intended it in the sense in which it was then understood in legislative and official acts in this State, rather than that it intended to ignore this settled acceptation and adopt the

signification of the word in an act of Congress, a signification which for twenty-two years had not been adopted in the administration of kindred acts embodying the same word. The special provisions with reference to unconfirmed lands were prompted by the recognized uncertainty as to the State's claim, and the insecurity that purchasers would feel as to lands of which the State did not have the ordinary proofs and muniments of title; and it may well be presumed that such special provisions were intended to apply so long as the Secretary of the Interior failed to do anything that he ordinarily did to assure the State's right to such lands; for until he did that, the State's land office could not exhibit to applicants or furnish to purchasers the usual evidence of a title. This construction of the acts seems more reasonable also because it tends better to subserve the State's general policy of protecting settlers on this class of lands. It secures the State in its right to be paid for its land, and protects the settler in the enjoyment of the fruits of years of his toil, labor and outlay; and where a stranger obtains the patent without right, it corrects the wrong without imposing a penalty on him.

The judgment dismissing the complaint was erroneous, and must be reversed. The judgment should have been for the defendant on his cross-complaint; and if, within a reasonable time to be fixed by the court, he should pay the plaintiff the amount paid by the latter for the State's patent, with interest from date of payment at 6 per cent. per annum, the legal title to the land should be vested in defendant. As the defendant disputed the plaintiff's right to recover anything and asserted title in himself, the costs of the lower court should be divided between them. The cause will be remanded, with directions to enter a decree as above indicated.

BATTLE, J., dissenting. The opinion in this case is based on the statutes which give the right of pre-emption to swamp lands in certain cases. Treating the land in con-

troversy as swamp land, this court holds that appellee is entitled to it by right of pre-emption. In doing so it holds that the land is unconfirmed swamp land, within the meaning of those words as they are used in the act of 1879. From this interpretation of the statutes I dissent.

The land in question, together with other lands, was selected as "swamp and overflowed" land by the locating agents of the State, and the list containing it, duly certified by the surveyor general of the State, was forwarded to and received at the general land office of the United States, previous to the third day of March, 1857. By act of Congress of that date, it became confirmed swamp land. In *Martin* v. *Marks*, 97 U. S., 345, it was held that the effect of that act of Congress was to confirm such selections. The court said: "After the passage of that act (the act of March 3, 1857) the land department had no right to set aside the selections. The approval of them and the issue of patents to the State were mere ministerial acts, in regard to which that department had no discretion, unless it was found that the lands were not vacant, or had been actually settled on adversely to the swamp land claim. The act of 1850 was a present grant, subject to identification of the specific parcels coming within the description; and the selection confirmed by the act of 1857 furnished this identification, and perfected the title."

Treating the land in question as a part of the swamp lands granted to this State by the act of 1850, as this court does, it was confirmed to the State by the act of March 3, 1857. In what way and for what purpose did it become unconfirmed? The act of 1879 gives to pre-emptors and settlers on the selected and unconfirmed swamp lands of the State, and their legal representatives or assigns, a preference right to purchase such lands by making satisfactory proof to the Commissioner of their rights as such pre-emptors and settlers. It does not undertake to define what is meant by unconfirmed swamp lands. That was unnecessary, as its meaning was well understood. The Supreme Court of the United

States, in *Martin* v. *Marks*, 97 U. S., *supra*, had previously held that the land selected and reported previous to March 3, 1857, was confirmed by the act of Congress of that date. The other lands selected as swamp lands by the proper agents of the State, and reported as such to the Secretary of the Interior through the Commissioner of the General Land Office, when the selection thereof was approved and returned to the Governor, had been treated and recognized by the State as confirmed. There is nothing in the act of 1879 to indicate that either of these classes of swamp land were not recognized as confirmed swamp land. I cannot conceive of any good reason why the legislature should for any purpose treat either class as unconfirmed.

I have failed to discover any evidence that the State has ever treated any of the lands confirmed by the act of March 3, 1857, as unconfirmed swamp land, except the tract in controversy. Does the fact that the State so treated it enter into the interpretation of the act of 1879? Does it throw any light on the intention of that act? Is it to be presumed that the legislature, ascertaining that the land in question was treated as unconfirmed swamp land, concluded that all other lands confirmed by act of March 3, 1857, were unconfirmed, and intended to be so understood in the act of 1879? Certainly not. Yet such, it seems to me, must follow, if the reasons given for the conclusion stated in the opinion of the court be correct.

In the opinion of the court, the land in question is recognized as confirmed swamp land of the State; but it is held that it must be treated for the purpose of this suit as unconfirmed? Why? Because the State had so treated it. Suppose the State had, did that give to appellee the right to hold it as a pre-emptor and settler on selected and unconfirmed swamp land? How did the mistake of the State affect him? He was not misled or influenced by it. He was not lulled into security or taken by surprise by any act of the State. The State claimed the land. He considered it the property of the railroad, and purchased and held it under the railroad

and adversely to the State. The State had the right to correct its mistakes until they passed beyond its control. Appellee lost nothing; neither did he gain anything by the mistake.

ADDITIONAL OPINION ON MOTION FOR REHEARING.

Decided April 14, 1890.

HEMINGWAY, J. The defendant has presented a motion to modify the judgment rendered upon the hearing of this cause, and relies in support of it on matters not then argued by counsel or treated in the opinion delivered. We are asked to adjudge that defendant's title to the land under the railroad grant of 1853 is superior to plaintiff's title under the swamp land grant of 1850, and it is argued that such is the case for five reasons.

The first reason assigned is, that the State, by an act of the legislature approved January 11, 1851, authorized and empowered the United States government to dispose of lands within the swamp land grant, and that the government subsequently disposed of the land in suit by the act of 1853, making a grant to the State in aid of the railroad, and completed said disposal on the 17th of November, 1857, by approving to the railroad its selection of lands under the railroad act, including the tract in suit.

It is next insisted that the State conveyed the land, however acquired by it, to the railroad by act of the legislature approved January 19, 1855.

It is next argued that the lands passed to the State either by the swamp land grant or the railroad grant, and that all the title passed to the railroad by act of the legislature, approved December 14, 1875.

It is next insisted that the State and those claiming through it under the swamp land grant are estopped to contest title under the railroad grant, for the reason that the Governor transmitted to the government land office a list of the lands passing to the railroad under the railroad grant,

which list included the land in controversy, and that in pursuance thereof the Secretary of the Interior, on the 17th day of November, 1857, returned said list to the Governor with his approval.

The last ground of the motion is that the Secretary of the Interior, in the exercise of a jurisdiction conferred on him by the swamp land and railroad acts, adjudged that the land in controversy passed by the latter, and that this adjudication is final and conclusive.

We will treat the matters relied on in the order that we have stated them; and if we shall conclude that any one of them has the force claimed for it, it will entitle the defendant to the modification asked.

5. Authority of United States to sell swamp land.

1st. Did the act of January 11, 1851, authorize the United States government to dispose of the State's swamp lands, and was a disposition of the lands in suit made to the railroad by the railroad grant act, or by the approval of the Secretary of the Interior.

The only provision of the State act of 1851, relied on by the defendant, is as follows: "The board of swamp land commissioners are hereby empowered to demand of and receive from the proper accounting officer of the United States indemnity at the rate of one dollar and twenty-five cents per acre for any swamp and overflowed lands within this State, which have been sold or disposed of by the United States since the 28th September, 1850, or which may hereafter be sold or disposed of by the United States." Acts 1850-1, p. 137. This was passed soon after the swamp land act, and before any proof had been made to identify the lands coming within its provisions. Although the lands granted were identified by it as all the swamp and overflowed lands in the State, they were not identified by their numbers, and could not be stricken from the plats or lists of public land subject to ordinary entry, until the State should make its selections and furnish proof that such selections were of the character described in the grant. It was therefore inevitable that, in the course of rapid settlement

in a new State, the government should, without knowing it, make disposition of tracts of swamp land, unless it suspended all entries of its lands; and this course it did not see fit to take. It was to provide for such anticipated contingencies that the act was passed. We do not think that it contemplated that the government would knowingly dispose of the State's land, or intended to invest the government with any such general powers; but in view of the certainty that the government would, in the ordinary course of disposing of the public domain, unwittingly dispose of tracts of swamp land, the act empowered the board of commissioners to demand from the government the purchase price of its lands thus disposed of, and consented to accept the same in lieu of the land, rather than disturb titles thus acquired.

In view of this manifest policy, it may well be doubted whether the State's right to any lands thus disposed of would be barred until it had gotten from the government the price it received. But if it be conceded that the contention of the defendant furnished the correct interpretation of this act, it does not, as we think, sustain his claim; for if the power of disposal was conferred on, it was never executed by, the government.

6. Railroad grant excepts swamp land.

The railroad grant act (approved February 9, 1853,) contained no specific description of the lands granted, but left them to be ascertained from their situation with reference to the railroad when its line was finally located, and expressly excepted from its provisions all lands in place, which the government should have sold, or otherwise in any manner have reserved when the route of the road was finally located. The description of the lands included in the grant, as well as those excepted from it, is in the language found in a similar connection in the many railroad grants made by act of Congress since 1850. But it has been ruled by the Supreme Court of the United States that the swamp lands would not have passed under the description of the lands granted, because it could not be supposed that Congress ntended to give to railroads lands previously segregated

from the public domain and devoted to another purpose; and that if the language of the grant was broad enough to include them, they would be excluded by the terms of the exception. *Railroad Company* v. *Fremont County*, 9 Wall., 89; *Railroad Company* v. *Smith*, *ib.*, 95; *Leavenworth, etc., R. Co.* v. *U. S.*, 92 U. S., 733.

The approval by the Secretary of the Interior of the selection by the railroad of the land in suit does not aid the contention that the government disposed of this land to the railroad. We need not consider what the effect would be of the secretary's approving to the railroad land not within the railroad grant (see *Leavenworth, etc., R. Co.* v. *U. S.*, 92 U. S., *supra*); but it is sufficient to say that the approval relied on was made subject to any interfering rights, and did not prejudice the State's interfering claims under the swamp land grant. That the railroad grant, and the Secretary's approval of its selection under it, did not prejudice the State's claim, was held by the Attorney General of the United States, the Commissioner of the Land Office, and the same Secretary who made the approval, soon after the conflict arose; and it was then settled, so far as the opinion of the officers in the land department of the government could settle the matter, that where the claims of the State and railroad conflicted, the State was entitled to such lands as were swamp and overflowed, and the railroad to such as were dry. Opinions of Black, Hendricks and Thompson, 1 Lester's Land Laws, pp. 564–5–6–7. And it was held by the Secretary of the Interior, in the case of conflict arising under the same acts in Missouri, that although land had been certified as a part of the railroad grant, it would be approved to the State as swamp land, upon proof that it came within the description of land granted by that act. Opinion of Thompson, 1 Lester's Land Laws, p. 569. We are therefore of opinion that the government did not dispose of the land to the railroad.

2d. Did the State convey it, though swamp land, to the railroad by act of the legislature approved January 19, 7. Construction of act of January 19, 1855.

1855? This is entitled, "An Act fixing the line of the Little Rock and Fort Smith branch of the Cairo and Fulton Railroad, and granting the lands donated by Congress to the State in aid thereof." As far as the title of an act can indicate its scope, this title limits the grant of this act to the land donated by Congress in aid of the road. That such is its scope, is made manifest by the language of the grant it contains, which is, the lands granted by Congress to aid in the construction of a railroad, with no implication that the grant should extend to other lands. Acts 1854–5, p. 169, sec. 1. It is plain, we think, that the State intended to give the railroad the privilege to earn the lands it acquired under the railroad grant, and nothing more. And as the State acquired no swamp land under that act, it granted none by the act under consideration.

8. Act of December 14, 1875.

3d. Did the State confirm the title of the railroad by act approved December 14, 1875? In so far as it is pertinent in the consideration of this motion, that act is as follows:

"Whereas, Under the provisions of the act of Congress, approved September 28th, 1850, entitled, 'An Act to enable the State of Arkansas, and other States, to reclaim the Swamp Lands within their limits,' a large amount of lands were selected which were afterwards disposed of by the United States; and,

"Whereas, Upon proper proof that any lands so selected came within the provisions of the grant aforesaid, the United States government will refund to the State, in case of cash entry, the amount of purchase money, and an equivalent in lands for the tracts located with military bounty warrants or scrip; therefore,

"*Be it enacted by the General Assembly of the State of Arkansas:*

"SECTION 1. That the Commissioner of State Lands, by and with the approval of the Governor, be, and is hereby, authorized to appoint an agent, whose duty it shall be to procure the necessary proof in every case of the kind above

recited, and to make a final settlement with the United States government on behalf of the State.

"SEC. 7. That all titles to lands embraced in this act are hereby ratified and confirmed, and made as valid as if deeded or patented by the State of Arkansas."

It is obvious that the effect of this act is to confirm the title to all persons holding any lands, within its provisions, under the United States, and it is therefore necessary to determine whether it applied to swamp lands which came within the designation of lands embraced in the railroad grant. This is perhaps determined by the consideration of the first ground of the motion. For we have seen that the government did not grant swamp lands to the railroad; and as this act applies only to lands disposed of by the government, it does not apply to the class of swamp lands above indicated. But the same result would follow, for another reason. The preamble to this act recites that it was to apply to those lands only for which the government would make indemnity to the State, and that this comprised only lands sold for cash, warrants or scrip, which would not include lands donated in aid of railroads. It is manifest that this act was passed in response to Federal legislation, providing for a settlement by the government with the State on account of swamp lands disposed of by the former, and that its scope was intended to be co-extensive with the Federal law. If there were any doubts as to the kind of disposals to which it applied, it might be removed by reference to the Federal law. Looking to it, we find that the settlement it provides for is only on account of the disposal of swamp lands for cash, scrip or warrants. Acts March 2, 1855, and March 3, 1857; 1 Lester's Land Laws, pp. 248, 285.

9. Authority of Governor to bind State.

4th. Does an estoppel arise from the act of the Governor in transmitting to the general land office of the government the list of lands claimed by the railroad under the railroad grant, which included the land in suit? It is insisted by the defendant that the State, through the Governor, claimed the land for the railroad, and caused it to be approved to the

railroad, and should not be allowed to dispute the railroad's title. We are advised of no law which cast upon the Governor the duty, or conferred on him the authority, to act for the State in selecting or claiming lands under the railroad act. It was not his duty, nor was he authorized, on behalf of the State, to adjust the conflict between the State and the road, or to classify the lands affected by the conflict as swamp or dry lands, or to determine what passed to the State as swamp lands or to the railroad as dry lands. All his powers were conferred and defined by law, and of their character and extent the railroad was apprised. As he had no authority to act for the State in selecting or claiming the railroad lands, his acts could not bind the State; *Leavenworth, etc., R. Co.* v. *U. S.*, 92 U. S., 733; *Lake Superior, etc., Co.* v. *Cunningham*, 44 Fed. Rep., 832–3; but he did not select or classify the lands for the road, nor profess to act for the State in claiming them; and of this the road was fully advised. The agents of the road selected and located its lands and prepared the lists to be submitted to the land department. As the grant was made to the State as trustee, the department declined to treat concerning them, except with the State officers; and therefore the road transmitted its lists of selected lands through the Governor. He did not examine the lands or scrutinize or compare the lists, as the road well knew. He was a mere conduit to transmit the road's selections, charged with the exercise of no discretion on behalf of the State and assuming none. The road acted upon its own examination and selection, and was in nothing influenced by any act done by the Governor. It should have known the character as well as the location of the lands selected, matters not by law coming within his cognizance. Moreover, the State's claim for the swamp lands was pending when the railroad's claim was made; and of this the road was advised, for it protested against the approval of them to the State, as not being of the class of lands granted by the act of 1850. 1 Lester's Land Laws, p. 566. Before, at the time, and after, the railroad's claim was presented, the

State was urging the approval to it of all the swamp lands to which the conflict between the grants extended; and it continued to press its claim until it was settled by the department that, of the lands affected by the conflict, such as were swamp and overflowed should be approved to the State, and such as were dry should be approved to the railroad. 1 Lester's Land Laws, pp. 596–600. If the determination of the land department above referred to did not satisfy the road, there is nothing in the published documents of the department to disclose it. Is this a case for the application of the doctrine of estoppel? The State is not ordinarily bound by an estoppel, and we deem it unnecessary to consider the circumstances under which it may be invoked. *Johnson* v. *U. S.*, 5 Mason, 425; *Carr* v. *U. S.*, 98 U. S., 433; *Lake Superior, etc., Co.* v. *Cunningham*, 44 Fed. Rep., *supra*. It can never arise from the act of an agent in excess of his known authority. To make it apply to title to land, it must appear that the party invoking it is induced to act in relation to the land by the party against whom it was invoked, that he was ignorant of the true state of the title, and that it would prejudice him to permit such party to assert his title. Those conditions are not present in this case. The State's right to swamp lands was a part of the law of the land, and as such actually known to the road. The road was induced to no act by the conduct of the State; and in the matter with reference to which the Governor acted, the road was fully advised and relied upon its own information. It could not have relied upon the act of the Governor, for he had no authority to prejudice the State's claim, and the road knew what his powers were. If his acts had been misleading, no act was done by the railroad on account thereof; for its work of construction was begun years afterward, and after the State was actively asserting its swamp land title which would have removed any possible misapprehension arising from the Governor's acts.

10. Effect of approval of railroad's selections.

5th. Is the State's right concluded by an adjudication of the land department? If the department ever determined

the State's claim to the land in controversy, it does not appear in the record. The approval of the road's list of selected lands was only a determination that the lands embraced were of the legal designation of lands that would pass by the railroad act, waiving the effect of interfering claims. Whether they passed as against the prior grant was not determined by the approval, and, so far as we are advised or the record discloses, has never been determined. It is certain that, after the approval, the land officers treated it as a question for further inquiry. That leaves the matter open for judicial determination. *Railroad Co.* v. *Smith*, 9 Wall., 95; *Railroad Co.* v. *Fremont Co.*, *ib.*, 89; *French* v. *Fyan*, 93 U. S., 172; *Iron Silver Mining Co.* v. *Campbell*, 135 U. S., 294; *Ehrhardt* v. *Hogaboom*, 115 U. S., 67; *Wright* v. *Roseberry*, 121 U. S., 505. And as the proof in this case shows that the land was swamp and overflowed, we adhere to our former decision that it did not pass to the railroad.

We have availed ourselves of all the aid offered by the zeal, industry and ability of counsel, and feel that they can have overlooked or omitted but little bearing upon the question under consideration; we have carefully considered the points pressed, realizing the great interest, public and private, affected by this decision. Our conclusion is, that the judgment formerly entered was right under the law, and that the motion to modify it should be denied.

TURMAN v. BELL.

Decided February 28, 1891.

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1. *Mortgage foreclosure—Parties.*

The estoppel of a grantor of an absolute deed, retaining an unrecorded defeasance, as to a mortgagee of his grantee without notice of his equities, operates only to postpone his rights to the lien of the mortgagee, and does not extinguish them, nor authorize a foreclosure of them by a suit to which he was not a party.

2. *Subrogation—Purchase at mortgage sale.*

A purchaser at a foreclosure sale succeeds to all the rights of the holder of the mortgage foreclosed.

3. *Priorities—Notice.*

A mortgagee with notice that the mortgagor holds as security can enforce his lien only to the extent of the mortgagor's claim against his grantor; but if he took without notice, he can collect the entire mortgage debt.

4. *Withdrawal of unrecorded deed—Negligence.*

The rule that the holder of a deed has done all that is necessary under the registry laws to give notice of its contents when he files it for record and that the subsequent misconduct or neglect of the recorder cannot prejudice his rights, is subject to the qualification that where he carelessly takes it from the recorder's office before it is recorded and without noticing that it contains no certificate of record, a subsequent *bona fide* purchaser will be protected. *Oats* v. *Walls*, 28 Ark., 244, qualified.

5 *Warranty deed—Possession of grantor—Notice of equities.*

Where a vendor of agricultural land continued openly and notoriously in possession of the premises six months after the execution of a warranty deed, and after the time when such lands were usually entered upon for the next season's cultivation, his possession was sufficient to put a subsequent purchaser upon notice of his equities, unless such vendor, either expressly or by a recognized course of dealing, held out his vendee as authorized to convey.

6. *Equity—New trial.*

An equity cause will be remanded for a new trial when both parties have without fault omitted to introduce testimony upon a material point.

7. *Cross-complaint—Service on co-defendant.*

Judgment should not be rendered on a cross-complaint against a co-defendant who has not been summoned or warned to appear and who has not appeared.

APPEAL from *Scott* Circuit Court in Chancery.

JOHN S. LITTLE, Judge.

Suit to remove cloud upon title. Turman conveyed the land to Gilbreath in 1884 as security for a loan, and took a deed of defeasance. Gilbreath in 1885 mortgaged the land to the National Bank of Western Arkansas. The bank brought suit to foreclose the lien without making Turman a party. Plaintiffs, Bell and others, purchased at the foreclosure sale. In 1888 they brought this suit to cancel Turman's deed of defeasance as a cloud upon their title, making Gilbreath's administrator, Forrester, a party. Turman filed a cross-complaint, asking to redeem the land upon payment of the amount of the debt due by him to Gilbreath's estate. No summons was issued upon the cross-complaint for the co-defendant, Forrester, nor did he enter his appearance. Upon the pleadings and evidence the court dismissed the cross-complaint, and decreed that Turman's deed be canceled. Turman appealed.

The facts are stated in the opinion.

J. M. Moore, *Geo. H. Sanders* and *T. P. Winchester* for appellant.

L. P. Sandels and *C. E. Warner* for appellees.

1. Supposing that Turman did file the deed for record, were his acts in that behalf sufficient? 28 Ark., 244.

2. In view of the facts proven they were not. He placed Gilbreath in a position to perpetrate a wrong upon others.

3. A person is presumed to know the exact state of his title, and ignorance will not help him. And, in invoking the doctrine of estoppel, it does not matter whether Turman knew or not that his defeasance was not of record. 1 Johns. Chy., 344, 351, top; 129 Mass., 380; 7 Cr., 20; 2 Pom. Eq., sec. 731, and note 3, and sec. 821; 6 A. & E., p. 115; 3 Wash. R. P., 109–10; Bigelow on Estoppel, pp. 544 *et seq.*; 6 Johns. Chy., 166; 18 Ark., 142; 24 *id.*, 399; 93 Ind., 575; 51 N. H., 297.

4. Were appellees *bona fide* purchasers? They were if the bank was. A mortgagee is a *bona fide* purchaser. 49 Ark., 214. If Turman could not have set up his claim

against the bank, he cannot set it up as against appellees. 2 Pom. Eq., secs. 754, 724; 1 Story, Eq., sec. 409; 78 Mo., 458; 11 Ark., 137.

1. Parties necessary to mortgage foreclosure.

HEMINGWAY, J. As a general rule, no person can be affected by any judicial proceeding to which he is not a party; and a judgment takes effect only between the parties, and gives no rights to or against third persons. Freeman on Judg., sec. 154. So a foreclosure is effectual against only those persons interested in the equity who were parties; and while the foreclosure of a paramount lien conveys title, it is subject to the right of redemption of junior incumbrancers who were not parties to the proceeding. 2 Jones on Mort., sec. 1395. In this case the parties have treated the transactions between Gilbreath and Turman as a mortgage, and we think properly. Turman was therefore the equitable owner of the land, and Gilbreath held the legal title only by way of security. The mortgagees of Gilbreath could not therefore foreclose Turman's equity of redemption in a suit to which he was not a party.

It is argued that Turman is estopped to assert his equities against the bank, the mortgagee of Gilbreath, because he permitted the bank to take its mortgage and kept his equities hidden. If the fact be as alleged, the estoppel would only operate to postpone the rights of Turman to the lien of the bank. It would not extinguish his rights or authorize the bank to foreclose them by a suit to which he was a stranger.

It is further argued that he is estopped to assert his equities against the plaintiffs, purchasers at the foreclosure sale, because he permitted them to purchase without disclosing his interest. This contention, we think, rests upon no basis of fact. Before the sale under the decree he filed with the recorder and had recorded Gilbreath's deed of defeasance, and that gave notice of his rights under it to all persons dealing with the property. Moreover he was present at the sale, and before the land was offered he gave notice of his

equities to all persons in attendance. It is true that there is a conflict of evidence as to the latter fact, but we think the fair preponderance sustains our statement. He testified positively that he gave the notice by reading a paper which he had previously prepared. To strengthen his statement, he produced the paper and incorporated it in his testimony. His narrative is either true or corruptly false; for, if he in fact did not give the notice, he could not believe that he had given it, or innocently produce as a paper read one which in fact he had not read. He is corroborated in his statement by a number of witnesses. On the other side several witnesses testified that they heard him read no such notice, and one testified that he did not read it. They may be honest, and nevertheless Turman's statement may be true. That he read one notice all agree; and it may be that, although he read another, these witnesses failed to observe that the reading included more than one paper. Or, as several years intervened between the day of sale and that of testifying, they may not have recalled on the latter date all that they observed on the former.

So we hold that Turman had an interest in the property of which he could not be deprived by a foreclosure to which he was a stranger, and that he is not estopped to assert it in a proceeding to redeem from the purchaser under the foreclosure.

2. Subrogation.

Upon what terms is he entitled to redeem? In approaching that question it may be well to say that the plaintiffs, as purchasers at the foreclosure sale, succeeded to all the rights of the bank as holder of the mortgage foreclosed. 2 Jones on Mort., sec. 1395, and cases cited. What those rights were as against Turman, we shall now proceed to consider.

3. Notice of prior lien.

If the bank took the mortgage with notice that Gilbreath held the lands only by way of security and that the equitable title was in Turman, then the rights conferred by the mortgage could not be greater as against Turman than Gilbreath actually held. If, on the contrary, Turman in-

vested Gilbreath with the legal title to the land and clothed him with the indicia of absolute ownership, and the bank took its mortgage without notice of his qualified rights, then Turman cannot set up his claim to prejudice the collection of its mortgage debt. That does not imply that Turman may not set up his right to redeem as against the mortgage, but only that he cannot set it up so as to prejudice or defeat the collection of the claim secured. We hold that if the bank took the mortgage with the notice of Turman's rights, it can collect from the land no more than Gilbreath could; but if it took without notice, it can collect the entire amount due on its mortgage.

Turman contends that the bank took with notice given, first, by the filing of the instrument of defeasance for record, and, second, by his open and notorious possession of the land continued from the time that Gilbreath received his deed until the bringing of this suit.

4. Negligent withdrawal of unrecorded deed.

The facts as bearing upon the alleged notice by registry are: that on the day the defeasance was executed—being about one month after the execution of the deed—Turman left it with the recorder of the county to be recorded, and it was then indorsed by the recorder as filed for record. Some time afterwards (the date cannot be definitely fixed from the proof) Turman called for the defeasance, and it was delivered to him by the recorder. It had not been recorded, and there was attached to it no certificate of the recorder that it had been. Subsequently, after having made a search of the records which failed to discover the defeasance, the bank took its mortgage. It appears that the bank had no knowledge of the defeasance. Turman believed that it had been recorded, and did not discover his mistake until after the bank obtained the decree of foreclosure. Upon these facts it is contended that notice of the defeasance was given from the time it was filed for record. That contention is supported by the decision of this court in the case of *Oats* v. *Walls*, 28 Ark., 244; and if it is to be followed without limitation, it is decisive of this case. In the opinion in

that case the court used the following language: "In this case, Oats took his deed to the proper office, placed it in the hands of the person there in charge, and paid the fees for recording—this was all he was required to do. And any acts thereafter to be done to perfect the record and make the notice full to all subsequent purchasers, etc., devolved upon the clerk, and could not operate to the prejudice of the mortgagee."

That the holder of the deed has done all that is necessary under our registry laws to give notice of its contents when he files it for record and that the subsequent misconduct or neglect of the recorder cannot prejudice his rights, is the established law. But while such holder is exempt from prejudice by the misconduct or neglect of the clerk, we do not think the exemption should extend to his own acts that through design or negligence affect others. If A should file a deed to be recorded, and the recorder should so indorse it, and A should immediately take it out of the office, it would not be contended that such filing imparted any notice. Suppose that A, instead of taking the deed immediately after it is indorsed by the officer, should remain long enough in the office for the officer to record it, and should then take it out, knowing that it had not been recorded, would any one contend that such filing imparted notice to subsequent purchasers from A's grantor? If not, then if A took the deed out of the recorder's office without knowing whether it had been recorded or not, and when he might have known, by examining it for a recorder's certificate, that it had not been recorded, can he insist that such filing imparts notice to subsequent *bona fide* purchasers? The statute requires, when a deed has been recorded, that the recorder attach to it a certificate of the fact of record. When the owner takes a deed from the recorder's office, he can easily ascertain either that the certificate is or is not attached; and if it is not, he has no right to conclude that the deed has been recorded or to remove it from file. If he remove his deed before it is recorded, he places it in

the power of the grantor to exhibit a clear title and thus to mislead and deceive subsequent purchasers. By the exercise of slight care and caution he could have averted such a possibility; but if he fails to do it, persons ignorant of the deed, who have examined the records, may be induced to purchase, when they have exhausted all usual means of inquiry and information. If they do thus purchase, a loss must be borne. Where should it fall? Upon him whose care and caution could not prevent it, or upon him whose slight care and caution would have prevented it? The question implies its own answer. The party whose negligence made the loss possible should bear it, and should be estopped to set up his prior right against the party without fault.

The doctrine of constructive notice by registration rests upon the idea that all persons may learn and actually know that of which the law gives notice and implies knowledge; and it would contravene every principle of right and fair dealing to permit one to insist upon this constructive notice and claim the benefit of this implied knowledge, when his act had made such knowledge unattainable. We do not think the filing gave the bank notice of Turman's defeasance.

These are our views, after a careful and serious consideration of *Oats* v. *Walls*, 28 Ark, *supra*. The cases cited in support of that case have been examined and scrutinized by us, and do not conflict with the views herein expressed. In them it was held that where the holder of a deed filed it for record, and subsequent adverse interests were created before it was recorded, the notice was complete by the filing; but they were cases in which the failure to record was due to the delay of the recorder, the loss or destruction of the deed, or its abstraction from the files; in none of them did there enter the element of the owner's misconduct, either wilful or negligent. In so far as that case holds that a deed is notice of its provisions from the time it is filed for record and that the effect of such notice can not be impaired by the misconduct of the officer, it is approved; but in so far as it holds

that the notice continues as against those who in good faith and for value acquire adverse interests after the deed, unrecorded and without a certificate of record, is withdrawn from the files, it is overruled.

5. Possession of grantor is notice of equities reserved when.

Turman continued in the possession of the lands from the date of his deed to Gilbreath in August, 1884, until the execution of the mortgage to the bank in February, 1885—in fact, until the trial of this cause in the court below; and it is contended that this gave notice of all his rights. As a general rule the possession of land gives notice to all the world of the rights of the occupant, when there is no record evidence of his right of possession; but to this rule there are well-established exceptions. Whether the continuing possession of a grantor, after he has executed a deed of general warranty, comes within the rule or its exceptions, was suggested but not decided by this court in the case of *Gill* v. *Hardin*, 48 Ark., 409. We know of no other case in which the question has been alluded to by this court. Between the appellate courts of other States there is an irreconcilable conflict of ruling, and upon either side are to be found courts of the highest authority.

Those that sustain the application of the rule say that, by the terms of the deed, the grantor has not the right of possession, and that his continuing possession gives notice that he has rights reserved not expressed in the deed; that, inasmuch as the records disclose no right of possession, it is but reasonable to conclude that the continuing possession rests upon some right not disclosed by the records, and that the reasonableness of such conclusion imposes upon persons about to deal with the land the duty to make inquiry. *Illinois Central R. Co.* v. *McCullough*, 59 Ill., 166; *Daubenspeck* v. *Platt*, 22 Cal., 330; *New* v. *Wheaton*, 24 Minn., 406; *Hopkins* v. *Garrard*, 7 B. Mon., 312; *Webster* v. *Maddox*, 6 Me., 256; *Seymour* v. *McKinstry*, 106 N. Y., 230; *Wright* v *Bates*, 13 Vt., 341.

On the other side it is said that the execution of a warranty deed without reservation is a most solemn declara-

tion by the grantor that he has parted with all his rights in the property, and directly negatives the reservation of any right. That those who see the deed are warranted in relying upon such declaration as much as if it had been made to them orally upon an inquiry, and that if they acquire interests in faith of such reliance, the grantor in possession will be estopped to assert any right secretly reserved from the grant. That as the grantor has declared that he parted with his entire estate, strangers about to deal with the property would reasonably refer his continuous possession to the sufferance of the grantee, and would not reasonably think to refer it to a reserved right. *Eylar* v. *Eylar*, 60 Tex., 315; *Van Keuren* v. *Central R. Co.*, 38 N. J. L., 165; *Scott* v. *Gallagher*, 14 S. & R., 333; *Jaques* v. *Weeks*, 7 Watts, 261; *Koon* v. *Tramel*, 32 N. W. Rep., 243; *Bloomer* v. *Henderson*, 8 Mich., 404.

If the possession has continued after the making of the deed but a short time, it might be reasonably referred to the sufferance of the grantee; but where it was long continued, it would much more strongly imply a right in the occupant, and the implication would be sufficient to cast upon strangers the duty of inquiry. Where the lands were used for agriculture and sold during a crop season, it would not be reasonable to presume that the grantee would permit the grantor to hold by sufferance after the time when lands were usually entered upon for the purpose of the next year's cultivation; and possession continued after that time could not be explained upon the presumption of sufferance.

We think, with all deference to those who deny the application of the rule in such cases, that the controlling fact upon which their argument proceeds is assumed. Ordinarily the terms of a general warranty deed import a declaration that the grantor has reserved no rights in the subject of the grant, and by themselves may always bear such implication. But possession is ordinarily notice of a claim of right; and where a grantor continues in possession at the time of the grant and for a considerable time there-

after, should not the fact of possession be construed as an assertion of reserved rights, and as a limitation upon the provisions of the deed? True, the deed alone denies the reservation of equities, but it denies equally the right to continue in possession. If the grantor then holds open possession against the terms of his deed, is it not a reasonable implication that he has rights not expressed in it? If possession thus qualifies the terms of the deed, and it is open and continued, then the doctrine of estoppel cannot apply, for the grantor may as well expect persons to take notice of his possession as of his deed. We conclude that open and notorious possession of the lands by Turman from the date of his deed till the date of the bank's mortgage would give notice to the bank. But such notice only imposes a duty to make inquiry as to the rights of the occupant; and if he explain his possession in consonance with the right of his grantee to convey, he cannot attack the conveyances of the latter. If Turman held out Gilbreath as authorized to convey the land, either expressly or by a recognized course of dealing, then the bank would have been warranted in treating Turman's possession as in subordination to Gilbreath's right to convey, and would not be prejudiced by the notice.

6. When equity will remand for new trial.

It appears in a general and indefinite way that Gilbreath made sales of portions of the property conveyed to him by Turman, but the evidence does not disclose the dates or circumstances thereof; and we cannot determine what effect they should have upon the notice by possession. Moreover, the parties directed their attention to the development of the facts with reference to the filing and withdrawing from file of the instrument of defeasance, and did not fully develop the facts relative to Turman's continued possession. They treated the case of *Oats* v. *Walls*, 28 Ark., *supra*, as settling the law of notice by registry, and limited their evidence to the good faith of Turman in withdrawing his unrecorded defeasance from the files. Justice demands

that further proof be permitted to supply the omission as to the matters above indicated.

It is contended, and the record contains suggestions, that Turman received a part of the money secured by the bank mortgage, in addition to the amount he owed Gilbreath; if so, he can redeem only by paying it as well as his original debt. But if the mortgage represented money borrowed by Gilbreath for his own use, or for the purpose of discharging debts of Turman which he was bound by the terms of his agreement with Turman to pay, then the amount charged on the land in favor of plaintiffs should be credited on Turman's debt to Gilbreath.

7. Service of process upon filing of cross bill.

It does not appear that Gilbreath's administrator was made a party to Turman's cross-complaint, or that he appeared to it. In order that the rights of the parties may be fully adjudicated, he should be made a party.

We do not usually remand an equity cause for a new trial; but we should vary the practice where it is obvious that a cause cannot be otherwise intelligently determined, and such condition exists without fault of the parties. We therefore reverse the judgment for the reasons indicated, and remand the cause for further proceedings and retrial.

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CHRISMAN *v.* STATE.

Decided February 28, 1891.

1. *Assault with intent to kill—Proof of intent.*

On an indictment for assault with intent to kill proof of the specific intent is necessary, and such intent will not be inferred as a matter of law from proof of an assault with a deadly weapon without provocation. Whether the assault was made with the intent alleged is a question for the jury, in the determination of which they may consider the nature of the weapon and the manner of using it, together with all the other circumstances of the case.

2. *Drunkenness as a defense.*

Although voluntary drunkenness will not excuse the commission of a crime; yet where a person is accused of a crime such as can be committed only by doing a particular thing with a specific intent, it may be shown that, at the time of doing the thing charged, the accused was so drunk that he could not have entertained the intent necessary to constitute the crime.

APPEAL from *Johnson* Circuit Court.

J. G. WALLACE, Judge.

A. S. McKennon and *J. E. Cravens* for appellant.

The court erred in third, fourth, and especially the fifth instruction, and in refusing the prayers asked by defendant. These are reversible errors. Mansf. Dig., sec. 2459. In this class of cases the *intent* must be proved, and is *never presumed.* 49 Ark., 156; 11 S. E. Rep., 620; 19 Mich., 401; 10 *id.*, 212; 13 S. W. Rep., 147; 2 Thompson on Trials, p. 1888; 22 Pac. Rep., 80; 34 Ark., 275; *ib.*, 341.

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

The third instruction is good as far as it goes; the court might have gone further and told the jury that in statutory crimes consisting of an act and intent, the intent must exist to create guilt. The fourth is in harmony with 34 Ark., 275. As to whether upon an indictment for assault with intent to kill, it is necessary to prove a specific intent, or whether the use of a deadly weapon raises the presumption of an intent, see 10 Ark., 324; 8 Car. & Payne, 541; 9 *id.*, 258; 49 Ark., 159.

1. Intent in assault with intent to kill.

MANSFIELD, J. The appellant was convicted of an assault with intent to kill and murder F. J. Stanfield. The statute under which the indictment was found declares that "whoever shall feloniously, willfully and with malice aforethought, assault any person, with intent to murder or kill, * * * * shall, on conviction thereof, be imprisoned in the penitentiary not less than three nor more than twenty-one years." (Mansfield's Dig., sec. 1567.) It has been frequently held by this court that an indictment under this section of the criminal law cannot be sustained unless the evidence would have warranted a conviction for murder if

death had ensued from the assault charged to have been committed. (*Lacefield* v. *State*, 34 Ark., 275, and cases there cited.) But it has never been ruled here that such evidence will in every case be sufficient. On the contrary, the decision in the case of *Lacefield* v. *State*, cited above, and that in *Scott* v. *State*, 49 Ark., 156, both distinctly recognize the doctrine laid down by Bishop, that an attempt to commit a crime, such as the attempt charged in this indictment, is an offense consisting of two elements—"an evil intent and a simultaneous resulting act." Commenting on this class of crimes, Mr. Bishop says: "When we say that a man attempted to do a thing, we mean that he intended to do, specifically, it; and proceeded a certain way in the doing. The intent in the mind covers the thing in full; the act covers it only in part. Thus, to constitute murder, the guilty person need not intend to take life; but, to constitute an attempt to murder, he must so intend." * * * * "The intent must be specific to do some act, which, if it were fully performed, would constitute a substantive crime. Therefore * * * * general malevolence is not sufficient, even though of a sort which, added to the appropriate act, would constitute an ordinary substantive offense." After further comment on this subject, the same author says: "The doctrine of an intent in law, differing from the intent in fact, is not applicable to these technical attempts; and, if the prisoner's real purpose were not the same which the indictment specifies, he must * * * be acquitted. * * * For the charge is, that the defendant put forth an act whose criminal quality or aggravation proceeded from a specially evil intent prompting it; and, in reason, we cannot first draw an evil intent from an act, and then enhance the evil of the act by adding this intent back again to it." 1 Bish. Crim. Law, secs. 729, 730, 731, 735. In Lacefield's case, 34 Ark., *supra*, the court said that, while "it is true that every person is presumed to contemplate the ordinary and natural consequences of his acts, such presumption does not arise where the act fails of effect, or

is attended by no consequences; and where such act is charged to have been done with a specific intent, such intent must be proved, and not presumed from the act." As an application of this doctrine, it was held in that case that where one, "intending to kill A, shoots and wounds B, * * * * he cannot be convicted of an assault with intent to kill B." In *Scott* v. *State*, 49 Ark., 156, the defendant was charged with an assault upon one Bannister with intent to kill and murder him; and the trial court instructed the jury that, if they believed from the evidence that the defendant shot at some one other than Bannister, or if they had "a reasonable doubt as to whom the defendant intended to shoot," they should acquit the defendant, unless they further found from the evidence that the defendant shot into the house of Bannister and into a crowd where he (Bannister) was at the time situated, without provocation and when all the circumstances of the shooting showed an abandoned and wicked disposition and a reckless disregard of human life." But this court held that, as the "essence" of the crime charged was the specific intention to take the life of Bannister, it was necessary to prove the intent laid in the indictment to the satisfaction of the jury; and the judgment was reversed on the ground that the concluding portion of the charge quoted above was "liable to mislead the jury into the belief that proof of the particular intent alleged could be dispensed with."

In this case the evidence shows that the defendant assaulted Stanfield with a knife, inflicting upon the person of the latter a dangerous wound. The testimony furnishes no description of the knife used by the defendant; but, from the nature of the wound received by Stanfield and from what is said of the knife, it may well be inferred that it was a deadly weapon. There was evidence showing that the defendant was intoxicated at the time of making the assault, and that he had been drinking to excess for about four weeks. It was also shown that he had been intemperate for several years; and one of the witnesses stated that, when

intoxicated, he seemed to be irrational, and had the appearance of "a raving maniac." Another stated that for a week or more before the assault on Stanfield the defendant did not appear to know "what he was about." Others described his condition during the same time by saying that they did not think he "was at himself." Several witnesses, however, on the part of the State, testified that although drunk at the time of the assault, the defendant did not appear to be irrational. The court, against the defendant's objection, gave to the jury the following instruction:

"5. If the jury believe from the evidence that the defendant assaulted and stabbed the prosecuting witness with a knife calculated ordinarily to produce death, without provocation, the law presumes that he did it with the felonious design to kill; and the burden of proof is on the defendant to show to the contrary either by proof on the part of the State or defense."

Tested by the ruling of this court in the cases cited above, and by numerous decisions in other States having statutes similar to that on which the indictment is based, this instruction was erroneous. Whether the defendant assaulted Stanfield with the specific intent alleged in the indictment, was a question of fact which it was his right to have determined by the jury upon the whole evidence in the cause. But, under the instruction copied above, the jury were at liberty to presume the existence of a felonious intent to kill from the facts mentioned in the court's charge, without considering any others. We do not hold that it would have been improper to instruct the jury that the defendant should be presumed to have intended the natural and probable consequences of his act in stabbing the prosecuting witness. For it was clearly the province and duty of the jury to consider the nature of the weapon used by the defendant and his manner of using it, together with all the other circumstances of the case, in determining whether the assault was in fact committed with the intent alleged in the indictment. I Bishop, Crim. Law, sec. 735 and note 1.

But the objectionable charge shifted the burden of proof as to the question of such intent, which would still remain for the determination of the jury, although they believed that the facts recited by the court's instruction had been established by the evidence. *Ogletree* v. *State*, 28 Ala., 693; *State* v. *Neal*, 37 Me., 468; 1 Starkie, Ev. (10th ed.), 72; *State* v. *Jefferson*, 3 Harrington, 571.

2. Drunkenness as a defense.

We do not think it necessary to review on this appeal the other rulings of the circuit court complained of by the defendant. But as the cause must be remanded, we think it proper to say that although voluntary drunkenness cannot, as the jury were told by the court, excuse the commission of a criminal act; yet, where a person is accused of a crime such as can be committed only by doing a particular thing with a specific intent, it may be shown that at the time of doing the thing charged the accused was so drunk that he could not have entertained the intent necessary to constitute the offense. 1 Bishop, Crim. Law, sec. 413. Thus, in *Wood* v. *State*, 34 Ark., 341, it was held that "if one at the time of taking property is so under the influence of intoxicating liquor that a felonious intent cannot be formed in his mind, he is not guilty of larceny." The law on this subject is further illustrated by a ruling in *Casat* v. *State*, 40 Ark., 511. In the latter case it was held that voluntary intoxication cannot reduce murder in the first degree to a lower degree of homicide, unless it is accompanied by a temporary destruction of reason, and that it is not sufficient to prove a condition of mere nervous excitement produced by drinking.

For the error we have indicated the judgment must be reversed, and the cause remanded for a new trial.

RAILWAY COMPANY *v.* TRIPLETT.

Decided March 7, 1891.

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1. *Master and servant—Negligence—Co-servants.*

A master is not liable to a servant for an injury occasioned by a co-servant's negligence if the injury was one of the ordinary or probable risks assumed by the servant in the contract of employment.

2. *Duty of master—Protection to servant.*

Where a car-repairer was engaged in work under a car so situated that a jar from an approaching car would cause it to fall and crush him, it is the duty of the company, when apprised that its regulations are insufficient to protect him, to adopt such measures as will afford him reasonable protection against the dangers incident to the performance of his duties.

3. *Duty of master—Delegation to co-servant.*

Where the company delegated to a yard-master its duty to protect the car-repairer, it will be responsible for his negligence in the performance of that duty.

4. *Contributory negligence.*

Where complaint had been made to the proper official of the company that its regulations were insufficient to protect him, and the company had indicated that it would correct the evil, the car-repairer was justified in remaining in the service of the company.

5. *Instruction—Error without prejudice.*

Where the facts were undisputed, and the verdict could not have been different if the jury had been correctly instructed, the cause will not be reversed for an error in the court's instruction.

6. *Pleading—Aider by proof.*

Where both parties direct their evidence to the same issue, a defective complaint will be considered as amended to conform to the proof.

APPEAL from *Jefferson* Circuit Court.

JOHN A. WILLIAMS, Judge.

Action by C. H. Triplett, administrator of T. J. Brown, deceased, against the St. Louis, Arkansas and Texas Railway Company, to recover damages for personal injuries resulting in death. The facts are stated in the opinion.

J. M. & J. G. Taylor and *Sam H. West* for appellant.

1. The duty of the railroad ended *when it exercised ordinary care* to provide the deceased with a reasonably safe place in which to prosecute his work, and it did not guar-

antee that such place, obviously dangerous, should prove reasonably safe. Sh. & Redf. on Negl., 103; 35 Ark., 614; 25 Am. & E. R. Cas., 518, note; 48 Ark., 474; *ib.*, 345. It was necessary to allege and prove that the accident arose because of some failure to discharge a duty which the company owed deceased, and that the failure to perform such duty was the proximate cause of the accident. 41 Ark., 382. If the company furnished a safe place and instruments, it is not liable for the negligence of co-employes. 24 Am. & E. Cas., 453.

2. A railroad is not liable for the negligence of a fellow-servant. 4 Metc., 49; Wood, Mast. & S., sec. 427 *et seq.* As to who are fellow-servants is well stated in 3 Wood, Ry. Law, sec. 388, p. 1500. It is laid down that the true test is "subjection to the same general control and co-operation to secure a common result." 6 Rep., 264; 109 U. S., 478; 24 A. & E. R. Cas., 455. Yet the court told the jury in the fourth instruction, that deceased was *not* a fellow-servant, and consequently the railroad was liable. This was error. 84 N. Y., 77; McKinney on Fellow-Servants, 310; 46 Ark., 388; 92 Ill., 43; 51 Ark., 477. The negligence of fellow-servants is one of the risks arising from his employment which the employe undertakes. Cases *supra*; 24 A. & E. Cases, 428; 10 Allen, 236; McKinney F. S., sec. 124; Whit. Smith on Neg., p. 139, and note; 17 N. W. Rep., 422; 48 Ark., 474. The duty of the master is to supply the servant with suitable and safe machinery and appliances, with competent and skilful co-workers, and to make and promulgate sufficient rules and regulations for the conduct of its business, etc. 5 A. & E. R. Cases, 524; 25 *id.*, 507; 58 N. Y., 217; 53 *id.*, 549; 53 Ill., 336; 25 A. & E. R. Cases, 511, and note, p. 513. Who are fellow-servants is a question of fact, not of law, and should be left to the jury. 110 Ill., 216; 12 Am. & E. R. Cas., 228; 17 *id.*, 564; 88 Pa. St., 260; Rorer on Railroads, p. 831; 133 U. S., 374. It devolved on appellee to prove that the injury happened because the railroad did not exercise proper care in the prem-

ises. 44 Ark., 529. Even if it devolved on the company to use red flags as danger signals, yet Brown went about his work knowing full well that none were used, and that such was not the custom of the company, and thus assumed the risk incident to the enforcement of such rules as the company had adopted. 150 Mass., 478; 30 Wisc., 674–8; 50 *id.*, 462; 45 *id.*, 98; 75 Ill., 106; 5 Oh. St., 541; 25 N. Y., 562; 44 Cal., 187. These cases show that if deceased knew the manner of doing business in defendant's yard and remained in its employ after such knowledge, then he could not recover for injury resulting from such management. 5 A. & E. R. Cas., 472; 53 Wisc., 74; 5 A. & E. R. Cas., 469; 74 Ind., 440. See also McKinney on F. S., p. 101; 92 Pa., 276; 5 A. & E. R. Cas., 508, and note; Rorer on R. R., p. 703.

M. A. Austin for appellee.

The proximate cause of the death of Brown, appellee's intestate, was the direct result of four separate and distinct acts of negligence on the part of appellant railway company. First—In not keeping danger signals on all the cars on the same track, while Brown was engaged in working under them. Second—In not keeping the switch leading to the track on which these cars were standing securely guarded, or locked, while cars were undergoing repairs. Third—In permitting its servants to change the switches to such tracks, and run in its engines and cars on this track while Brown was engaged in such repairs, without giving him reasonable warning of the danger that might result from such acts of its servants. Fourth—In going in on this track with its engine and cars, and causing the death of Brown.

Brown and the switchman and engineer were not fellow-servants, but the servants of the same master in a different employment. The injury was not one of the ordinary risks of the employment. 24 Am. S. Rev., 190; 1 McM., 385; 112 U. S., 377–383. The doctrine of fellow-servants does not apply in this case. Brown contracted without contem-

plating the risks resulting from the negligence of those running the engines. He did not regard it as a risk. The company neglected to advise him of the risks by the promulgation of rules governing these repair tracks. Sh. & Redf. on Negl. (2d ed.), 118; Beach on Cont. Neg., sec. 141; Kirkman on Ry. Serv., 258; 91 N. Y., 332; 69 Ill., 464. See also 15 A. & E. R. Cases, 325; Sher. & Redf. on Negl., p. 18; 48 Ark., 345; 100 U. S., 213; 110 Mass., 241; 116 *id.*, 417; 55 Vt., 84; 66 Me., 420; 107 N. Y., 374; 59 Tex., 334; 80 Ind., 281. It was the railroad's duty to provide Brown with a safe place to work. It was its duty to protect him from the carelessness and negligence of its servants. He had the right to rely upon this. Having failed in its duty, it cannot rely upon the doctrine of fellow-servant. McKinney on F. S., pp. 60, 61, 62; 83 N. Y., 7; 24 *id.*, 410; 36 Ohio St., 222; 20 Fed. Rep., 87; 17 Am. L. Reg., 616; 69 Ill., 461; 39 Ark., 17; 44 *id.*, 524; 53 N. Y., 549; 5 M. H. & G., 352. Where the master has been negligent in performing a duty, he cannot escape liability by saying that it was the negligent act of his servants. 73 N. Y., 38; 106 U. S., 700; 5 Vroom, N. J., 151.

JOHN FLETCHER, Special J. This is an appeal from a verdict and judgment against the railway company for $5000 damages, sustained by the death of appellee's intestate, T. J. Brown, while in the employ of appellant. Brown was a car-repairer employed at the shops of the railway company at Pine Bluff. Near the shops and within the yard limits of the company were situated what are known as repair tracks, on which cars badly crippled and requiring much time to repair are placed. These tracks were under the supervision and control of the foreman of repairs. By the rules of the company, no switchman or engineer was permitted to go upon these tracks for the purpose of switching cars without permission from the foreman of repairs, and he was not supposed to give such permission when men were at work on the track.

The yards of the company are under control of the yard-master. "He has entire supervision of the yard, charge of all trains and cars while in the yard limits, and the placing and disposition of all cars, subject to the order of the superintendent or agent. He does all the necessary switching and anything else that may turn up in that way." He hired and controlled and had the power to discharge the switchmen and engineers at work on the yards. The car-repairers were hired by, and were nnder the immediate supervision of, the master mechanic.

It was the rule of the company for the yard-master at 1 p. m. every day to send a switchman and engineer with an engine to the foreman of repairs, with instructions to do such switching of cars on the repair tracks as might be required, at which time the foreman of repairs would instruct them what cars to take off and what to put upon the repair tracks and where to place them.

At the usual hour on the day of the accident, the yard-master sent a switchman and engineer with an engine, who as usual reported to the foreman of repairs and received from him the number of cars to be switched and instructions where to place the same. At the same time the foreman of repairs pointed out to them the fact that Brown was at work under a car jacked up on one of the tracks, and told them not to go upon that track. The foreman of repairs returned to his office near by, and within twenty or thirty minutes afterwards the switchman threw the switch and caused a train of cars to be backed upon the track where Brown was at work, and, without warning to him, the train struck the car under which he was at work and caused it to fall upon and kill him.

It is claimed by the railway company that the switchman and engineer were fellow-servants with Brown, and no liability can attach to the company by reason of their negligence.

1. Liability of master for co-servant's negligence.

The rule which exempts the master from liability for an injury to a servant occasioned by the negligence of a fellow-

servant is now firmly established. The court and text-writers, however, have found great difficulty in giving an accurate and satisfactory test by which to determine who are fellow-servants within the meaning of the rule.

It is said generally that fellow-servants are those engaged under the control of the same common master and in the same common business, or, to use the terms of several text-writers, "same common pursuit" (3 Wood's Railway Law, sec. 388), "same general business" (2 Thompson on Negligence, p. 1026), "accomplishing the same common object" (Beach on Contributory Negligence, p. 338, sec. 115).

But when we undertake to determine what is essential to render the service common to all, within these terms or expressions, we find the cases numerous and contradictory. It would be beyond the scope of this opinion to undertake to review or to reconcile them.

It would seem that a test approximately applicable to all cases can only be found in the reasons in which the rule itself is based.

Here again we find the courts not entirely harmonious.

One of the reasons assigned for the rule is that of supposed public policy which assumes "that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety, as well as that of the master." "Much potency," says Mr. Justice Field, in the case of *Chicago, etc., R. Co.* v. *Ross*, 112 U. S., 377, "is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of the servants contribute the chief protection against accident. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant." Some of the courts, however,

assuming this reason to be the basis of the rule, have drawn from it the conclusion that those only are fellow-servants who are so consociated in the discharge of their duties that they can exercise an influence upon each other promotive of caution, because, as they say, the reason of the rule ceasing, its application should also cease.

Out of this has arisen the doctrine of separate departments, by which a distinction is made between those servants engaged in the same department, and those engaged in different departments, of the same general business. *Chicago & N. W. R. Co.* v. *Moranda*, 93 Ill., 302; S. C., 34 Am. Rep., 168; *Cooper* v. *Mullins*, 30 Ga., 150; *Louisville, etc., R. Co.* v. *Collins*, 2 Duv. (Ky.), 114; *Nashville, etc., R. Co.* v. *Jones*, 9 Heisk. (Tenn)., 27; McKinney on Fellow-Servants, sec. 72, and cases cited.

The reasoning of these courts is not without weight and in given cases is strongly persuasive, as reflecting light upon the nature of the risks assumed by the servant and the obligations of the master to protect him against such risks. But when it is sought to make the question whether or not the servants are engaged in the same or different departments an arbitrary test by which to determine the liability of the master, the results reached must often be unsatisfactory. It leads to confusion and possible absurdities.

It is not difficult to conceive of instances where servants engaged in the same department of business may have no opportunity to observe the habits or to exercise an influence upon each other; or where servants in different departments may have opportunity to observe and influence the conduct of each other; or where the dangers naturally arising from the negligence of each may be as great in different as in the same department of business.

As said by the Supreme Court of Rhode Island in *Brodeur* v. *Valley Falls Co.*, 17 Atl. Rep., 55, there is "an obvious impracticability in trying to gauge the liability of an employe, in a complex business, by the independence of its different branches, or by the intercommunication of those

employed. Not only would it be impossible, in many cases, to separate the work into distinct departments, and to discern their dividing lines, but incidental duties, changing the relations of workmen to each other, would vary also the master's liability. He would thus be liable for the negligence of a servant at one time or place, and not at another. Without a personal supervision of all his help in all their work, he would not know when he was responsible and when he was not. Moreover, such a rule would govern the liability of a master when the groundwork upon which the rule is founded did not exist. For, if the test of liability be that of the separate and independent duties of the servants, they may nevertheless be so near each other as to be able to exert a mutual influence to caution; or, if it be that of association, they may still be in the same department, but unable, from their duties or position, to exert such influence."

The true reason on which the rule is based, as shown by the great weight of authority, is that a person who voluntarily engages in the service of another presumably assumes all the risks ordinarily incident to that service, and fixes his compensation with a view to such risks. *Randall* v. *B. & R. Co.*, 109 U. S., 478; Wood on Master and Servant, sec. 326; Underhill on Torts, p. 52; *Farwell* v. *Boston & Worcester R. Co.*, 4 Metc. (Mass.), 49. See note 5 to sec. 72, McKinney on Fellow-Servant, where the authorities are cited: *Campbell* v. *Pennsylvania R. Co.*, 24 Am. and Eng. Ry. Cases, 427; *Railroad Co.* v. *Fort*, 17 Wall., 553.

If this be the principle underlying the rule, it would seem that the question which forms a test in any case is one of risks. And that where one servant is shown to have been injured by another, the question is, not whether the two servants were fellow-servants in any technical sense of the term, but *whether the injury was within the risk ordinarily incident to the service undertaken.* "The negligence of a fellow-workman engaged upon a common work is commonly accounted among the risks undertaken, but is only a subordi-

nate instance. *Lawler* v. *Androscoggin R. Co.*, 16 Am. Rep., 498.

"A fellow-servant," says the court in *McAndrews* v. *Burns*, 39 N. J. L., 117, "is any one who serves and is controlled by the same master. Common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that through the carelessness of fellow-servants it may probably expose them to injury."

Or, as more fully expressed by Williams, J., in the case of *Baird* v. *Pettit*, 70 Pa. St., 477, 482: "Servants, it is said, are engaged in a common employment when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that it may probably expose them to the risk of injury in case he is negligent. That this is the proper test is evident from the reason assigned for the exemption of masters from liability to their servants, viz.: that the servant takes the risk into account when fixing his wages. He cannot take into account a risk which he has no reason to anticipate, and he does take into account the risks which the average experience of his fellows has led him as a class to anticipate."

Judge Dillon, after discussing this subject in an article published in 24 Am. Law Rev., 190, concludes: "The real inquiry is: *Was the injury caused by another servant one of the ordinary risks of the particular employment?* If so, the mere grade, whether higher, lower or co-ordinate, or the department of the faulty servant, is of no consequence.

"It is a condition of contract of service that the servant takes upon himself the risk of accidents in the *common course of the business*, all open and palpable risks, including the negligence of all fellow-servants of whatever grade in the same employment.

"The true inquiry in each case is, Was the accident one of the normal and natural risks in the ordinary course of business? If so, then there is no common law liability on

the part of the employer; if not, there is such liability; and the inquiry, except as it bears on the above, is not one of grades or departments. This is the final form the doctrine has assumed, and it is the correct one. It is plain, intelligible and practical. It is founded upon just principles, viz., that it is precisely commensurate with the master's personal duties."

The court, by its fourth instruction to the jury given in behalf of the plaintiff, said: "If the jury believe from the evidence in the case that the deceased was engaged in the business of repairing cars on a repair track, and was in no way connected with the running of cars, and had nothing to do with the cars being near, then he was not a fellow servant of those engaged in running the cars; and if his injury was occasioned by the negligence of an employe of the company who was engaged in running the cars, the company was liable." This was error. The fact that Brown "was in no way connected with the running of cars, and had nothing to do with the cars being near," or that he was engaged in a separate department from that of those engaged in moving the cars, should not control the other facts, viz., that the track on which he was at work, and those on which the duties of the switchman and engineer were being performed at the same time, were in close proximity to each other, converging with their switches near the same point, so that the negligence or inadvertance of the switchman in operating the switches and moving the trains was liable to endanger him.

The fact that the switchman and engineer were not permitted, under the rules of the company, to go upon the track while Brown was there at work, only removed the probability of danger from their negligence to the extent that their efficiency or carefulness might cause them to observe these rules.

It is said that because the rules of the company forbade the yardmen to enter upon this track, Brown had a right to rely upon the company to keep them out, and therefore the

risk of their failure to keep out was not one of the risks assumed in his contract of employment.

2. Duty of master to protect servant.

But if the company owed him any duty in this respect and has failed to discharge that duty, by which it has in any manner contributed to the injury, it is liable by reason of its own negligence, notwithstanding the negligence of a fellow-servant may have been the immediate or direct cause of the injury.

"It is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence." *Chicago, Milwaukee & St. Paul R. Co.* v. *Ross*, 112 U. S., 377, 383.

It was the duty of the railway company in this case, by the exercise of ordinary care, to provide Brown with a safe place in which to work. It is conceded that the repair track within itself was a safe place. But, if unprotected from intrusion by the yard men, it was obviously unsafe.

To obviate the danger from this source, the company established the rule which required the switchman and engineer to keep off the track except by permission of the foreman of repairs. It is claimed by the company that if this rule was sufficient, when faithfully observed by its employes, to guard against the danger, the company has discharged its duty. *International & G. N. R. Co.* v. *Hall*, 15 S. W. Rep. (Tex.), 108.

This seems to be the general rule of law, when the circumstances are such that a reasonably prudent person might rely upon rules and regulations to afford protection. But if the master sees proper to rely upon such methods of protection to his servants, and the occasion demands it, he

should also adopt such measures as may be reasonably necessary to secure the observance of such rules. The fact that rules have been adopted is only evidence of the degree of care and diligence exercised by the master in any given case. Wharton on Negligence, sec. 221; Wood on Master and Servant, sec. 370; *Madden* v. *C. & O. R. Co.*, 28 W. Va., 610; *Moore* v. *Wabash, etc., R. Co.*, 85 Mo., 588; *Criswell* v. *Railway Co.*, 30 W. Va., 798; *Lake Shore, etc., Ry. Co.* v. *Lavalley*, 36 Ohio St., 221; *Ohio & M. R. Co.* v. *Collarn*, 73 Ind., 261; S. C. 38 Am. Rep., 134.

The degree of care must always be measured by the exigencies of the particular case. Wood on Master and Servant, sec. 359; *Hough* v. *Railway Co.*, 100 U. S., 213.

Brown was required to do needed work under a car jacked up so that a jar from approaching cars would necessarily cause it to fall and crush him. He had no opportunity to look out for the approach of intruders. His mind, if he performed well his duty, would necessarily be absorbed in his work, and he became oblivious to danger. He would rarely, if ever, detect the approach of an engine or cars. He was entirely helpless, so far as any precautionary measures that he might take to protect himself were concerned. He had to rely entirely upon the company for protection His life, as it were, was in its keeping. What steps should it have taken to protect him from danger? It is not a question of rules and regulations. Protection was what he needed, and to this end he had a right to rely upon the company for the exercise of that degree of care which a person of ordinary prudence would exercise in view of the extreme and obvious hazard to which he was exposed.

One of the precautions taken by some of the railroad companies in such cases is to place locks upon the switches. Had the company in this case adopted such precaution, we presume no question could have been raised as to its sufficiency. The company, however, instead of locks, adopted the rule referred to.

This rule proved insufficient to keep the men out. They either wilfully violated it or through negligence failed to observe it, and, about two months before the accident occurred, complaint was made by the master mechanic (Bergold) to the master of transportation, in whose department the yard-master and yard men were at work. Thereupon the master of transportation wrote a letter to the yard-master which, omitting the address and signature, is as follows: "Please note attached complaint from Mr. Bergold and manage to correct it. I instructed you some time ago about your men going in on the repair track without permission from the foreman. If you have instructed them in this matter, dismiss the man in fault; as everybody must understand that orders must be obeyed. I have written Mr. Bergold today that you would have a man on hand each day at 1 p. m. to go with engine and hostler, as he suggests, and pull the repair track. You had better manage to be there yourself as much as possible. When this is done, answer, so that I will know that you fully understand what I want."

Here the company is shown to have notice of the violation of the rule, and it must have taken cognizance that the regulation it had provided was insufficient to afford protection, unless rigidly enforced. It became the duty of the company then to take the necessary steps to correct the evil and obviate the injury. Cooley on Torts, 559; Wood on Master & Servant, secs. 378–380; *Hough* v. *Railway Co.*, 10 Otto, 213; *Patterson* v. *P. & C. R. Co.*, 76 Pa. St., 389, (18 Am. Rep., 412); *Conroy* v. *Vulcan Iron Works*, 6 Mo. App., 102; *Laning* v. *N. Y. Cent. R. Co.*, 49 N. Y., 521.

The only additional precaution taken was to fix an hour at which switching should be done on these tracks, and to again instruct the men to report at that hour to the foreman of repairs for instructions and not to go upon the repair tracks without his permission. The yard-master says he carried out the order of the master of transportation as far as possible; but when asked the question, "What precautions were taken to protect the men in working on those re-

pair yards, so far as switchmen are concerned?" he answered: "Well, that I don't know, whether there were any or not; any more than the general precaution that men must not go there without getting the consent of the foreman of the car repairers. If he told them to go, it was all right; if the foreman told him he must not, he must not go."

3. Delegation of master's duty to co-servant

The master of transportation evidently had a clear apprehension of the danger of entrusting this work to the ordinary employes at work on the yards, and he saw the necessity for a personal supervision of the work by the yard-master himself, when he said to him, "You had better arrange to be there yourself as much as possible." This, if not a positive command, was sufficient to indicate to the yard-master the necessity for his personal supervision of the men under his control at that hour, in order to secure a faithful observance of the rule. It was his duty to do so. His convenience or the details of his business, at this hour when the lives of men who were looking to the company for protection were endangered, should have been subordinated to the more important duties of the master. In this respect he was not merely a co-laborer with Brown. He was performing duties which would have been required of the master if present, the personal oversight and supervision of the men under his control. *Kirk* v. *Railway Co.*, 25 Am. & Eng. Ry. Cases, 520; *St. L., I. M. & S. Ry.* v. *Harper*, 44 Ark., 530; *Heine* v. *C. & N. W. Ry. Co.*, 17 N. W. Rep., 422; *Lake Shore, etc., Ry. Co.* v. *Lavalley*, 36 Ohio St., *supra*; *Chicago, etc., R. Co.* v. *Ross*, 112 U. S., *supra*; *Ohio & Mississippi Ry. Co.* v. *Collarn*, 73 Ind., *supra*; S. C., 38 Am. Rep., 134; Wood on Master & Servant, pp. 867–8.

The fault may be traced if necessary to a higher source—the master of transportation. When he saw the danger and the necessity for the yard-master's presence, his orders should have been to go, or he should have adopted other positive precautionary measures to meet the difficulty.

The fact that the foreman of repairs had, but a few moments before the accident, admonished the switchman not to go upon the track, only demonstrates the insufficiency of the precautions taken by the company, and confirms the apprehensions of the master of transportation, when he suggested the necessity of the yard-master's presence. The switchman knew, without being admonished, that he had no business on this track, unless directed by the foreman of repairs to go there.

4. Contributory negligence.

Contributory negligence is not attributable to Brown for remaining in service of the company. After attention had been called to the fact that the rules were not observed and the company had indicated that it would correct the evil, he had a right, under the circumstances, to rely upon the company to take all necessary steps to protect him. *Cook* v. *St. P., etc R.. Co.*, 24 N. W. Rep., 311; *Russell* v. *Railway Co.*, 20 N. W. Rep., 147 (32 Minn., 230); Wood on Master and Servant, sec. 352.

The rule which exempts the master from liability to a servant for the negligence of a fellow-servant is founded upon principles of justice; and although apparent *hardships* may arise in its application, yet, if administered in strict harmony with the master's duties to the servant, no *injustice* will be done.

5. Error without prejudice.

There was no conflict in the evidence; the facts were undisputed, and clearly supported the conclusion that the company had been negligent in performance of its duty in affording protection to the deceased, and that this neglect contributed to the injury. The verdict could not have been otherwise than for plaintiff, notwithstanding the error of the court above indicated. If the jury had been instructed as to the law, as indicated in this opinion, and had found a verdict for the defendant, we could not have sustained it on the facts presented. We see no occasion for remanding the case for a new trial, and affirm it, notwithstanding the error.

OPINION ON MOTION FOR REHEARING.

Filed May 9, 1891.

6. When pleadings aided by proof.

FLETCHER, Sp. J. The ground for recovery alleged in the complaint in this case is that "the defendant so carelessly and negligently managed and operated its train and cars that they passed over the body of the deceased, and thereby, without the fault of the deceased, he was killed."

At the trial, evidence was introduced without objection to show on behalf of the plaintiff that the railway company had failed to afford a proper and safe place for the deceased to work, and had not exercised proper care in affording him protection against the carelessness of his fellow-servants. The company introduced evidence on the same issue. In fact, the burden of the evidence in the case was upon this issue. It was made one of the leading issues on the proof before the jury. The facts thus developed were undisputed, and the court gave instructions on both sides as to the law bearing upon the same.

Counsel for appellant now insist, in an earnest and vigorous argument, that this court erred in considering on appeal the issue thus made, and that it is not proper to affirm the judgment on this issue.

The point was directly ruled against the contention of counsel in the case of *St. L., I. M. & S. Ry. Co.* v. *Harper*, 44 Ark., 527, where the court say: "The appellee, while in the discharge of his duty as watchman for the railroad, in its yards at Texarkana, was injured by the explosion of the boiler of one of the company's locomotives. Critically considered his complaint charges an injury to a servant by a co-servant, and nothing more. It is the well established rule of this court that the master cannot be made to respond in damages for this. The defendant, however, made no objection to the sufficiency of the complaint, but denied knowledge of defects in the exploded engine, as well as a want of care on its part, and permitted the plaintiff to introduce evidence tending to show that the boiler of the engine

which caused the injury was defective, and that the agents of the company who were charged with the duty of repairing it ought to have known of the defects. After verdict for the plaintiff, the complaint may be considered as amended to conform to this proof, and the defendant can take nothing by the motion in arrest of judgment."

Other questions are presented in the motion and argument for reconsideration, all of which were either directly or indirectly considered in the opinion in this case.

The motion to reconsider is overruled.

SHAUL *v.* HARRINGTON.

Decided March 14, 1891.

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Sale—Delivery—Fraud.

Where there is a completed contract of sale and an agreement by the vendor to hold as bailee for the vendee in lieu of actual delivery, the sale is valid against the vendor's creditors, if it is not otherwise fraudulent. *Davis, Mallory & Co.* v. *Meyer & Co.*, 47 Ark., 210, distinguished.

APPEAL from *Lee* Circuit Court.

M. T. SANDERS, Judge.

Action of trover by the State for the use of Richard Shaul against V. M. Harrington, sheriff, and his official bondsmen for property taken under writs of attachment in favor of the creditors of John Campbell.

Shaul's statement of the controversy is substantially as follows. He sold Campbell two mules and a wagon and harness on credit. He says Campbell brought the property to him, stated that he was unable to pay for them, and offered to rescind the sale and return the property. To this he agreed. Thereupon Campbell remarked to him, at the same time pointing to the property which was in their presence and only few feet distant: "There are the mules, wagon and harness, Mr. Shaul; I have brought them up here to-day for you, and you can now take them." At the same time Camp-

bell instructed the driver of the wagon to release the property. Shaul immediately walked to his store, forty or fifty yards distant, and credited Campbell's account with the purchase price. Before Shaul had taken possession of the property Campbell proposed to rent it for a definite period of time. Shaul accepted the proposition and permitted him to take it home with him.

On the contrary, Campbell denied that he ever cancelled the sale or offered to deliver the property to plaintiff.

The court instructed the jury as follows: "The jury are instructed that a sale of personal property is not complete, and is no of avail against subsequent purchasers or attaching creditors, without an actual delivery by the vendor to the vendee; and if they find from the evidence that there was no actual delivery and visible and substantial change of possession from Campbell to plaintiff, then their verdict should be for the defendants."

From a verdict and judgment in defendant's favor plaintiff has appealed.

James P. Brown for appellant.

1. The testimony of Blount tended to corroborate Shaul, and should have been admitted as part of the *res gestæ.* 48 Ark., 333.

2. *Manual* delivery of wagons and mules is not necessary to make a sale complete. 19 Ark., 566. When the purchase money is paid at the time of the purchase, delivery of the property is not necessary. 8 Ark., 213. But a failure to deliver is not fraud *per se*, and is, at best, only a circumstance in proof of fraud which may be explained. Benjamin on Sales, sec. 738, note 58 (4th ed.); 7 Ark., 197; *ib.*, 269; 23 *id.*, 121; 18 *id.*, 123; 35 *id.*, 190. The case in 47 Ark., 210, is peculiar in its facts and *extreme* in its conclusions of law, but it is different from this case. See Benj. Sales, p. 643.

E. D. Robertson and *McCulloch & McCulloch* for appellees.

An actual delivery of chattels is essential to complete a sale thereof, as against subsequent purchasers from, or attaching creditors of, the vendor. 47 Ark., 210; 1 S. W. Rep., 707. This court has adopted the policy that an actual and visible delivery of chattels is essential to complete a sale. Cases *supra;* 32 Conn., 405; 20 *id.*, 23. The testimony failed to establish proof of delivery, and did not tend to show a delivery. 97 Am. Dec., 340, 348, and note, 345. The property in suit was capable of actual manual delivery; and when this is true, constructive or symbolical delivery is not sufficient. *Ib.* See also 76 Am. Dec., 500; 49 *id.*, 316; 9 N. H., 137; 32 Am. Dec., 341. The agreement to pay rent does not change the rule. 3 N. H., 415; 14 Am. Dec., 375. See also 2 Aiken, 115—16 Am. Dec., 686; 70 Mass., 307; 132 Mass., 233; 48 Conn., 258. The evidence of Blount was properly excluded. 48 Ark., 333. The time elapsed was not short enough to bring it within the rule of *res gestæ*. *Ib.*

Retention of possession by vendor as proof of fraud.

COCKRILL, C. J. The rule that retention of possession of personal property by the vendor raises a conclusive presumption of fraud has never prevailed in this State. This court has persistently held that continuance of possession by the vendor is in effect only a circumstance indicating fraud. *Valley Distilling Co.* v. *Atkinson*, 50 Ark., 289. The rule is frequently stated to be that, while constructive delivery is always sufficient to pass title as between vendor and vendee, nothing but actual delivery, where that is practicable, will be sufficient to pass the title as against attaching creditors. 2 Schouler, Personal Property, sec. 395; note 97 Am. Dec., 340; Bigelow on Fraud, 327–8, chap. 13, sec. 1. But, in order to make the statement of the rule of general application where the question of *fraus vel non* is one of fact for the jury, accuracy requires this addition to it, viz.: The failure to make actual delivery raises only a rebuttable presumption of fraud. *Puckett* v. *Reed*, 31 Ark., 136. If the vendor is left in possession under an executory contract to sell, the property may be seized for his debts, although

the contract for sale was made in good faith and upon a valuable consideration. To execute the contract, something in the nature of delivery is essential. Again, when, by the contract of sale, the vendor is required, not merely to prepare the goods for removal by the vendee, but to make delivery by deposit at a designated place before the sale is complete, or when delivery is necessary to take the case out of the statute of frauds, the failure to make actual delivery prevents the passing of the title, and leaves the property subject to be seized for payment of the vendor's debts. The case of *Davis* v. *Meyer*, 47 Ark., 210, seems to embrace both of the latter features; consequently it was correct to hold that actual delivery to the first vendee was essential to give him title against a subsequent purchaser from the vendor in possession. But to hold that actual and visible possession by the vendee is essential to his title in every case where the articles sold are capable of manual delivery, would be in effect to make the continuance of possession by the vendor fraud *per se*, and so allow no exculpatory explanation by the vendee. In Twyne's case, which forms the basis of all the learning on this subjeet, there was no visible or manual delivery of the property, and the doctrine there established applies to cases of retained possession as distinguished from acquired possession. But in England, where the doctrine of that case is followed and where the rule, as established by later cases, is not more lenient than ours, the retention of possession is no more than a badge of fraud. Benjamin on Sales, sec. 485.

An examination of the cases will show that a legal delivery, and not a visible change of possession, is all that is demanded to protect the vendee's title.

In *Cocke* v. *Chapman*, 7 Ark., 197, a bill of sale of a slave, who had escaped from his master and was at large, was held to pass the title against an attaching creditor who caused him to be seized before the vendee acquired actual possession. The constructive delivery and possession which the law implies in such a case was considered sufficient. In

Field v. *Simco*, *ib.*, 269 there was a complete oral contract of sale of chattels in the hands of a bailee who was notified of the sale. The property was seized by a creditor of the vendor after the notice to the bailee but before there was any attempt by the vendee to remove it. It was held that the bailee's possession became that of the vendee, and satisfied the law as against the creditor. The case of *Puckett* v. *Reed*, 31 Ark., *sup.*, was also the sale of property in the hands of a bailee, but there was no notice to or agreement by the bailee to hold for the vendee. A delivery of the bailee's receipt for the chattels was held to be symbolic delivery and sufficient against creditors. The doctrine of that case was affirmed in *Durr* v. *Hervey*, 44 Ark., 301, where it was held that the vendor's constructive possession of cotton in a warehouse passed to the assignee of the warehouseman's receipt, without notice of the assignment to the warehouseman. It is settled too elsewhere, where the law as to the presumption of fraud from possession is similar to ours, that actual delivery of a part in token of the whole is sufficient as against creditors, although the bulk of the property remains in the actual possession of the vendor. *Hobbs* v. *Carr*, 127 Mass., 532. In such a case there is constructive and not actual delivery of that part of the property not removed, and it remains in the ostensible possession of the vendor. The cases are numerous where the constructive delivery of property in the hands of a bailee, though capable of manual delivery, is held sufficient against creditors. The reason of the latter ruling is sometimes said to be because the vendor, not having actual possession, is not held out to the world as owner by the failure to make a visible delivery. But the true foundation of the rule in Twyne's case is the evidence of a secret trust for the vendor which the retention of possession affords, and not the fictitious credit supposed to be acquired by the possession of personal property the title to which is in another. 2 Bigelow on Fraud, 327; *Pregnall* v. *Miller*, 21 S. C., 385. If the latter were the test, property in the hands of a bailee

or conditional vendee would be liable for his debt or subject to legal disposition by him. But it is not. *McIntosh* v. *Hill*, 47 Ark., 363.

Constructive delivery being enough to satisfy the law, it is an easy transition to constitute the vendor a bailee for the vendee, and so work out a delivery. And it is held that such a delivery is sufficient against creditors. Whenever there is a completed contract of sale and an agreement by the vendor to hold as bailee for the vendee in lieu of an actual delivery, the sale is complete against creditors, if it is not otherwise fraudulent. *Little Rock & Fort Smith Ry.* v. *Page*, 35 Ark., 304; *Stinson* v. *Clark*, 6 Allen, 340; *Ingalls* v. *Herrick*, 108 Mass., 351; *Thorndike* v. *Bath*, 114 Mass., 116; *Barrett* v. *Goddard*, 3 Mason, 106; *Webster* v. *Anderson*, 42 Mich., 554: *Norwegian Plow Co.* v. *Hanthorn*, 37 N. W. Rep., 825; *Pregnall* v. *Miller*, 21 S. C., *supra*. If the vendee may leave the vendor in possession to enjoy temporarily the full fruits of ownership, as was done in Twyne's case, and yet be allowed the opportunity to maintain his title, as he may in this State, the reason is all the stronger for allowing the vendor to retain possession as bailee for the vendee's profit or benefit.

Cases *contra* are cited and relied upon by the appellee, but they are either from jurisdictions where the fact of retention of possession is conclusive of fraud, or are traceable to the authority of the case of *Lanfear* v. *Sumner*, 17 Mass., 110, the adherence to which in subsequent cases and the application of its doctrine to a different state of facts seem to have introduced over-nice refinements and caused some apparent, if not real, confusion in the decisions of Massachusetts and other States as to the character of the delivery that must be made to protect the vendee. The authority of that case has been fairly challenged. See 1 Parsons on Shipping, p. 84, and note; Blackburn on Sales, 327–9; *Hallgarten* v. *Oldham*, 135 Mass., 8. It can not control the decision of this case.

It follows that the court erred in charging the jury that the plaintiff could not recover in the absence of a showing that there was an actual and visible delivery of the property to him after his alleged purchase from Campbell. His testimony tended to show a completed purchase for a valuable consideration in good faith and without design to defraud, hinder or delay the creditors of the vendor, and the jury should have been left at liberty to accept his version of the transaction, and thereupon to return a verdict in his favor.

Reverse and remand for a new trial.

HALLUM *v.* DICKINSON.

Decided March 14, 1891.

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54 90 311 359

Judgment of another State—Presumption as to jurisdiction.

In an action upon a duly authenticated judgment of the Supreme Court of another State, where jurisdiction of the person appears, it is presumed, in the absence of evidence to the contrary, that such court had jurisdiction over the subject matter, that its proceedings were regular, and that the appeal was heard at the proper place.

APPEAL from *Lonoke* Circuit Court.

JOSEPH W. MARTIN, Judge.

John Hallum pro se.

1. The record must affirmatively show how the court acquired jurisdiction. 20 Ark., 12; 47 Ark., 120.

A judgment is not evidence of anything to be inferred by argument from it. Presumption and argument cannot be resorted to; the record must speak of itself; nothing extraneous can be introduced to prove a record. 19 Ala., 430; 17 Pa. St., 412; 2 Iredell, 290; Duchess of Kingston's Case, Smith's Leading Cases; 93 U. S., 272.

2. All defenses which are admissible against a judgment where it was pronounced are equally admissible in actions upon it in another State. Freeman on Judg., secs. 76, 575. Congress so provides. *Ib.*, sec. 559, note 1. Parts of a

record, especially *fragments*, as in this case, cannot be read, to prove anything. 2 Cold. (Tenn.), 265; 38 Ark., 181; 47 *id.*, 120.

3. This was a summary judgment against a party without notice or day in court and without hearing. This is apparent from the record. 14 Ark., 27; 8 *id.*, 318; 9 *id.*, 336; 5 *id.*, 410; 4 Hill (N. Y.), 522; 24 Wend., 35.

4. The statute commenced to run from the rendition of the judgment. The pendency of an appeal does not suspend plaintiff's right of action, unless superseded. Freeman on Judg., sec. 433; *ib.*, secs. 432, 328; 28 Conn., 433; 29 Vt., 339; 10 Ire. Law, 274; 4 Leigh (Va.), 57.

5. If fraud could be set up in Tennessee, it can be set up here. Freeman on Judg., sec. 576. Fegan was Dickinson's agent (29 Ark., 99), and his fraud was that of his principal. 42 Ark., 97; 25 *id.*, 219. Declarations of an agent in the course of his agency are admissible against the principal. 37 Ark., 47.

T. C. Trimble, for appellee.

The objections pointed out in 47 Ark., 120, have all been removed. To make a record of a State judgment valid upon its face, it is only necessary for it to appear that the court had jurisdiction of the subject matter of the action and parties, and that a judgment had in fact been rendered. 88 U. S., 71; 89 U. S., 77; 21 Wall., 71; 22 *id.*, 77. In an action on foreign judgment, where it appears that the court was a court of record having a judge, clerk and seal, the presumption is in favor of its jurisdiction and the regularity of its proceedings. 119 Ind., 103.

2. The statute began to run from the date of the judgment in the Supreme Court.

3. The third plea was disposed of in 47 Ark., 125, as an immaterial issue.

4. The testimony as to fraud was irrelevant and heresay.

5. The judgment is conclusive. 59 N. Y., 423. It cannot be questioned except for fraud or want of jurisdiction.

82 Ky., 451; 2 West. Rep., 785; 16 Lea (Tenn.) 82; 2 Dall., 231; 4 Cr., 434. If conclusive in the State where rendered, it is equally so everywhere. 5 Wall., 290; 97 U. S., 331. When a party appeals, he thereby enters his appearance, and the court acquires jurisdiction of his person. 31 Ark., 58.

BATTLE J. John A. Only, trustee, etc., instituted an action of replevin against Edward Fegan, trustee, etc., and John A. Dickinson, in the circuit court of Shelby county, in the State of Tennessee, to recover possession of certain household furniture and other property. In order to commence the suit he and John Hallum executed a bond in the sum of $5200, payable to Dickinson and Fegan, and conditioned to be void if Only abided by and performed the judgment of the court in the action. The property sued for was delivered to Only. On the trial Dickinson recovered a judgment against Only, and, Only waiving the right to return the property, judgment was rendered against him and Hallum on their bond for the value of it. Only then moved for a new trial, which was denied, and he and Hallum appealed to the Supreme Court of Tennessee. They then filed in the Supreme Court a transcript of the pleadings, proceedings and judgment in the action. On the 6th of April, 1872, the cause having been heard on the transcript, the Supreme Court of Tennessee rendered a judgment in favor of Dickinson against Only and Hallum. On this judgment this action was brought by Dickinson against Hallum. Hallum's defenses to the last mentioned action were: (1). *Nul tiel record* (2.), the statute of limitation of ten years, and (3), fraud in the procurement of the judgment sued on.

Judgment of another State—Presumption as to jurisdiction.

I. A copy of the transcript filed in the Supreme Court of Tennessee, except the evidence set out therein, and of the judgment sued on, authenticated by the certificates of the clerk and Chief Justice of the Supreme Court in due form. was produced and read as evidence in the trial of this action. There being no evidence to the contrary, it showed that the Supreme Court had jurisdiction of the subject matter of the

action of replevin. *Nunn* v. *Sturges*, 22 Ark., 389; *Lockhart* v. *Locke*, 42 Ark., 17; *Pringle* v. *Woolworth*, 90 N. Y., 502; *Bissell* v. *Wheelock*, 11 Cush., 277; *Buffum* v. *Stimpson*, 5 Allen, 591, S. C., 81 Am. Dec., 767: *Stewart* v. *Stewart*, 27 W. Va., 167. The taking of the appeal and the filing of the transcript gave it jurisdiction of the persons of Only and Hallum. The omission to copy the evidence contained in the transcript filed in the Supreme Court was immaterial, and did not prejudice Hallum, as its only object or effect was to enable the Supreme Court to ascertain whether there was evidence to sustain the judgment of the Shelby circuit court, or reversible error in the admission or rejection of evidence by that court.

But it is said that the transcript read as evidence in the trial of this action shows that two actions were brought by Only against Dickinson and Fegan, and fails to show any pleadings or process in the action in which the judgment sued on was recovered. The ground for this contention is that the transcript shows the rendition of a judgment by default for property in favor of Only against Dickinson and Fegan, and fails to show that it was ever set aside. Hallum insists that the presumption is that the judgment by default was the termination of the suit in which it was rendered, and that all that follows in the transcript was a copy of the proceedings in another action. But this is not true. The certificate of the clerk to the transcript shows that there was only one suit, and the transcript in other ways bears evidence of the same fact.

The judgment by default was rendered against Dickinson before he was served with process or appeared in the action. He was the real party in interest, and the judgment against him was a nullity. No advantage was taken of it by any one, and it was treated by all the parties as of no effect, and all advantage gained by it was lost in the subsequent proceedings.

There is an inconsistency in the transcript. The record of the Shelby circuit court shows that Only and Hallum ap-

pealed to the Supreme Court when held for the western division of Tennessee at Brownsville, and their appeal bond shows that it was taken to the court when held at Jackson. The transcript shows that the judgment in question was rendered by the court when sitting at Jackson. Hallum insists that this is sufficient to defeat this action. But there is no evidence that the Supreme Court when sitting at Jackson did not have jurisdiction. The appeal was taken by Only and Hallum, and, it appears, was prosecuted by them in the court sitting at Jackson. It was taken to the Supreme Court. There is no question about that. It being a superior court of record, the jurisdiction appearing, the presumption is in favor of the regularity of its proceedings, and that the appeal was heard at the proper place. *Nunn* v. *Sturges*, 22 Ark., *supra*; *Lockhart* v. *Locke*, 42 Ark., *supra*.

II. This action is not barred by the ten years' statute of limitation. The judgment sued on was rendered on the 6th of April, 1872, and this action was commenced on the 31st of March, 1882.

III. There was no evidence adduced on the trial to show fraud in the recovery of the judgment in question. To show fraud appellant on the trial of this action offered, and the court refused to permit him, to prove that one Flora Burdick, "conscience stricken," on bended knees made confession to him, and asked his pardon for wrongs committed; and that Fegan, while acting as the agent of Dickinson, admitted to him that Flora Burdick secretly stored a part of the property, which was in controversy in the action of replevin which was instituted in the Shelby circuit court, in his store in Memphis, Tenn., during the pendency of that action; and that Fegan had promised to satisfy the judgment sued on in this action. But the evidence was not competent. The confessions of Flora Burdick were hearsay evidence. The admission of Fegan did not tend to show that he or Dickinson had committed any fraud in the procurement of the judgment in question. The property in controversy in the action of replevin was delivered to

Only. There was no evidence that either Fegan or Dickinson after that had any control over it or had deprived Only of the possession thereof. Only had taken it out of their possession by writ of replevin; they were not responsible for it, or under any obligations to look after it or keep Only informed of its locality. The mere fact that Flora Burdick stored a part of it in the store-house of Fegan does not tend to prove that Fegan or Dickinson committed a fraud upon Only. There was no evidence adduced or offered that, in so doing, she acted without the authority of Only. There was no evidence that the promise of Fegan to satisfy the judgment was based on a consideration, or that he had authority to satisfy it. The evidence offered was therefore properly excluded.

The judgment of the court below is affirmed.

ARKADELPHIA COTTON MILLS *v.* TRIMBLE.

Decided March 14, 1891.

Corporation—Stock—Subscription.

Where the articles of association of a corporation provide that the capital stock shall be fifty thousand dollars, of which fourteen thousand and five hundred dollars have been subscribed, and that the residue may be issued and disposed of as the board of directors may from time to time direct, and where the company had begun business before defendant subscribed, there is no implied condition that his subscription shall not be paid until the whole capital stock is subscribed.

APPEAL from *Miller* Circuit Court.

C. E. MITCHEL, Judge.

Arnold & Cook for appellant.

It is true the general rule is that it is an implied contract that the subscription is binding only after the full capital stock has been subscribed. 6 Pick., 23; Cook on Liability of Stockholders, sec. 176; Morawetz on Pr. Corp., sec. 137. But the statute does not require the whole capital stock to

be subscribed, and where a charter by its terms shows an intention to begin business after a certain sum is subscribed, then the subscription is binding. 113 Mass., 79; 13 Met. (Mass)., 311; 12 Gray, 244; 34 Me., 360; 40 Me., 44; 2 Met. (Ky.), 219; 11 Kans., 412; 11 N. Y., 102; 18 Ind., 452; 65 Me., 636; 68 Mass., 277; 128 Mass., 445. This was an unconditional subscription. Mor. Pr. Corp., sec. 149; 31 Ohio, 23; Mor. Pr. Corp., sec. 410.

Scott & Jones for appellee.

Appellee was not liable upon his subscription until the whole of the capital stock was subscribed. 5 Am. and Eng. Corp. Cases, 40. This is the rule, *unless there is a clear provision in the contract* to the contrary. 46 Tex., 633; 7 S. W. Rep., 480; 10 Am. and Eng. Corp. Cases, 72; 12 *id.*. 85; 37 Fed. Rep., 508; 1 N. E. Rep., 268; 37 Pa. St., 210; 7 Atl. Rep., 482; Cook on Stock, etc., sec. 176.

2. Under our laws it is a jurisdictional condition precedent to parties becoming an incorporation to transact business, that the fixed amount of capital must have been subscribed. Mansf. Dig., secs. 961–8; 1 Mor. Pr. Corp., sec. 29.

BATTLE, J. The Arkadelphia Cotton Mills is a corporation organized and existing under the laws of this State. Sometime in January, 1888, M. H. Trimble subscribed the articles of association of the corporation, and an agreement to take and pay for twenty shares of its capital stock, amounting in the aggregate to $500. Afterwards four assessments of 25 per cent. each on all the shares taken in the capital stock were made by the board of directors. Trimble was duly notified of the assessments upon his share, but refused to pay them because the full amount of the capital stock, as fixed by the articles of association, had not been taken. The question is, was he subject to the assessment?

Subscription to corpora stock.

As a general rule every contract to take and pay for shares in the capital stock of a corporation is based on the implied condition that no part of it is to be performed until the corporation is authorized to begin the prosecution of its en-

terprise. The reason of the rule is that "until that time the company can have no use for its capital, nor can there be any assurance that it will ever be required." It is also based on another condition, and that is, no assessments upon the shares taken shall be made until the whole amount of the capital stock has been subscribed. This condition, in the absence of a contrary agreement, arises by implication from the just and reasonable understanding of the subscriber that he is to be aided by other subscriptions, which, with the amount subscribed by himself, will be equal to the amount fixed as the capital stock of the company. *Stoneham Branch R. Co.* v. *Gould*, 2 Gray, 278; *Galveston Hotel Co.* v. *Bolton*, 46 Texas, 633; 1 Morawetz on Private Corporations, sec. 137, and cases cited.

In *Stoneham Branch R. Co.* v. *Gould*, Chief Justice Shaw said: "It is a rule of law too well settled to be now questioned, that when the capital stock and the number of shares are fixed by the act of incorporation, or by any vote or by-law passed conformably to the act of incorporation, no assessment can be lawfully made on the share of any subscriber, until the whole number of shares has been taken. This is no arbitrary rule; it is founded on a plain dictate of justice, and the strict principles regulating the obligation of contracts. When a man subscribes a share to a stock, to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five hundred are subscribed for, and he can have no assurance which he is bound to accept that the remainder will be taken, he would be held, if liable to assessment, to pay a five-hundredth part of the cost of the enterprise, besides incurring the risk of the entire failure of the enterprise itself, and the loss of the amount advanced towards it."

This rule is further explained in *Galveston Hotel Co.* v. *Bolton*, 46 Texas, 633, as follows: "When there is no provision to the contrary, the man who takes the first share of stock takes it on condition that all of the shares will be

taken, until the amount fixed as the capital stock of the company shall be taken by persons who will be equally bound with himself to bear the expense of the enterprise, share and share alike. In principle, it is the same as if one would say, 'I will be one of five hundred persons who will bind themselves to contribute equal amounts, not exceeding five hundred dollars each, in building a first-class hotel in Galveston.' The proposition is not accepted and contract made so as to bind the purchaser, if only two hundred and fifty persons join in it."

But it is obvious that this rule does not apply where the articles of association, or the circumstances which affect the interpretation of the agreement to take stock, show an intention that the corporation shall be fully organized and commence business before shares amounting to the full capital stock shall be subscribed. There can be no implied agreement to a particular effect when the express contract is to the contrary. Neither does the condition arise by implication under the general rule where the circumstances, which enter into the agreement of the subscribers and throw light upon its intent, show no such condition was understood. Like other contracts, an agreement to take shares in the capital stock of a corporation is governed by its intention, expressed or implied. So long and to the extent parties are free to make contracts, they are bound to peform them according to the intention. *Boston, Barre & Gardner R. Co.* v. *Wellington*, 113 Mass., 79; *Penobscot & Kennebec R. Co.* v. *Bartlett*, 12 Gray, 244; *Bucksport, etc., R. Co. v. Buck*, 65 Me., 536; *Boston & Albany R. Co.* v. *Pearson*, 128 Mass., 445; Morawetz on Private Corporations (2d ed.), sec. 410.

The articles of association subscribed by Trimble contains the following provision: "The amount of the capital stock of the said corporation shall be fifty thousand dollars, of which fourteen thousand five hundred have been subscribed by the corporators aforesaid, and the residue may be issued and disposed of as the board of directors may from time to time

order and direct." No implication arises from this provision that the corporation was to postpone the prosecution of its enterprise until all the capital stock was subscribed. There does not appear any reason why subscriptions for the remainder of the stock should not, without postponement, be solicited and received if such was the intention. The most reasonable inference to be drawn from it is that the $14,500 was all the money the corporation needed for the commencement of business, and that the residue of the stock was to be solicited and received from time to time as the board of directors ascertained and determined that the money to be derived therefrom was needed in the business of the corporation. *Lexington & West Cambridge R. Co.* v. *Chandler*, 13 Met., 311. The fact was, it began business as soon as the $14,500 was subscribed and paid, and after that Trimble agreed to take and pay the $500 of the stock subscribed by him. From this it is evident that there was, and could be, no implied condition in his agreement, that the corporation should not begin business until all the capital stock was taken; neither was there an implied understanding that he should not be required to pay anything until that time. The corporation was engaged in business when he subscribed. It was evident that it would need money in the prosecution of its enterprise; for, if it would not, there was no necessity for his subscription. He was not to be an honorary member. But, on the contrary, the manifest understanding was that he should pay on his shares as the board of directors should ascertain and determine that the money he agreed to pay was needed. *Nutter* v. *Lexington & West Cambridge R. Co.*, 6 Gray, 85; 1 Morawetz on Private Corporations (2d ed.), sec. 142, and cases cited.

Trimble was liable to pay the assessments upon his shares in the capital stock. The judgment of the court below is therefore reversed, and this cause is remanded with instructions to the court below to enter judgment in favor of appellant against him for the $500 and lawful interest on each assessment on his shares from the time the same was due, according to the findings of the facts by the circuit court.

VESTAL v. LITTLE ROCK.

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Decided March 14, 1891.

1. *City—Extension of limits—Intervening river.*

An intervening river will not preclude the annexation of an unincorporated town on one side to a city on the other, although at the time the only means of communication are two toll bridges and a number of small boats operated by private persons for hire.

2. *Annexation—Unplatted land.*

The annexation of unplatted land which is touched on two sides to its entire extent by platted lands will not be set aside on appeal because it is vacant, low, flat and wet and covered with timber, since it may have been needed for town purposes and may have needed organized local government to reclaim it.

3. *Agricultural land.*

Agricultural land, distant a half or three-quarters of a mile from any settlement, to which no streets or other city improvements extend, and which is not needed nor at present adaptable for city uses, should not be annexed to a city.

4. *Amendment in circuit court.*

On appeal from the county court, the circuit court hears a petition for annexation *de novo*; and may permit it to be amended to exclude lands embraced within it.

5. *Amendment in Supreme Court.*

Where land is improperly embraced in a petition for annexation, this court will not permit the petition to be so amended as to exclude such land and affirm the judgment; but will reverse and remand the cause for further proceedings.

APPEAL from *Pulaski* Circuit Court.

ROBERT J. LEA, Judge.

Proceeding to annex the unincorporated town of Argenta to the city of Little Rock. The facts are stated in the opinion.

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

1. Argenta is not *contiguous* to Little Rock. 32 La. Ann., 435; Smith, Synonyms, p. 273 (1889); 29 Mich., 451. Being a navigable stream, the Arkansas river, together with its bed and the banks between high and low water mark,

belongs to the State. 94 U. S., 168; 117 U. S., 338; 20 Fed. Rep., 32; 33 *id.*, 755; Gould on Waters, sec. 66.

2. The annexation is unreasonable and improper, subjecting the annexed territory to increased burdens without any corresponding benefit. There is no impending necessity for it. 9 B. Mon., 330; 11 *id.*, 498. See also as to merging two villages. 32 N. W. Rep., 458; 5 S. & W., 281.

3. A city cannot annex territory solely for the purpose of increasing its revenue, etc. 1 Neb., 16; 13 Iowa, 86; 16 *id.*, 271; 17 *id.*, 404; 20 *id.*, 419; 30 *id.*, 542; 15 B. Mon., 497.

4. Nor is it reasonable to allow it to annex agricultural lands, not platted, nor built upon, nor needed for city purposes, but simply to increase the city revenues. See 8 Iowa, 170; 37 Am. Rep., 633; 28 Pa. St., 256; 85 *id.*, 170; 13 Iowa, 86; 17 *id.*, 407; 34 *id.*, 194; 22 Mo., 384.

Blackwood & Williams for appellee.

1. The fact that the Arkansas river rolls between Little Rock and Argenta does not prevent contiguity. It is immaterial who owns the bed of the river. The bed may be annexed with Argenta. 6 Johns., 135; 19 *ib.*, 175; *ib.*, 179; 5 Cow., 375; 28 N. H., 216; 11 Ohio St., 96.

2. As to the objection of onerous taxation, it is sufficient to say that the constitutional limitations protect them. But if the new territory could not partake of these benefits and had to assume burdens of taxation against their will, they could be annexed. 1 Dill. Mun. Corp.; 11 Ohio St., 96; 8 *id.*, 285; 92 U. S., 307; 43 Ark., 324; 33 Ark., 508.

W. G. Whipple for appellee.

1. The only case in point that could be found is in our favor. 11 Ohio St., 96.

2. The power to add contiguous territory is conferred by Mansf. Dig., sec. 922; 33 Ark., 514; 43 *id.*, 325.

3. Has there been any abuse of it? The county court has full jurisdiction. Mansf. Dig., 786.

4. The lands taken in are adapted to city purposes and uses. This is the test. 33 Ark., 517; 43 *id.*, 326.

5. As to the increased burdens of taxation, that question has not arisen yet. But see 52 Miss., 53; 58 Mo., 141; 85 Pa. St., 170; 18 Ohio, 514; 6 Mich., 54; 5 Dillon C. C., 443; Dillon, Mun. Corp., sec. 794.

HEMINGWAY, J. This appeal arises in a proceeding on the part of the city of Little Rock, to annex to itself certain outlying and contiguous territory.

The statute prescribes conditions upon a compliance with which a municipal corporation may present to the county court its petition to annex to it contiguous territory lying in the same county. Mansf. Dig., sec. 922. It provides that when such petition is presented to the county court, it shall fix a day for a hearing thereon of which notice shall be given, and that any person interested may appear and contest the granting of the petition. Mansf. Dig., sec. 786. It further provides that if the court shall find that the prescribed conditions have been observed, and shall deem it reasonable and proper to grant the petition, it shall make an order to that effect. Mansf. Dig., sec. 787 A reversal of the order granting the city's petition under this statute is sought on two grounds: first, because the court exceeded its authority in ordering that lands be annexed that were not contiguous to the city; and, second, because it ordered that lands be annexed which it was unreasonable and improper to include within the city. Before considering them directly, we will state what we conclude from the many authorities to be the correct rule to guide in determining an application for annexation.

1. That city limits may reasonably and properly be extended so as to take in contiguous lands, (1) when they are platted and held for sale or use as town lots, (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner, (3) when they furnish

the abode for a densely-settled community, or represent the actual growth of the town beyond its legal boundary, (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulation, and (5) when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation, would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use.

2. We conclude further that city limits should not be so extended as to take in contiguous lands, (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use, (2) when they are vacant and do not derive special value from their adaptability for city uses. *People* v. *Bennett*, 18 Am. Rep., 111; *Cheaney* v. *Hooser*, 9 B. Mon., 330; *City* v. *Southgate*, 15 B. Mon., 491; *Morford* v. *Unger*, 8 Ia., 82; *New Orleans* v. *Michoud*, 10 La., Ann., 763; *Bradshaw* v. *Omaha*, 1 Neb., 16.

By contiguous lands we understand such as are not separated from the corporation by outside land; and we think the statute permits the annexation of any such lands, and that the court is justified in making an order to annex them, whenever they are so situated with reference to the corporation that it may reasonably be expected that after annexation they will unite with the annexing corporation in making up a homogeneous city, which will afford to its several parts the ordinary benefits of local government. But however near they may be to the petitioning corporation, if they are so circumstanced with reference to it that it could not reasonably be expected that the parts would amalgamate and organize a municipal unit which would afford to each the ordinary benefits of local government, it would not be reasonable and proper to order their annexation. When actual unity is impracticable, legal unity should not be at-

tempted, but the incongruous communities should be left to independent control. In all cases, however, where actual unity is practicable, legal unity should be ordered as promising the greatest aggregate of municipal benefits.

1. An intervening river not a bar to extension of city limits.

To sustain their first ground for reversal, appellants rely on the fact that the city is on one side, and a part of the lands included in the order is on the other side, of the Arkansas river. But we do not think this fact conclusive that the lands are not contiguous within the meaning of the act. The river is also included in the land annexed, and is therefore not a break to contiguity nor an insuperable barrier to a complete amalgamation of the communities upon its opposite banks. That intervening rivers do not prevent such amalgamation or the consequent building up and maintaining of a compact city, is attested by common observation. And the Supreme Court of Ohio in construing a provision in the same terms as that relied on, contained in a statute upon which our own appears to have been modeled, held that a city might annex territory on the opposite bank of a large river. *Blanchard* v. *Bissell*, 11 O. St., 96; see also *Ford* v. *Incorporated Town, etc.*, 45 N. W., 1031.

To sustain the ground that the annexation ordered was unreasonable and improper, reliance is had upon the fact just considered, and the further fact that the only means of communication between the communities on opposite sides of the river are afforded by two toll bridges and a number of small boats operated by private persons for hire. That such are the means of communication between the communities, does not prove that they would continue to be the only means when the two, now separate, are blended in municipal union. While these are facts to be considered in determining whether annexation is proper and reasonable, they are not necessarily inconsistent with the attainment of municipal unity or the usual benefits of local government. To what extent they would tend to prevent it, and how far this tendency would be obviated by the action of the united communities, is a question of great uncertainty. It has

been resolved against the appellants by the county court, to whose determination it is primarily committed, and again by the circuit court on appeal. Indulging the ordinary presumption in favor of the correctness of their finding in a matter about which conclusions might well differ, we would certainly not be warranted in disturbing their finding.

2. Annexation of unplatted land.

On the same ground reliance is placed upon the fact that the annexation includes forty acres of land belonging to William Metz, which is vacant, low, flat and wet, covered with timber, and, as it is claimed, for these reasons unsuited for town purposes. It has not been platted, but platted lands in the unincorporated town of Argenta touch it upon two sides to its entire extent; it does not appear how densely the adjoining lands are settled. Upon those facts we cannot say that the court was not warranted in finding that it was proper to annex this land. It may have been needed for town purposes, and it may have needed organized local government to reclaim the low, wet parts and fit it for town uses. Such places are thus reclaimed in the ordinary course of town improvements, and become centers of population and business activity.

3. Agricultural land.

The last fact urged is the inclusion of forty acres of land belonging to Joseph W. Vestal. It lies across the river from the corporation, and is from a half a mile to three-quarters of a mile distant from the unincorporated town. No streets of the corporation or village, or other town improvements, extend to it, and the line of city settlement has not reached it; it is not laid off for city uses, there is no settlement on it, and its proprietor cultivates it in his business as a florist and farmer. He remonstrated against its annexation upon the hearing in the county court, and by successive appeals renews his remonstrance here. He insists that his land is not needed nor at present adaptable for city uses, that it would not be enhanced in value by annexation, but that its annexation would subject it to taxation without any benefit or compensation to him; and the facts sustain his contention. Upon a similar state of case it has been held

by some courts that land could not be subjected to municipal taxation; and never, so far as our information goes, that it ought to be. In this State all city property must bear alike the burden of ordinary city taxation; *Fletcher* v. *Oliver*, 25 Ark., 289; *Cary* v. *Pekin*, 88 Ill., 154; *Martin* v. *Dix*, 52 Miss., 53; *Washburn* v. *Oshkosh*, 60 Wis., 453; and, in determining whether the annexation of particular lands is reasonable and proper, regard should be taken of this fact. Was it desirable and proper to include Vestal's land, and subject it to ordinary taxation for city purposes? He had no need of local government, and the city had no need of his land. It could not afford him, even in a moderate degree, the ordinary benefits of city government, without an expense which it could not have contemplated without cause for remonstrance on the part of its residents. The cases cited by the appellee arose upon resistance by tax-payers to acts of the legislature including their lands within cities; the courts said it was in the power of the legislature to pass the acts, and declined to inquire, for want of authority, whether it was morally wrong or practically unjust to pass them. *Martin* v. *Dix*, 52 Miss., *supra; Giboney* v. *Cape Girardeau*, 58 Mo., 141; *City* v. *Coulter*, 58 Cal., 537; *Washburn* v. *Oshkosh*, 60 Wis., *supra; Turner* v. *Althaus*, 6 Neb., 54. Such is not our attitude toward the question in this case; and if this order, without the conclusiveness of legislative enactment or final judicial sanction, can be sustained, there is no reason why a corporation may not extend its control and power over all the farming lands of a county, if it observe one caution—not to skip any as it advances. We recognize the weight that attaches to the finding of the court below; but the facts are undisputed, and admit of but one deduction, and that is, that Vestal's farm and garden were not needed for city use, and that their annexation would subject him to the burdens, without the compensating benefits, of local government. Courts of wisdom and learning have, upon the same facts, in the protection of private rights, set aside the solemn acts of a co-ordinate branch of the government. *City* v.

Southgate, 15 B. Mon., 191; *Morford* v. *Unger*, 8 Ia., 82; *Bradshaw* v. *Omaha*, 1 Neb., 16; and see *County Commissioners* v. *The President*, 51 Md., 465; *New Orleans* v. *Michoud*, 10 La. Ann., *supra;* 2 Dill., Mun. Corp., 795 and note; *People* v. *Bennett*, 18 Am. Rep., *supra; Borough of West Philadelphia*, 5 W. & S., 281; *Kelly* v. *Meeks*, 87 Mo., 396. Without committing ourselves to the entire approval of those cases, we cannot, in the exercise of ordinary appellate jurisdiction, ignore the considerations of justice and right that prompted them. Believing that the facts admit of no implication to sustain the judgment of the circuit court, we cannot do it.

4. Amendment in circuit court.

The statute provides that the county court may permit the petitioner to amend the petition so as to exclude land embraced within it. Mansf. Dig., sec. 786; *Foreman* v. *Marianna*, 43 Ark., 324. The circuit court tries the case *de novo*, and makes such order as the county court should have made; *Dodson* v. *Fort Smith*, 33 Ark., 508; and it may therefore permit a like amendment, unless restrained by other provisions of the statute. Secs. 790, 916–922, Mansf. Dig. We do not think they restrain it. Without determining their legal effect, it is sufficient to say we think they were intended to provide a cumulative remedy for a review of the action of the county court, and that the directions they contain as to the judgment to be rendered by the circuit court apply only when that remedy is invoked, and have no application to a proceeding by appeal.

For the error indicated the judgment will be reversed, and the cause remanded to the circuit court; the petitioner should be permitted to make such amendments as it may deem proper in order to exclude from the petition lands that should not be annexed, and remonstrants should be permitted to resist granting the petition as amended.

In order to prevent possible complications, we have thought proper to add that we think the order of annexation is wholly inoperative, at least after the judgment of reversal.

SUPPLEMENTAL OPINION ON MOTIONS TO MODIFY.

Filed May 9, 1891.

HEMINGWAY, J. Petitions have been filed on part of the appellants and of the appellee, asking that we reconsider our former ruling and modify our former judgment in this cause.

The appellants ask that the order remanding the cause with leave to the appellee to amend its petition be rescinded, and that the petition be dismissed. They contend that it is not within the power of the circuit court to permit an amendment to a petition for annexation which reduces the territory sought to be annexed. Is this tenable? This court held in a former annexation case that upon appeal to the circuit court such cases should be tried *de novo* and such proceedings had and such judgment rendered as though that court had original jurisdiction. *Dodson* v. *Fort Smith*, 33 Ark., 511–15. As the statute provides that such amendments, as we have directed to be permitted in the circuit court, may be made in the county court, we think the direction in that regard proper. Mansf. Dig,, sec. 786; *Foreman* v. *Marianna*, 43 Ark., 329.

5. Amendment in Supreme Court.

The appellee also asks that the judgment remanding the cause be set aside, but it further asks that it be permitted to amend its petition here by excluding the land which we found it was not proper to annex, and that we render a judgment of annexation upon the petition as amended. Counsel say that it is asked upon the principle of *remittitur*. But we do not think the request is sustained by the rules regulating the right of *remittitur*. A *remittitur* is often permitted in order to conform a judgment here to a right established below, but we know of no case in which it has served to authorize the rendition of the judgment here, which could not have been entered upon the issues tried in the court below.

In proceedings for annexation, the petitioner must particularly describe in its petition the territory to be annexed,

and the finding must be either in favor of or against annexing the entire territory, and cannot be against annexation as a part and for it as to another part. Neither the court nor the persons protesting are advised or can assume that the petitioner desires, or would consent, to annex any part unless it may annex the whole of such territory; nor are they called to shape their conduct in the trial with a view to a petition for a part. The petitioner might well desire to annex the whole, but decline to receive any part of it. In this respect this proceeding is somewhat anomalous, entirely unlike the actions to recover money or real or personal property. This affects the *res* as a whole, while they concern its parts separately. In this latter class of actions the actor asks for what he fixes as his demand as well as for any part thereof to which he may be entitled, if not entitled to the whole, and may recover verdict and judgment for any part of the demand without any amendment of his pleadings; and the defendant, by proof that the plaintiff is not entitled to recover a part of the thing demanded, does not defeat the entire demand, but only reduces the amount of the recovery. In such cases the plaintiff asks for a stated sum of money or amount of property, but it is entirely proper to find and adjudge to him any part thereof to which his right may be established, for if he cannot get what he asks, he will take what he can get; and when the defendant seeks to defeat the demand, he undertakes to show that there is no right to any part of it, and if, upon a trial, he disproves the right to but a part, he cannot object that judgment was given against him for the other part, for he was called upon to defend as to every part.

Such is not the case in this class of actions; here the city asks to annex an entire designated territory—no more and no less—and it alleges that it is right and proper to grant its petition. Those who protest against the annexation deny this allegation, and thus make the only issue in the cause. When they show that for any reason it would not be right and proper to grant the petition, they have sustained the

issue upon their part; and where the petitioner takes no steps to amend, they are not called upon to accumulate evidence further. If it is not right and proper to grant the petition, it should be refused; and this whether the wrong and impropriety springs from one or many causes, or extends to the whole or only a part of the territory sought. All that the protesting parties can do is to show that the petition as presented should be refused, and to this end proof of a dozen separate reasons would be no more effective than of one. When parties have made their case, they are not called to introduce more proof merely to show how strong they can make it. They are called only to meet the issues as made, and need not anticipate or attempt to meet issues not made, and which can be made only by an amendment of pleadings, which is contingent upon the election of the other party and the leave of court. If, before the trial or upon the trial, it develops that the petition should not be granted, but the reason exists only on account of a part of the territory sought, the petitioner may, if it desire, obtain leave to amend by excluding the part; but since those protesting could not foresee the amendment, and since they make their case by establishing one reason why the petition should be refused, they should always have an opportunity to respond to the petition as amended. To rule otherwise would be to say that, after the evidence closes, the plaintiff may so amend his complaint as to require more or different proof from the other side, but that the right to adduce it shall be denied. Such does not seem fair or right, nor in accordance with our statute regulating amendments. If the evidence discloses that the plaintiff is not entitled to what he asks, and he conceives that he is entitled to something else which he may ask by amendment, he should obtain leave to amend or signify his intention to do so in such season as will point his adversary to meet the change. In this case the appellants made their case upon proving that the petition sought to annex a tract of farming land not valuable nor needed for town uses, and had a right to close without going further,

unless the city had indicated a desire to exclude that tract and annex the remainder. This it failed to do until after the decision in this court, and now it asks to do it upon terms that exclude further proof. We can not think that amendment upon such terms is just or within the purpose for which amendments are designed. The appellants had a right to rely upon the proof introduced and close their case; there is no authority of law to treat a petition to annex a whole as a petition to annex any of its separate parts, and it can only become such by an amendment which can only be made if the petitioner so elect, and upon its motion, and by leave of court, which does not go as matter of course. These are contingencies which cannot be foreseen and which no one is called to meet until they arise. It cannot therefore be said that, if there were other reasons why the petition in this case should be denied, the appellants were remiss in not proving them, nor that, because they proved but one, no other existed. They proved enough to defeat the entire petition and prevent the rendition of any judgment for annexation as the pleadings stood, and were warranted in closing, since they had no intimation from the petitioner of its intention or desire to amend. As no amendment was made in the circuit court, no judgment of annexation could properly have been rendered there, but we are asked to permit an amendment to be made and a judgment to be rendered here, although it could not have been properly entered there. That is quite a different thing from our rendering judgment upon a *remittitur* for the amount for which there could and should have been a finding and judgment below. Since the circuit court could not properly have rendered judgment in favor of annexation, without an amendment of the petition, the entire judgment was erroneous; we cannot say what the record would have disclosed if the proposed amendment had been made below, upon terms that were fair and permitted proof to be introduced, and we therefore feel that the cause is not ready for a just and intelligent final determination.

Counsel labor under a misapprehension as to the opinion delivered in this cause. The judgment as to Metz and Vogel was not affirmed. There was but one issue made in the circuit court and one finding and one judgment thereon. The issue was upon the reasonableness and propriety of the proposed annexation, and the finding and judgment were in its favor. It was here alleged as grounds of reversal that the finding below was wrong, and three different matters were relied upon as showing that; we announced that two of the matters relied upon were not of such a conclusive character as to warrant us in reversing a finding as to fact, but that the third was sufficient; and we reversed the entire judgment, and remanded the cause for a new trial. In contemplation of a future trial we attempted to announce some rules that should guide a court in determining when outlying territory should be annexed to a corporation, and remanded the cause to be tried in the light of those rules and upon the evidence that should be introduced, without any suggestion as to the weight we attached to the matters referred to, except that they were not so conclusive against the finding as to justify us in setting it aside. When the weight attached to such finding is considered, it will be seen that this indicated no concurrence in it on our part. We did not even intimate our personal views as to that.

All persons who became parties in the county court and protested against granting the petition were parties when the cause reached the circuit court for trial *de novo*. Now that the judgment of the circuit court is reversed and the cause remanded, it stands as if no trial had taken place in the circuit court, and the status of the parties there is unchanged. All who are parties should be heard to show any reason that may exist why it is not right or proper to grant the prayer of the petitioner; but strangers to the proceeding in the county court have no standing in the circuit court and should not be heard. We see no reason to recede

from the rulings heretofore made, and the motions to modify will be refused.

BATTLE and MANSFIELD, JJ., concur.

DISSENTING OPINION.

COCKRILL, C. J. The only error found by this court in the judgment in question was in the failure of the proof to sustain the trial court's finding that a single well-defined tract of land lying on the outermost limits of the territory proposed for annexation was needed for city purposes. The opinion of the court declares that the proof was sufficient to warrant the annexation of the other territory, and no error was complained of or found in the preliminary proceedings which lie at the foundation of the right of a city to annex new territory. The error is therefore easily separable from the faultless part of the judgment; the city offers to make amends upon the usual terms by releasing her claim to the territory as to which the error was committed; and, as the record, upon which alone the cause is determined, fails to disclose any legal prejudice to any one by the residue of the judgment, I think that the established rules of practice in this court require that it should be affirmed, after striking out the tract as to which the error was committed. The practice is based upon the theory that it is to the interest of the public that there should be an end to litigation.

I see nothing exceptional in this class of cases to take it out of the general rule. When once the power to amend by striking out a part of the territory first proposed for annexation is conceded, objection to conforming to the general practice above indicated vanishes. That power exists under the decision in this case.

The fact that the remonstrants who appeared in the county court and prosecuted the appeal to the circuit court may be said to represent the public, does not alter the aspect; for if the public sees fit to permit them to represent it, it is bound by the action of its representatives. The case made by

them is the public's case, and it is not to be presumed that any facts against annexation exist except such as they have presented. When therefore the case is concluded, the courts must act upon it as they would upon any other case. There is nothing anomalous in a few persons representing the interests of many or of the public. I am not aware that any exception is made of the cases presented by them for that reason. The statute specially applicable to this class of of cases makes none. Indeed it is more to the interest of the State that litigation should cease when the public is interested than when the judgment affects individual interest only. The reason is stronger therefore that the rule invoked by the city should be enforced in this case than in ordinary cases.

Judge HUGHES concurs in this view.

VOGEL *v.* LITTLE ROCK.

Decided March 14, 1891.

Municipal corporation—Contiguous territory.

Territory separated from a city by a navigable river is "contiguous," within section 922 of Mansf. Dig., authorizing municipal corporations to annex contiguous territory lying in the same county.

APPEAL from *Pulaski* Circuit Court.

JOSEPH W. MARTIN, Judge.

C. L. Vogel filed a petition in the Pulaski circuit court against the mayor, city clerk, and council of the city of Little Rock, alleging that he was a resident and taxpayer of the unincorporated village of Argenta, in said county, situated on the north side of the Arkansas river, opposite the city of Little Rock; that, on the 15th day of February, 1890, the city council of Little Rock had passed an ordinance by which it was proposed to submit to the electors of said city, at the next annual election, the question as to whether the territory therein described should be annexed

to said city, which territory embraced the entire unincorporated village aforesaid.

Petitioner alleged that said territory of Argenta, north of the river, was not contiguous to the said city, but was separated from it by the river, which is a navigable stream. Petitioner prayed for a *certiorari* to the said clerk to bring up the ordinance, and that it, or so much of it as related to the territory lying on the north side of said river, might be quashed.

A demurrer to the petition was sustained, the petition was dismissed, and the petitioner excepted and prayed an appeal to this court.

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

Blackwood & Williams for appellee.

HEMINGWAY, J. As the territory described in the city ordinance was contiguous to the city of Little Rock, its passage was within the power of the city council, and the demurrer to the petition for *certiorari* was properly sustained for this reason, if for no other.

Affirm.

BEAVERS *v.* STATE.

Decided March 14, 1891.

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1. *Assault with intent to kill - Instruction.*

54 336
180 179

Where one is indicted for an assault with intent to kill the brother of a girl whom he had seduced, a reference in the court's charge to the age and infirmity of the girl's father or to the fact of the seduction, not limiting the jury's consideration of the latter fact to its bearing on the *animus* with which the assault is made, is calculated to prejudice the jury against the defendant.

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85 518

2. *Abstract instruction.*

An instruction based upon a state of facts not in evidence is erroneous.

3. *Self-defense—Attempt to debauch a woman.*

The court charged that if the defendant went to the house of the girl's parents for the purpose of forcibly taking her away, in order to further debauch and degrade her, and upon arriving there, with his hand upon his pistol, called to her to come and go with him, and she replied that her brother was at the window and was going to shoot, and the defendant thereupon fired at the brother with intent to kill, then the jury should convict; for in that event it would be immaterial who fired the first shot. *Held*, erroneous, in that it failed to state that, before the unlawful purpose with which he went there could cut off his right of self-defense, it must appear that he attempted to carry it into effect.

APPEAL from *Logan* Circuit Court.

HUGH F. THOMASON, Judge.

Evans & Hiner and *John S. Little* for appellant.

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

HUGHES, J. The appellant was convicted of an assault with intent to kill John Pridmore, and appealed to this court.

The evidence in the case tended to show that the appellant had, some time prior to the alleged assault, seduced and debauched his sister-in-law, Mattie Pridmore, the sister of John Pridmore, and that on that account bad blood and ill feeling had existed between the said John Pridmore and the defendant.

For the purpose of this opinion it is not important to state here the evidence in the case, nor to discuss the instructions given to the jury by the circuit court, except the following: "The court charges you that if you find from the evidence that Mattie Pridmore, being the sister of John W. Pridmore and being a girl of tender years, towit: under the age of eighteen years, and her father being old and infirm; and you further find that, prior to that time, the defendant had seduced and debauched the said Mattie; and that, on the day of and before the alleged assault, she being at her father's house, and her father and John W. desiring to keep and protect her from further debasement; and you further find that witness, John W., had

stated and declared that, if necessary to so protect her, he would do so, even to the taking of the life of the defendant; and that, on the morning of the alleged assault and a short time prior thereto, these facts were communicated to the defendant, and that the defendant thereupon, armed with a deadly weapon, immediately proceeded to the house of said Mattie's parents for the purpose of forcibly taking her away in order to further debauch and degrade her, and upon arriving there, with his hand on his pistol, he called to her to come and go with him, and said Mattie replied, 'Johnny is at the window with a gun and is going to shoot,' and that defendant responded, 'Yes, Johnny, d—n you; I see you,' and drew his pistol and fired at witness, John W., with intent to kill him, you should convict; for in that event it would be immaterial who fired the first shot."

1. Charge as to assault with intent to kill.

This instruction, in the opinion of the court, should not have been given, because, first, the age and infirmity of Mattie Pridmore's father was not material to the issue, nor was the fact that the defendant had seduced and debauched the said Mattie prior to the alleged assault material, further than to show the *animus* with which the assault was made. Evidence to show the state of feeling that had existed between the parties a short time anterior to the difficulty was proper to aid the jury in forming a conclusion as to the intent with which the assault was made, if they found that an assault had been made by the defendant, as charged in the indictment, upon John Pridmore. But it was not proper that they should consider wrongs which the defendant had committed before the assault, which had no connection with the assault. To allow them to do so was calculated to prejudice them against the defendant, and could not have aided them in arriving at an unbiased and correct conclusion. It was erroneous therefore to refer in this instruction to the fact that the defendant had seduced Mattie Pridmore, save for the purpose indicated.

2. Abstract instruction.

Secondly, because there was no evidence in the case upon which the jury could have found that the defendant had

proceeded to the house of Mattie Pridmore's parents for the purpose of forcibly taking her away in order to further debauch and degrade her. An instruction based upon a hypothetical state of facts as to which there is no evidence is abstract and erroneous.

3. When right of self-defense is cut off.

Thirdly. This instruction embodies the idea that if the jury found from the evidence that the defendant "proceeded to the house of Mattie Pridmore's parents for the purpose of forcibly carrying her away, in order to further debauch and degrade her, this alone would have deprived him of the right to urge that he acted in self-defense in assaulting John Pridmore. But the instruction failed to state that, before the unlawful purpose with which he went there could have the effect to cut off his right to be heard to say that he acted in necessary self-defense in making the assault, it was necessary that they should find from the evidence that there was an attempt to carry such unlawful purpose into effect. The law does not punish evil intent unaccompanied with an effort to carry such intent into effect, even where the intent, coupled with an attempt to carry it into effect, would constitute an aggravated crime.

It is well settled that, to constitute an assault with intent to kill, it must appear from the evidence that the assault was made with a specific intent to take the life of the person assaulted; and that if death had ensued from the assault, the offense would have been murder in either the first or second degree.

The intent to take life, even where a deadly weapon is used in making the assault, is not a presumption of law arising from the assault or the use of the deadly weapon, in a prosecution for assault with intent to kill; it is a question of fact for the jury to determine from the evidence. It is competent for the jury to infer or find as a fact from the use of a deadly weapon, if the circumstances of the case warrant, that the person using it intended to take life. The presumption of such intent does not arise as a matter of law from the act, but the use of a deadly weapon is an evidentiary

fact or circumstance to be considered by the jury in making up their conclusion. The burden of proof as to the intent is upon the State. The law defining assault with intent to kill and its constituent elements is fully and satisfactorily stated in the case of *Crisman* v. *State*, *ante*, p. 283, by Judge Mansfield, where the cases in this State are discussed.

For the error indicated in the said instruction, the judgment is reversed and the case remanded for a new trial.

NIX *v.* DRAUGHON.

Decided March 14, 1891.

1. *Mortgage—Guaranty.*

   Where a vendor executes a mortgage to his vendee to secure the repayment of the purchase money if a pending suit affecting title to the land should be adversely determined, the mortgage is an original, and not a collateral, undertaking. The vendee's failure to sue upon the covenants of his deed will not release or discharge the vendor from the obligation imposed by the mortgage.

2. *Liquidated damages.*

   Where the purchase price is fixed by contract as the amount of damages to be repaid the vendee, the sum fixed becomes, on the happening of the event on which its payment depends, the precise sum to be recovered, and constitutes an actual debt.

3. *Mortgage—Foreclosure—Rents and profits.*

   The condition of the mortgage being broken by the adverse determination of the suit, a petition for foreclosure is not defective which fails to allege an eviction, or an offer to restore possession and account for rents and profits, since, if the vendor was not the owner, the vendee is not accountable to him for rents.

4. *Suit—Final termination.*

   A suit is not finally determined until a pending appeal is disposed of.

APPEAL from *Miller* Circuit Court in chancery.

C. E. MITCHEL, Judge.

E. F. Friedell and *John Hallum* for appellant.

1. The property conveyed in the mortgage was a pledge of guaranty to make the covenants in the deed good. The

remedies on the covenants must first be resorted to as the primary source before resorting to the guaranty. Brandt on Sur. and Guar., secs. 1, 21, 22 and note 6; *ib.*, sec. 84 and notes; Baylies on Sur. and Guar., pp. 272–3, 222–3; 45 Tex., 553; 35 *id.*, 763; Wood on Lim., p. 323; Jones on Mortg., sec. 1187; 7 B. Mon., 336; 2 Head. (Tenn.), 699.

2. The limitation on an action of covenant is five years. Brandt on Sur. & G., secs. 124, 405, 84–5. The case was finally determined April 13, 1881; the appeal did not extend the time. 19 Wall., 572; Dillon on Removal of Causes, sec. 109 (5th ed).

3. A bill for the rescission of a contract for the sale of land cannot be maintained when the vendee is in possession enjoying the rents and profits, has never been evicted, or threatened with eviction by paramount title.

Scott & Jones for appellees.

1. The case was not finally determined until the final judgment in the Supreme Court. Freeman on Judgments (2d ed.), sec. 21; 33 Cal., 474; 24 How., 195. Adverse possession does not run between mortgagor and mortgagee except when mortgagor repudiates the title of mortgagee. 43 Ark., 504. The act of March, 1887, does not aid appellant. It is not retrospective. 6 Ark., 484; 24 Ark., 371; 28 *id.*, 555. If it was retrospective, it was unconstitutional. Wood on Lim., pp. 26, 27; 32 Ark., 410.

2. The mortgage was executed to secure the repayment of a certain sum of money, for which Nix was primarily liable. The debt, though contingent, was always the debt of appellant as principal. In the event Nix's title should prove defective, the mortgage contract required appellant at once to refund the purchase money, or the mortgage might be foreclosed.

MANSFIELD, J. This suit was brought to foreclose a mortgage of lands executed to the plaintiffs, Draughon and Allen Brothers, by the defendant, John B. Nix, on the 4th day of September, 1880. The complaint sets out in full the

mortgage deed; and the latter contains a recital to the effect that Nix had, on the day the mortgage bears date and for the consideration of $350, "cash in hand paid," conveyed to the plaintiffs by deed, "with full covenants of warranty and seisin," certain town lots, describing them; that, on the same day and by like deed, Nix and W. H. Cayce had, for the sum of $600, conveyed to the plaintiffs certain other lots, describing them; and that the title to all said lots was the subject of controversy in a suit in equity then pending in the circuit court of the United States for the eastern district of Arkansas, in which Nix was the plaintiff and one Thomas Allen was the defendant. After reciting these facts, the condition of the mortgage provided that it should be void if said suit should "finally be determined" in favor of Nix, so that it should be adjudged that he was the owner in fee simple of the lots sold to the plaintiffs; but that it should otherwise "remain in full force and effect" for the purpose of securing to the plaintiffs "the full repayment of the sums paid by them" for the lots, "whenever, by the judgment and decision of said court," it should be "determined and decided" that Nix should not recover the lots, but that they were the property "of said Thomas Allen or any other person claiming adversely" to Nix.

The complaint alleges that said cause of Nix against Thomas Allen was taken by appeal to the Supreme Court of the United States, where, on the 3d day of November, 1884, it was finally determined by the judgment of that court that the lots so conveyed to the plaintiffs were not the property of Nix, but were the property of some other person claiming adversely to him. The complaint further alleges that no part of either of said sums has been paid, and prays judgment foreclosing the mortgage. Nix filed an answer in which he states that the "mortgage was given as conditional indemnity and guaranty against the happening of a future contingency, and not to secure * * * an ascertained sum of money or debt;" that each of the covenants in the deeds conveying the lots was broken on the

13th day of April, 1881, and that no suit had been brought for such breaches; that, by failing to bring such suit, the plaintiffs have been guilty of gross negligence, whereby the right of action on the mortgage has been lost. The defendant further states that the plaintiffs took possession of the town lots after the conveyances made to them, and that they have ever since had uninterrupted possession of the same, "enjoying the rents and profits." He also pleads the statute of limitations, and, by way of demurrer reserved in the answer, objects to the sufficiency of the complaint. The defendant also filed a cross-complaint, setting up in substance the same matters contained in his answer, and praying that the plaintiffs be enjoined from prosecuting their action, and that the mortgage be declared void. A demurrer was sustained to the answer and cross-complaint, and, Nix declining to plead further, a judgment was entered condemning the land to sale for the satisfaction of the plaintiffs' demand. No personal judgment against the defendant was rendered.

1. Mortgage —Guaranty.

I. There is nothing in the terms of the mortgage contract or in the subject matter of its stipulations to support the contention of the appellant that it creates only a collateral liability. He was primarily liable for breaches of the covenants contained in both of the deeds executed for the conveyance of the town lots. And the mortgage is not an undertaking to pay the debt or perform the agreement of a third person. He does not as mortgagor stand in the attitude of a surety for the performance of his own covenants as vendor of the lots. And the mere neglect of the plaintiffs to sue upon such covenants could not therefore under any circumstances release or discharge him from the obligation imposed by the mortgage.

2. Liquidated damages.

II. But it is insisted that no action can be maintained on the mortgage until the damages resulting from the failure of Nix's title shall have been ascertained in a separate action on the covenants contained in the deeds for the lots. If it were conceded that the mortgage was given, not to secure

the exact sums it specifies, but to provide for the payment of such damages, not exceeding the amount of both sums, as might actually result from the loss of the title to the lots, this in our opinion would create no necessity for two suits between these parties—one to ascertain the sum recoverable, and the other to enforce a lien for its payment. But we are unable to adopt the construction given to the mortgage contract by appellant's counsel. The instrument is free from ambiguity, and its terms import—what the facts it recites plainly indicate—that it was executed for the two-fold purpose of liquidating and securing the payment of the damages which it was conceded would ensue from a failure of the title to the lots. When damages are thus liquidated by the stipulation of the parties to a contract, the sum fixed becomes, "on the happening of the event on which its payment depends, the precise sum to be recovered," and constitutes an actual debt. 1 Sutherland on Damages, 475–478; *Beale* v. *Hayes*, 5 Sandford, 644; *Holmes* v. *Holmes*, 12 Barbour, 137; *Bradshaw* v. *Craycraft*, 3 J. J. Marshall, 77. No assessment of damages was therefore necessary in order to ascertain the amount for which the plaintiffs were entitled to enforce the lien of the mortgage.

3. Mortgage foreclosure

III. As ground of demurrer to the complaint, it is stated that no eviction of the plaintiffs from the town lots is alleged, and that no offer is made to restore possession or to account for rents and profits. It was not necessary that the plaintiffs should suffer an eviction in order to give them a cause of action on the mortgage. That instrument is conditioned for the payment of a sum of money upon the happening of a different contingency. But the sum it secures was the consideration paid for the lots, and this would ordinarily be taken as *prima facie* evidence of the actual damages resulting from a breach of the covenant for seizin. Rawle on Cov. Tit., sec. 164. And, for aught that appears to the contrary, the parties may have intended that a decision adverse to Nix's title in his suit against Thomas Allen should be treated as equivalent in its consequences to

an eviction. However that may have been, it was obviously the intention of the parties that such decision should be regarded as conclusive evidence that Nix's title had failed; and it is equally plain that they intended that the sums secured by this mortgage should represent the damages resulting from such failure. The authorities cited above show that the amount thus fixed by agreement can be neither increased nor diminished by proving the damages actually sustained. It is true that where the possession of a vendee suing for breach of covenant for seisin has ripened into a title under the statute of limitations, he can usually recover only nominal damages. *Pate* v. *Mitchell*, 23 Ark., 590. But this rule could not benefit the defendant in this case, for the reason just stated. And if the law as to liquidated damages were otherwise, there is nothing in this record from which it may be inferred that the plaintiffs have held such possession as to invest them with title. Nor is there any averment in the answer that Nix was ever in the actual possession of the lots; nor does he allege with any directness or certainty that the plaintiffs took possession under his conveyances. He was not the owner of the property, and the plaintiffs were not accountable to him for rents.

4. When suit finally determined.

IV. To bar an action to foreclose a mortgage of real estate, under the statute of limitations in force prior to the act of 1887, seven years adverse possession against the mortgagee was necessary. *Coldclough* v. *Johnson*, 34 Ark., 312; *Ringo* v. *Woodruff*, 43 *id.*, 469–504. No such possession for any period is alleged in the defendant's pleadings. The act of 1887 provides that, in a proceeding to foreclose a mortgage, it shall be a sufficient defense that the suit has not been brought within the period of limitation prescribed for an action to recover the debt, for the security of which the mortgage is given. Acts 1887, p. 196. Whether this act applies to all causes of action existing at the time of its passage, it is not necessary to decide in this case. The plaintiffs' suit is upon a writing under seal. But, whether the debt be regarded as one due upon a sealed or unsealed

instrument, the period between the time of its maturity and the commencement of this suit is not sufficient to bar the action under either the act of 1887 or the statute previously in force. The suit of *Nix* v. *Allen* was determined in the Supreme Court of the United States on the 2d day of November, 1884, and we think the prosecution of the appeal to that court, which, it appears, was taken by Nix, must be regarded as a continuation of the original suit, within the meaning of the stipulation fixing the close of that litigation as the time when the mortgage debt should mature. See Freeman on Judgments, sec. 21; *Hills* v. *Sherwood*, 33 Cal., 474; *Nations* v. *Johnson*, 24 How., 195. This suit was commenced on the 18th day of April, 1888, less than five years after the judgment rendered in the Supreme Court of the United States on Nix's appeal.

The demurrer to the defendant's answer and cross-complaint was properly sustained, and the judgment below is affirmed.

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TINSLEY *v.* CRAIGE.

Decided March 21, 1891.

1. *Landlord and employee—Lien for advances.*

The ownership of the crop is not the test of employment, in the act of April 6, 1885, which gives a landlord a lien on the crop raised on the premises for advances to his employee; where a landlord and laborer agree that the former shall furnish the land, team and tools, and the latter do the work, to make a crop, of which they are to be tenants in common, the latter is an employee, within the meaning of the act.

2. *Landlord's lien—Waiver.*

Under the act of March 21, 1883 (Mansf. Dig., sec. 4452), a landlord may waive his lien for advances to an employee only by written indorsement upon the mortgage or other instrument by which the employee transfers his interest in the crop.

3. *Repeal of inconsistent acts—Construction.*

Where an act contains a clause repealing all inconsistent acts, it will be held, in the absence of a clear intention otherwise manifested, not to revise, and consequently repeal by implication, prior acts relative to the same subject and not inconsistent with its provisions; the legislature having expressly prescribed its operation, no other effect can be given to it.

APPEAL from *Jackson* Circuit Court.

J. W. BUTLER, Judge.

Attachment to enforce a landlord's lien. The facts are fully stated in the opinion.

The appellant *pro se.*

1. Craige's mortgage was void for uncertainty, and should not have been admitted in evidence. 41 Ark., 70;

2. Dunn was a mere share-cropper, and had no interest he could mortgage until his part was set off to him. 32 Ark., 436; 48 *id.*, 264; 34 *id.*, 687.

3. The mortgage was made without Tinsley's consent. Mansf. Dig., sec. 4452.

4. The parties were not tenants in common. 46 Ark., 254; 48 Ark., 295.

5. The landlord's lien is paramount to a mortgage. 51 Ark., 222; 48 Ark., 264, 295; Mansf. Dig., sec. 4452; Acts 1885, p. 225, sec. 1. The lien exists whether the parties are landlord and tenant, or employer and employee.

Jno. W. & Jos. M. Stayton for appellees.

1. Unless Dunn and Tinsley were landlord and tenant, the act of 1885 does not apply. The evidence shows them to be "*share-croppers*," and tenants in common of the crop 33 Ark., 436; 34 *id.*, 179; 34 *id.*, 687; 48 *id.*, 624; 46 *id.*, 254.

COCKRILL, C. J. Dunn raised a crop of cotton on Tinsley's land under a parol contract which both parties denominated a contract upon the shares. Tinsley stated the terms of the contract in the following language, viz.: "I was to furnish the land, team, tools, and feed for team, and Dunn was to do the work in making the crop. Each one was to gather his

1. What is an employee?

half of the crop as near as practicable, and, after being gathered and hauled to the gin, if there was any difference, it was to be equalized. Dunn was to pay me out of his half for what he got from me." A part of the crop was removed from the premises, when Tinsley caused the residue to be attached in the field for the purpose of enforcing the landlord's lien for supplies furnished Dunn. The lien was asserted under the following provision of the act of April 6, 1885 (Acts 1885, p. 225), viz.: "In addition to the lien now given by law to landlords, if any landlord, to enable his tenant or employee to make and gather the crop, shall advance such tenant or employee any necessary supplies, either of money, provisions, clothing, stock, or other necessary articles, such landlord shall have a lien upon the crop raised upon the premises for the value of such advances, which lien shall have preference over any mortgage or other conveyance of such crop made by such tenant or employee. Such lien may be inforced by an action of attachment before any court or justice of the peace having jurisdiction, and the lien for advances and for rent may be joined and enforced in the same action." Craige intervened and claimed Dunn's interest in the cotton; and the main question for determination is, Was Dunn either a tenant or employee of Tinsley, within the meaning of the act? If he occupied either of those relations, the act applies and the lien exists. If he occupied neither, it is immaterial to Tinsley whether Craige is the rightful owner of the cotton or not.

Inasmuch as the possession of the land was not surrendered, and the contract vested no interest in it in Dunn, he was not a tenant, within the meaning of the previous decisions of this court. *Hammock* v. *Creekmore*, 48 Ark., 264, and cases cited.

Is he an employee within the meaning of the act? It is obvious that the act can apply only to that class of employees who have an interest in the crop, for it confers a lien upon the crop only. A cropper on shares has such an interest and is an employee, within the meaning of the act.

The court charged the jury that the landlord had no lien for supplies against a cropper on shares. That was prejudicial error, if the evidence would justify the finding that Dunn was a share-cropper.

In attempting to ascertain the relation in which the parties stood to each other, the circuit court at the trial made the ownership of the crop the test, and charged the jury, among other things, that if they found that the landowner and the occupant were tenants in common of the crop, no lien existed, and they should find against the landlord.

Ordinarily when the parties occupy the relation of landlord and tenant, the title to the crop is in the tenant, and he pays the landlord rent in kind or otherwise; and in general where they occupy the relation of landlord and cropper on shares, the title to the crop is in the landlord, and he delivers a part of it to the cropper in payment of his services. But the title to the crop is not the criterion for determining the relation that exists between the parties. That is governed by their intent, and is determined by the terms of their contract. If there is a demise or renting of the premises, with a stipulation that the landlord shall receive his rent by becoming an owner in an undivided interest in the crop, the relation of landlord and tenant exists as to the premises, and the parties are tenants in common of the crop. *Putnam* v. *Wise*, 37 Am. Dec., 309, and note p. 318; *Johnson* v. *Hoffman*, 53 Mo., 504.

And so if the landlord employs a laborer to make a crop, under an agreement that he is to have an undivided share of it as his wages, the relation of employer and employee is established. That was recognized in *Sentell* v. *Moore*, 34 Ark , 687–690, where it was held that it was to such cases that a provision of another act giving the landowner a lien upon the crop of his laborer was intended to apply. Mansf. Dig., sec. 4452. Where the title to the whole crop is in the landowner, and by the terms of the contract he is to pay the employee who labors in the crop only what is left of it after deducting the amount due for supplies furnished to

make it and for the use of the land, team and tools, there is no necessity for legislation to protect his interests. In such cases the cropper can sell or mortgage only the interest remaining after the landlord's demands are satisfied. *Beard* v. *State*, 43 Ark., 284. The landlord has therefore the remedy for his protection in his own hands.

In former decisions of this court where stress has been laid on the fact that the landowner and occupant were tenants in common of the crop, it was to distinguish their title to or interest in the crop from the ordinary incidents of ownership that exist as between landlord and tenant and landowner and cropper, in order to determine the remedies of the parties in suits about the crop, or to ascertain their respective interests in it, and not for the purpose of determining their relation to each other. *Bertrand* v. *Taylor*, 32 Ark., 470; *Ponder* v. *Rhea*, *ib.*, 435; *Hammock* v. *Creekmore*, 48 Ark., *supra*.

Under the contract as stated above Dunn was a cropper on shares under Tinsley, and a tenant in common of the cotton raised on the land. It is immaterial whether the cotton was to be divided in the field before it was picked or afterwards at the gin. That was the subject of contract between the parties, and did not control the relation between them. As Dunn was a cropper on shares, he was an employee, within the letter and spirit of the act; and Tinsley had a lien on his share of the crop for supplies furnished to enable him to make it, which he could not defeat by sale or otherwise without Tinsley's assent. *Parks* v. *Webb*, 48 Ark., 293. The court erred therefore in its charge to the jury.

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

OPINION ON MOTION FOR REHEARING.

Filed May 23, 1891.

2. Waiver of landlord's lien.

COCKRILL, C. J. It is argued that the judgment should be affirmed, notwithstanding the error in the court's charge above specified, upon the ground that the appellant had

waived his lien for supplies upon the crop of his employee in favor of the appellee, by inducing the latter to furnish supplies to the employee under the belief that he would not exercise his privilege as landlord to acquire the superior lien by furnishing the supplies himself. See *Coleman* v. *Siler*, 74 Ala., 435; *Hammond* v. *Harper*, 39 Ark., 248. But the statute specifies that the evidence of the waiver of the landlord's lien for supplies shall be in writing by indorsement upon the mortgage or other instrument by which the employee transfers his interest in the crop. Mansf. Dig., sec. 4452. There is no testimony to the effect that there was such a release, and the charge of the court upon that branch of the case was erroneous.

3. Repeal of statute by implication.

But it is argued that the act of April 6, 1885, cited in the opinion in chief, repeals so much of the prior act as required the written evidence of waiver. There is no express repeal of the prior provision, nor anything in the second act that is repugnant to it. Unless therefore it is clear that the legislature intended to revise the whole subject of the landlord's lien for supplies furnished his employees, and to embody all the rules to be found on that subject in the latter act, it cannot be held to repeal the provision referred to. *Coats* v. *Hill*, 41 Ark., 149; *Blackwell* v. *State*, 45 *id.*, 90; *Zerger* v. *Quilling*, 48 *id.*, 157.

But the act of 1885 does not profess to be an act to revise the law upon the subject of the landlord's lien for supplies furnished his employee, and carries its own evidence of the intent not to furnish the only rules to be found on that subject.

Its principal object was to provide for a lien for the landlord upon the crop of his *tenant* for supplies furnished, which prior to that time did not exist. It provides also for the enforcement of the lien and the punishment of the tenant for a fraudulent sale of the property upon which the lien exists, the same provisions being made to apply to the landlord's lien upon the employee's interest in the crop. The act concludes with a clause repealing all acts inconsistent with

its provisions. By the latter provision the statute prescribes its own operation upon the previous act; and, in the absence of a clear intention otherwise manifested, no other operation can be given to the latter act, because that is then the express limitation the legislature has seen fit to place upon it. *Henderson's Tobacco*, 11 Wall., 652; *Patterson* v. *Tatum*, 3 Saw., 164; *Lewis* v. *Stout*, 22 Wis., 234; *Gaston* v. *Merriam*, 33 Minn., 271.

There is therefore no repeal of any previous provision of the law in reference to the landlord's lien for supplies furnished his employee, except such as is repugnant to some provision of the second act. As before stated, there is no such repugnancy as to the provision under consideration. There is no provision in the statute requiring a waiver in writing of the landlord's lien for rent or for supplies furnished his *tenant;* but the distinction is a matter of policy which is left to the legislature for determination, and it is not a consideration to control the construction of the statute.

If the second statute were held to repeal the first, an equally glaring inconsistency would remain in this, viz.: An employee would be subject to punishment under the second act for selling the crop to defeat the landlord's lien, while the landlord would be relieved of the punishment prescribed by the first act for a like conduct toward his employee. The second act does not provide for the punishment of the landlord, because it was devised chiefly to cover the defect as to the lien on the crop of the *tenant;* and as neither the title nor possession of the crop is in the landlord, he has no power to sell and defeat the tenant's rights.

Motion denied.

WILSON *v.* YONGE.

Decided March 28, 1891.

Appeal—Supersedeas *bond—Administration.*

The execution by an administrator of the qualified *supersedeas* bond provided by section 1295 of Mansfield's Digest does not warrant the issuance of a *supersedeas* in favor of other judgment defendants.

APPEAL from *St. Francis* Circuit.

M. T. SANDERS, Judge.

A judgment was obtained by Yonge & White, plaintiffs, against D. M. Wilson, administrator of the estate of D. M. Wilson, deceased, late sheriff of St. Francis county, and James M. Davis and six other sureties upon said sheriff's official bond. The defendants excepted and appealed to this court. The administrator, pursuant to section 1295 of Mansfield's Digest, filed a *supersedeas* bond with the clerk of this court, conditioned that he should not commit or suffer any waste or *devastavit* of the estate during the delay occasioned by the *supersedeas*. The clerk thereupon issued a *supersedeas* in favor of all the defendants, staying all proceedings upon the judgment. Appellees filed a motion to quash the *supersedeas* except as to the administrator.

James P. Brown for appellees, petitioners.

The judgment in this case was a personal judgment against the sureties, and the qualified bond filed by the administrator under the proviso of sec. 1295, Mansf. Dig., only superseded the judgment as to the estate of Wilson.

George Sibly for appellants.

The sureties are not in default, and, bond or no bond, no execution could issue until failure by the administrator to pay the debt, after order by the proper court. The case is still in *fieri* and, as long as the appeal is pending, undetermined. If no *supersedeas* had issued, the court would recall an execution. 22 Ark., 578; 27 *id.*, 256.

Effect of *supersedeas* in favor of administrator upon other appellants.

COCKRILL, C. J. When a judgment for the recovery of money is against an administrator and others, the qualified or limited bond which the administrator executes, under section 1295 of Mansfield's Digest, to supersede the judgment against the estate of his decedent, does not warrant the issuance of a *supersedeas* in favor of other judgment defendants. If they desire to supersede the judgment rendered against them, they must appeal and enter into bond in accordance with the statute. The fact that the administrator's decedent is the principal, and the other defendants his sureties, in an official bond, does not alter the case, because the judgment plaintiff is not forced to exhaust his remedy against the estate of the principal before resorting to his execution upon the judgment, but may proceed by execution against the property of the living defendants in the first instance.

The *supersedeas* in favor of all the defendants except the administrator should be quashed.

It is so ordered.

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RAILWAY COMPANY *v.* TRIMBLE.

Decided March 28, 1891.

1. *Railway—Ejection of passenger—Damages.*

   One who enters a railway train in the expectation and with the desire that he should be put off, in order that he may make a case for damages against the company, and is ejected without rudeness or unnecessary violence, cannot recover damages for wounded feelings or pain of mind.

2. *Damages—Statutory penalty.*

   The recovery by the passenger of the statutory penalty for an illegal overcharge of fare is no bar to a suit for damages for an unlawful ejection from the train.

3. Remittitur.

   A *remittitur* of excessive damages will be permitted where it will cure the errors indicated in the opinion.

APPEAL from *Sebastian* Circuit Court, Fort Smith District.

JOHN S. LITTLE, Judge.

Trimble's complaint was that defendant, the St. Louis and San Francisco Railway Company, operating a railroad in the State more than seventy-five miles in length, wrongfully ejected him from its train because he refused to pay for fare from Van Buren to Lillie station five cents per mile, being in excess of the maximum rate fixed by the act of April 4, 1887, regulating the rates of charges for the carriage of passengers. At three cents per mile the fare would be 25 cents; the fare demanded was 35 cents. By defendant's wrongful act he was damaged in business, humiliated and mortified in his feelings and injured in his standing. Wherefore he prayed judgment for damages in the sum of $1500.

He testified that he knew the company was charging five cents per mile when he got on the train. He had told another passenger that he was going to offer the conductor the maximum fare fixed by the statute, three cents per mile, and, if the conductor wouldn't accept it, he was going to require him to put him off the train, and then he would bring suit. He tendered the conductor three cents per mile in payment of his fare. The conductor refused to receive it and demanded five cents per mile. Upon his refusal to pay it, the conductor stopped the train at the Van Buren freight depot, a short distance from the passenger depot, and pleasantly escorted him from the coach. Plaintiff says: "When he put me off the train, he laid his hands on me gently; I told him all I wanted him to do was to simply lay his hands on me; I told him that I was not going to resist. We were both smiling at the time." The conductor testified that the plaintiff made no protest against being put off, and did not object to going off.

Plaintiff hired a hack to complete his journey which cost him $2.65 more than his expenses by rail would have been.

The court instructed the jury as follows:

The jury are instructed that if they find from the evi dence that the defendant is a railroad more than seventy-five continuous miles in length, and * * * that the plaintiff boarded the defendant's train at Van Buren, and offered the conductor of said train the sum of 25 cents as payment of his fare to Lillie, and the said Lillie was not over seven or eight miles distant from Van Buren, and the conductor refused such amount as payment of his fare, then such refusal was unlawful; and if they find that the conductor, after the plaintiff had tendered him such fare, ejected or caused the plaintiff to be ejected from the train, then such ejection was unlawful, and they should find for the plaintiff.

If they find for the plaintiff, then they may consider the humiliation of being put off the train, the inconvenience of being compelled to reach the destination by other means, the loss of time occasioned by traveling to his destination by other conveyances, the pain of body, the pain of mind, and humiliation to his feeling and the loss of business and damage to his reputation, and should assess such damage as they see proper, not exceeding $1500.

There was verdict and judgment for plaintiff in the sum of $250.

Clayton, Brizzolara & Forrester for appellant.

1. Appellee was not entitled to damages for "humiliation" or "pain of mind," but, if anything, only to actual or compensatory damages. Suth. on Dam., vol. 1, p. 17; 40 Ill., 503; 7 Mass., 254; 4 Mason, 115; 11 Mich., 542; 27 *id.*, 234; 4 Dallas, 206; 16 N. Y., 494; 1 Otto, 489; 53 N. Y., 216; 4 Otto, 214; 62 Mo., 171; 112 Mass., 492; 10 Wisc., 388; 35 Ark., 492; 29 Ohio St., 126; 29 Ark., 448; 4 Ind., 471; 2 Beach on Rys., sec. 893; 37 Am. & E. Ry. Cases, 100; 13 Hun, 319.

2. The court erred in excluding the former judgment. 29 Ark., 465; 17 Cow., 420; 16 How. (U. S.), 114; 29 Oh. St., 126.

J. M. Hill for appellee.

Humiliation and pain of mind were proper elements of damage. The instruction for plaintiff was proper. 43 Ark., 529; 45 *id.*, 529; 3 Suth. on Dam. (ed. 1884), p. 259; 16 Atl. Rep., 67; 42 Wis., 23; 9 S. W. Rep., 451; 15 Minn., 49; 12 S. W. Rep., 275.

2. The former judgment, being for a statutory penalty, is not a bar to a suit for ejection and consequent damages. One is a *qui tam* action, the other a trespass.

1. Damages for ejection of railway passenger.

COCKRILL, C. J. The charge of the court upon the measure of damages assumes that the plaintiff was humiliated, that his feelings were wounded, and that he suffered "pain of mind" by being put off the train. Whether the plaintiff was humiliated and suffered as indicated, was a question of fact for the jury's consideration.

The inference that one has so suffered may be legitimately drawn, without express proof of the fact, in a case where nothing is shown except that the servants of the railway have wrongfully expelled a passenger from one of its trains; because it is a state of feeling that would ordinarily exist where such an indignity is offered to the person of a passenger who is himself without fault. And knowledge by the passenger of the fact that the railway would eject him unless he consented to submit to an illegal exaction, demanded in violation of a plain statutory duty which it had instructed its servants to disregard, would not deprive him of the right to recover for whatever mental injury he might suffer from the indignity. But the proof in this case had a tendency to show that the plaintiff entered the defendant's train in the expectation and with the desire that he should be put off, in order that he might make a case for damages against the railway. If such was the case, he should recover nothing for wounded feelings or pain of mind, for to the willing mind there is no injury. *Railway* v. *Cole*, 29 Ohio St., 126.

Moreover the charge assumes that there was proof that the plaintiff had sustained loss of business and damage to his reputation by the ejection, but there is no evidence in the

record upon which a verdict for special damages upon either score could be sustained.

2. Recovery of penalty no bar to suit for damages.

The plaintiff's recovery of judgment for the statutory penalty for the same illegal overcharge of fare was not a bar to a suit for damages for the wrongful ejection from the train. *W. U. Tel. Co.* v. *Cobbs*, 47 Ark., 344. The court's refusal to allow the plaintiff to put the judgment in evidence for that purpose was not error.

3. *Remittitur.*

For the errors indicated the judgment must be reversed. Actual damages in the sum of $2.65 only were proved, that being the extra cost the plaintiff was put to in reaching his destination by private conveyance. A *remittitur* will cure the errors indicated, and if the plaintiff will remit the excess of the judgment over $2.65, judgment will be entered here for that amount; otherwise the cause will be remanded for a new trial.

It is so ordered.

DAVIS *v.* NICHOLS.

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Decided March 28, 1891.

Death by wrongful act—Survival of action against wrong-doer's administrator.

When one is killed by the wrongful act of another, the cause of action for the benefit of his estate, under section 5223, Mansfield's Digest, survives the death of the wrong-doer; but the action for the benefit of his widow and next of kin, created by the act of 1883 (secs. 5225–6, *ib.*), abates upon the wrong-doer's death.

APPEAL from *Lee* Circuit Court.

M. T. SANDERS, Judge.

George Sibly for appellant.

1. The action did not lie. 34 Am. & Eng. R. Cases, 464. The criminal liability merges the civil action. 95 U. S., 758; 1 Add. on Torts, secs. 45–6. To entitle the personal representative to maintain the action, there must have existed a

contracted relation between deceased and the person at whose hands he suffered death. Note 1 to p. 133 of 5 A. & E. Enc. Law; 72 Ga., 137; 28 A. & E. R. Cases, 575. See, also, Mansf. Dig., sec. 5225. If Nichols could not maintain the action, neither his widow nor administratrix could. 41 Ark., 299; 5 A. &. E. Enc. Law, 132, note 2; *ib.*, note 1; 95 U. S. Our statute purports only to provide for the survivor of the action that the party injured might, in his lifetime, have maintained. 34 Am. & E. R. R. Cases, 462; 12 Bush, 172; 82 Ky., 383.

N. W. Norton for appellee.

That the action survived is settled by the statute, and 41 Ark., 296; Const., art. 5, sec. 32; Mansf., Dig., sec. 5230; 17 Ark., 270; Whit. Smith on Negl., p. 437.

Do actions for wrong resulting in death survive wrongdoer's death?

COCKRILL, C. J. Curtner killed Nichols in a personal altercation. Nichols' widow, as adminstratrix of his estate, brought this suit against Curtner to recover damages. The complaint alleged that, "on the 22d day of January, 1886, the defendant, W. H. Curtner, wrongfully did assault, shoot and wound the said J. F. Nichols, her intestate, whereof the said J. F. Nichols languished and languishing did die" on the 23d of January, 1886. It was further alleged that the plaintiff was the widow and next of kin of the deceased, that as such she was damaged in a large sum, and judgment was prayed for that sum and for general relief. Pending the suit Curtner died. The question is, Can the cause be revived against his administrator? The action would have abated at common law, and must abate now unless the statute has changed the common law rule. The only provisions of the law bearing upon the question are sections 5223–6 of Mansfield's Digest. The first two of these sections are taken from an act of 1838, and relate to the revivor of actions *ex delicto;* the others are from the act of 1883, and confer upon the personal representative of the deceased a right of action for his death when it is caused by wrongful act, neg-

lect or default—to be prosecuted for the benefit of the widow and next of kin.

It is plain that whatever cause of action J. F. Nichols had against Curtner survived to his administrator by virtue of section 5223 referred to above and hereinafter copied. *Ward* v. *Blackwood*, 41 Ark., 295; *Davis* v. *Railway*, 53 *ib.*, 117. The terms of the section are specific also to the effect that the cause should survive in favor of Nichols' estate against Curtner's administrator. It is plain, too, that, had Curtner lived, he would have been liable to an action by Nichols' administrator for the benefit of his widow and next of kin, by virtue of section 5225–6. But he is dead; and the question is, Did the court err in permitting the cause to be prosecuted to judgment against his administrator for the benefit of the widow and next of kin?

The statute under which that branch of the suit was maintained authorizes an action against a wrong-doer, but it is silent as to the administrator of the wrong-doer; and unless the provisions of the statute first cited cure the defect, the action must abate under the familiar rule of the common law that the wrong-doer and the wrong are buried together. The question has arisen frequently under statutes which like ours are modeled after Lord Campbell's act, and it has been invariably decided against the right of revivor. *Hegerich* v. *Keddie*, 99 N. Y., 258; *Moe* v. *Smiley*, 125 Pa. St., 136; *Russell* v. *Sunbury*, 37 Ohio St., 372; *Green* v. *Thompson*, 26 Minn., 500; *Hamilton* v. *Jones*, 25 N. E. Rep. (Ind.), 192.

The courts were driven to that conclusion in the cases cited, because it was found that the common law rule as to the survivability of actions had not been changed by legislation—the duty of the courts being to declare the law and not to make it.

The section of the statute from the act of 1838 already referred to is as follows, viz.: "For wrongs done to the person or property of another, an action may be maintained against the wrong-doers, and such action may be brought

by the person injured, or, after his death, by his executor or administrator, against such wrong-doer, or, after his death, against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts." It will be observed that this section provides that wrongs to persons or property shall be actionable, but that is only an affirmance of the common law. It does not therefore create a new cause of action or liability. It simply devolves an existing common law right or liability upon the administrator. To that extent it abolished the common law. The "injury to the person" mentioned in the provision has been construed to mean a bodily injury or damage of a physical character and no other (*Ward* v. *Black*, 41 Ark., *supra*); and the injury to property, so far as it relates to personal property, is such only as was contemplated by the statute of 4 Edward III, c. 7, on the same subject. *Russell* v. *Sunbury*, 37 Ohio St., *supra; Witters* v. *Foster*, 26 Fed. Rep., 737.

Whether the wrong is a physical injury to the person or an injury to property, the manifest intention is to do nothing more than prevent a subsisting cause of action from abating by the death of a party. The meaning of the legislature is not changed, but may be more plainly seen, by turning the section into this form, viz.: "When one who is entitled to maintain an action for an injury to his person or property dies, the action shall survive to his administrator; and if the wrong-doer dies, it shall survive against his administrator."

But the cause of action which survives to the administrator upon the death of one who has received a physical injury does not inure to the benefit of the widow and next of kin. The action which is prosecuted for their benefit is not founded on survivorship, but is a new cause of action which death itself originates. It begins where the action which survives ends. *Davis* v. *Railway*, 53 Ark., *supra*. Many cases illustrating different phases of the question may be found in the authorities referred to in *Davis* v. *Railway*.

The case of *Hegerich* v. *Keddie*, 99 N. Y., *supra*, is a case in point upon the question for decision. This suit was brought for damages for the death of the plaintiff's intestate against the administrator of the wrong-doer. It seems that the suit was for the benefit of the estate as well as of the widow and next of kin. The statute of revivor construed by the court was couched in the same language as section 5223, Mansf. Dig., except that it does not embrace injuries to the person, and where the word "property" appears in our statute, the broader term "property rights or interests" is substituted. Of this statute the court said: "The wrongs referred to in these sections are such only as are committed upon the 'property rights, or interests' of the testator or intestate, and to the cause of action for which the executors and administrators acquire a derivative title alone. The whole scope and design of the statute is to extend a remedy already accrued, to the representatives of a deceased party, and provide for the survival only of an existing cause of action." And in speaking of the remedy under a statute similar to our act of 1883, the opinion continues: "The cause of action here provided for does not purport to be a derivative one, but is an original right conferred by the statute upon representatives for the benefit of beneficiaries, but founded upon a wrong already actionable by existing law in favor of the party injured, for his damages. The description of the actionable cause seems to have been inserted merely to characterize the nature of the act which is intended by the statute to be made actionable, and to define the kind and degree of delinquency with which the defendant must be chargeable in order to subject him to the action. (*Whitford* v. *Panama R. R. Co.*, *supra*.)

"It will be observed also that the statute, although creating a new cause of action, and passed for the express purpose of changing the rule of the common law in respect to the survivability of actions, and conferring a right upon representatives which they did not before possess, does not undertake, either expressly or impliedly, to impair the

equally stringent rule which precluded the maintenance of such actions against the representatives of the offending party.

"The plain implication from its language would, therefore, seem to be at war with the idea that the legislature intended to create a cause of action enforceable against, as well as by, representatives."

What is there said of the injury to "property rights or interests" applying only to a derivative action is applicable as well to an injury to the person under our statute.

It follows that the action cannot be revived upon the theory that it is an injury to the person within the meaning of section 5223. The case just quoted is authority also to the proposition that it cannot be revived under that section either as an injury to the "property" of the decedent or of his widow and next of kin.

In *Yertore* v. *Wiswall*, 16 How. Pr., 8, it was held by the Supreme Court of New York that an action for the benefit of a widow to recover damages of a common carrier for negligently causing the death of her husband was a suit for an injury to her property interests within the meaning of the statute, and that the action survived the death of the wrong-doer; but the decision was overruled by the court of appeals in *Hegerich* v. *Keddie*, 99 N. Y., *supra;* and the doctrine of *Yertore* v. *Wiswall* has been repudiated, as we are advised, wherever the question has arisen. *Russell* v. *Sunbury*, 37 Ohio St., *supra; Hamilton* v. *Jones*, 25 N. E. Rep., *supra; Moe* v. *Smiley*, 125 Pa. St., *supra; Ott* v. *Kaufman*, 68 Md., 56.

These cases clearly show that the right of the widow to recover damages for the death of her husband is not based upon an injury to property within the meaning of the statute.

It follows that the action prosecuted for the benefit of the widow abated upon the death of Curtner, the wrong-doer, and that the court erred in permitting the plaintiff to proceed to judgment against his administrator for her benefit. For this error the judgment must be reversed.

But the complaint stated a cause of action in Nichols himself which survived to his administratrix, and she is entitled to prosecute it for the benefit of his estate.

Reverse and remand for a new trial.

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ARMSTRONG *v.* STATE.

Decided March 28, 1891.

1. *Justice of the peace—Jurisdiction—Malicious mischief.*

   A justice of the peace. trying a criminal prosecution for maliciously killing an animal, under section 1654 of Mansfield's Digest, has jurisdiction to award three-fold damages to the injured owner as part of the punishment, although the amount exceeds one hundred dollars, the limit of his civil jurisdiction.

2. *Motion for new trial—Discretion of trial court.*

   A motion for a new trial upon the ground of newly discovered evidence is addressed to the legal discretion of the trial court.

APPEAL from *Newton* Circuit Court.

R. H. POWELL, Judge.

J. M. Moore for appellant.

1. The justice of the peace had no jurisdiction. Art. 7, sec. 40, Const.; Mansf. Dig., sec. 1654; 44 Wisc., 288; 22 Kans., 15; 32 Ark., 202; 1 Herm. on Est. and Res. Adj., pp. 107, 167. This case not only involves a matter of damages to personal property, but the object and effect of the statute is to redress and afford satisfaction for the private wrong as well as the punishment of the public offense.

2. Appellant was entitled to a new trial on the ground of newly discovered evidence. 2 Ark., 42; Rose Digest, p. 563; 10 Ark., 556.

3. The instructions were misleading. Malice is an essential ingredient of malicious mischief, and it must exist against the owner of the animal. 35 Ark., 345.

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

This is a prosecution under sec. 1654, Mansf. Dig.

1. The damages are a part of the punishment. Justices have jurisdiction of all misdemeanors. See 19 Ark., 176.

2. The newly discovered evidence could not have affected the verdict.

3. The instructions were correct. The motion is merely evidentiary. Bur. Cir. Ev., 296.

MANSFIELD, J. Armstrong was charged before a justice of the peace with malicious mischief. The offense as alleged was committed by the killing of two horses belonging to one Holland. The jury found him guilty and fixed his fine at the sum of one hundred dollars. They assessed the value of the horses at two hundred dollars, and the justice thereupon rendered judgment in favor of the State for the fine, and in favor of Holland for three-fold the assessed value of his horses. The defendant appealed to the circuit court, where the case was tried anew with the same result reached in the justice's court, except that the fine imposed on the appeal was only twenty dollars. A new trial was refused, and the defendant seeks a reversal of the judgment of the circuit court on the following grounds: (1) want of jurisdiction in the justice of the peace; (2) newly discovered evidence; (3) error in court's charge to the jury.

1. Jurisdiction of justice of the peace.

1. The offense for which the defendant was prosecuted is defined by section 1654 of Mansfield's Digest, which, omitting a proviso not applicable to this case, is as follows: "If any person shall wilfully and maliciously, by any means whatsoever, kill, maim or wound any animal of another which it is made larceny to steal, he shall, on conviction, be punished by a fine of not less than twenty nor more than one hundred dollars, or by imprisonment in the county jail for a period of not less than ten nor more than sixty days, or by both such fine and imprisonment, and shall, moreover, be liable to damages to the owner of the animal so killed, maimed or wounded, as in the preceding section provided."

The preceding section provides that: "Every person who shall knowingly administer any poison to any horse,

ass, mule, or to any cattle, hog, sheep, goat or dog, or maliciously expose any poisonous substance with intent that the same shall be taken or swallowed by any of the aforesaid animals, shall, on conviction, be punished in the manner prescribed by law for feloniously stealing property of the value of the animal so poisoned; and the jury who shall try such cases shall assess the amount of damages, if any actual damage has occurred, occasioned by such poisoning or intent to poison, and the court shall render judgment in favor of the party injured for three-fold the amount so assessed by the jury."

The constitution of 1874 provided that justices of the peace should have such jurisdiction of misdemeanors as was then or might be prescribed by law: Art. 7, sec. 40, 3d clause. At that time a provision of the criminal code which still remains in force gave to justice's courts jurisdiction concurrent with the circuit courts, in "all matter less than felony." (Mansf. Dig., sec. 1966). It is conceded that under these two provisions—the one constitutional and the other statutory—justices of the peace have jurisdiction of all cases of misdemeanor; and it is not controverted that malicious mischief is an offense of that grade. But it is contended that this case is one to which the jurisdiction of the justice could not be made to extend without a violation of the constitutional provision limiting his jurisdiction in matters of damage to personal property to cases where the amount in controversy does not exceed the sum of one hundred dollars: Art. 7, sec. 40, 2d clause. In support of this contention it is argued that the assessment of damages made in Holland's favor was rather by way of redressing a private wrong than as a punishment for a public offense. The same position, in effect, was assumed by counsel in the case of *Lemon* v. *State*, 19 Ark., 172, which was also an appeal from a conviction for malicious mischief. But the court held that the provision of the statute giving the injured party three-fold the actual damage sustained made the act "highly penal;" and that the damages assessed were as much

a part of the punishment as the imprisonment. On this subject Mr. Justice Hanly, who delivered the opinion of the court, said: "It is not uncommon for the legislature to prescribe a double penalty for offenses, *e. g.*, personal punishment and pecuniary fine, and we know of no principle which the policy violates. Such was the evident design of the legislature in the act before us. It is true by the act we are considering, the legislature has seen fit to bestow the pecuniary fine upon the injured party, instead of appropriating it to the public; acting, we presume, upon the ground that the public wrong would be compensated by the imprisonment, and that the injured party would be restored to his rights and reimbursed in his damages by the pecuniary mulct." At the time of Lemon's conviction the statute punished the offender by imprisonment for a period of not less than six months. But it inflicted no pecuniary punishment, except such as resulted from the assessment of damages made in favor of the owner of the property. And yet it will be observed that the court in that case regarded the damages as being in effect a fine and part of the punishment for the public crime. The statute was amended in 1869 so as to provide, as it does at this time, that a fine of not less than twenty nor more than one hundred dollars shall be imposed, or that the accused shall be punished by imprisonment in the county jail for a period of not less than ten nor more than sixty days, or that he shall be punished by both such fine and imprisonment; and that damages shall also be assessed in favor of the owner of the property, as directed by the original act. The amended act, while thus reducing the period of imprisonment and permitting the jury to omit that part of the punishment entirely, imposes what it terms, apparently in contradistinction to the damages, "a fine." But, in the view taken of the original act in the case cited above, the effect of the amendment was to increase the pecuniary punishment, and the whole amount adjudged against the defendant is therefore to be regarded as in the nature of a fine—part of which goes to the State

and the residue to the injured party. Bearing in mind the nature of the offense and the greater severity with which the original act dealt with the offender, we cannot conclude that the legislature intended still further to mitigate the punishment by treating the damages otherwise than as part of the fine.

Our attention is called to an observation made by Chief Justice English, in *Floyd* v. *State*, 32 Ark., 200, to the effect that the sum adjudged to the injured party in that case was compensation for a personal wrong. This was not said by way of indicating an opinion on any question such as is raised here. But that case was a prosecution for malicious mischief, and, like this, originated in a justice's court where judgment was rendered against Floyd for a fine, and also for damages amounting to one hundred and fifty dollars. The conviction occurred several years after the adoption of the present constitution, and the report of the case contains no intimation that the validity of the judgment was questioned here. The decision on that appeal is therefore to be taken as a tacit recognition of the justice's jurisdiction, rather than as indicating any opinion against it. In the later case of *Schlief* v. *State*, 38 Ark., 522, prosecuted under the same statute and also originating in a justice's court, it is obvious that the recovery had in behalf of the person injured was regarded by this court as strictly a matter of criminal procedure.

By way of further argument against the jurisdiction of the justice, it is said that, when damages are assessed in favor of the injured party in prosecutions of this kind, a subsequent civil action for the same wrongful act would be barred by the judgment rendered in the criminal cause. We find no authority to support this contention and think it cannot be sustained upon principle. The owner of the property is not a party to the criminal prosecution and cannot control it. The charge may be dismissed without his consent, and he can prosecute no appeal from a judgment awarding him an insufficient compensation or none at all.

The doctrine of reasonable doubt prevails on the trial, and the offense is not made out without proof of malice. But in a civil action for the tort no such proof would be necessary, and a bare preponderance of the evidence in favor of the plaintiff would entitle him to a verdict. It would therefore be unjust to one who suffers from an act of malicious mischief to bar him of his remedy by civil action because of the mere entry of a judgment convicting the offender of the public wrong. The rule against such a result is, we think, well established. Freeman on Judgments, sec. 319; Bigelow on Estoppel, 115, 116; *Brown* v. *Swineford*, 44 Wis., 282.

In Massachusetts it was provided by statute that when, by reason of the negligence of a railroad corporation, the life of a passenger or other person not in the employment of such corporation was lost, the corporation should be punished by a fine of not less than $500 nor more than $5000, to be recovered by indictment and paid to the executor or administrator of the deceased for the use of his widow and children. A later statute provided that the corporation should in such case also be liable in damages for not less than $500 nor more than $5000, "to be recovered in an action of tort" by the executor or administrator for the use of the same parties. And it was held that "no criminal jurisdiction existing under the earlier statute" was taken away by the later enactment. *Kelley* v. *B. & M. Railroad*, 135 Mass., 449.

Whether the action of the person injured by an act of malicious mischief would be barred by accepting the damages adjudged to him in a criminal prosecution against the offender, is a question which does not arise on this appeal. *Commonwealth* v. *Metropolitan R. Co.*, 107 Mass., 236.

The framers of the constitution of 1874, it must be presumed, knew that the inferior courts had uniformly given to the statute punishing malicious mischief the construction indicated by the ruling of this court in *Lemon* v. *State*, 19

Ark., *supra*. They knew, too, that justices of the peace were then exercising jurisdiction under the act without regard to the amount of damages to be assessed in favor of the person injured; and that the statutes of this State had for more than thirty years made the offense a misdemeanor as it was at common law. And yet the constitution declared that, until otherwise provided by the legislature, justice's courts should continue to exercise jurisdiction concurrent with the circuit courts in all cases of misdemeanor. This necessarily included all misdemeanors committed by acts of malicious mischief. That such was the practical, contemporaneous construction given to the constitution is shown by the fact that in 1879 the general assembly amended and re-enacted the law against malicious mischief, giving it the form it now has in section 1654 of the Digest. See Cooley Const. Lim., 82–86; *Baker* v. *State*, 44 Ark., 137; *Board of Equalization Cases*, 49 Ark., 525; *Glidewell* v. *Martin*, 51 Ark., 570.

Our conclusion is that the second clause of section 40, article 7, of the constitution, cited as prohibiting the jurisdiction exercised by the justice in this case, applies only to civil actions, and that the limitation it imposes can have no application to criminal prosecutions for malicious mischief.

2. New trial.

2. It was within the legal discretion of the court below to grant or refuse the defendant's application for a new trial so far as it was made on the ground of newly discovered evidence. The record discloses no abuse of that discretion, and, unless this appeared, the denial of the application is without avail as a cause for reversal. *Anderson* v. *State*, 41 Ark., 229.

3. The exception reserved to the charge of the court is confined to a single instruction. In that there was no error prejudicial to the defendant, when it is considered in connection with all the other instructions given to the jury. *Chappell* v. *State*, 35 Ark., 345.

The judgment is affirmed.

JONES *v.* STATE.

Decided April 4, 1891.

Criminal law—Venue—County boundaries.

An instruction that, if an offense is committed upon the boundary of two counties, or if it is uncertain where the boundary is, a conviction may be had in either county is erroneous where there is no proof that the offense was committed upon the boundary of two counties, or that there was uncertainty about the location of the boundary, and where the only uncertainty was as to the place where the offense was committed.

APPEAL from *Desha* Circuit Court.

JOHN M. ELLIOTT, Judge.

Appeal from a conviction of the crime of marking another's hogs with intent to steal them. Defendant admitted that he marked the hogs "back of the Bowles place." A witness testified that, as respects the land back of the Bowles place, "part is in Desha county and part in Drew." The testimony fails to show in which county the crime was committed.

Section 1972 Mansfield's Digest provides:

"Where the offense is committed on the boundary of two counties, or if it is uncertain where the boundary is, the indictment may be found and a trial had in either county."

C. H. Harding and *Thos. B. Martin* for appellant.

There was no proof that the marking was done in Desha county, but the venue, if proved, was shown to be in Drew county. 32 Ark., 180; 23 *id.*, 158; 30 *id.*, 43.

W. E. Atkinson, Attorney General, for the State.

Section 1972 is not unconstitutional. 46 Mo., 350.

The jury found the venue to be in Desha county. Cooley, Const. Lim., 392, top.

COCKRILL, C. J. The court charged the jury that where an offense is committed upon the boundary of two counties, or if it is uncertain where the boundary is, a conviction could be had in either county. Venue.

There was no proof that the offense was committed upon the boundary line of two counties, nor does the proof disclose that there was any uncertainty about the location of the boundary line. The uncertainty was as to the place where the offense was committed, and as to that alone. The charge was therefore misleading. The case is controlled by the decision in *State* v. *Rhoda*, 23 Ark., 156.

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

BLACK *v.* BRINKLEY.

Decided April 4, 1891.

1. Certiorari—*Parties.*

   A writ of *certiorari* to quash an order of annexation of territory to a town or city, which was granted upon the petition of owners of the annexed territory, will be refused unless such owners, or the person or persons named in their petition as authorized to act on their behalf, are made parties to the proceeding.

2. *Laches in applying for* certiorari.

   The writ of *certiorari* will be refused when the party seeking it fails to show that he has proceeded with due expedition after discovering that it was necessary to resort to it. Accordingly it was refused where the application was made eight months after the order of annexation was made, where no excuse for the delay was offered, and where great confusion would result from a quashal of the writ.

APPEAL from *Monroe* Circuit Court.

M. T. SANDERS, Judge.

Black and another, on the 24th of February, 1888, made application for a writ of *certiorari*, upon notice served upon the mayor and recorder of the town of Brinkley, The petition alleged that, on the 9th day of May, 1887, forty-three persons presented a petition to the county court of Monroe county, praying the court to annex certain territory therein described to the town of Brinkley; that said petition prayed that territory on the north, south, east and west of the town of Brinkley be annexed thereto; that nearly all of the

signers to the petition lived in the territory lying west and south of said town; that the owners of the land on the east and north of the town did not join in the petition, and a majority of them did not wish to have their lands annexed to the town; that appellants owned a large part of the territory sought to be annexed to the town; that, on the filing of said petition, the county court fixed the 13th day of June, 1887, as the time for hearing the same, and the mayor's office in said town of Brinkley as the place; that, on said 9th day of May, 1887, the county court adjourned to court in course; that, notwithstanding the court was adjourned for the term, the county judge caused John T. Box, who had been named in said petition as petitioners' agent, to give notice by publication in the Brinkley *Argus*, a newspaper published at Brinkley, that the court would be held on the 13th day of June, 1887, at the office of the mayor of the town of Brinkley, for the purpose of considering said petition; that, on said 13th day of June, 1887, the county judge, with the county clerk and a deputy sheriff, did assemble at the office of the mayor of the town of Brinkley, and pretended to hold a session of the county court, and granted the prayer of petitioners, and declared the territory described in said petition to be annexed to the town of Brinkley; that on the 16th day of June, 1887, the county clerk notified the council of the town of Brinkley of the action of the county judge, and, on the 22d day of June, 1887, the council by resolution accepted said territory as a part of the town. Wherefore, they prayed that a writ of *certiorari* be issued, directing the county clerk to certify to the court all the papers, records and proceedings in connection with the matter, and that the order of annexation be quashed.

The town of Brinkley appeared by counsel and answered the petition. It denied that a majority of the owners of the land on the north and east did not join in the petition for annexation, and denied that the county court adjourned on May 9th till court in course, but alleged that it adjourned to

meet on June 13th at the mayor's office in Brinkley. The subsequent proceedings were admitted to be as alleged.

The record of the proceedings of the county court on the 9th day of May shows the filing of the petition for annexation, and the fixing of June 13th for the hearing, and then the adjournment of the court until court in course. Affidavits were introduced showing that a majority on the north and east parts of the territory annexed did not petition for annexation.

Upon the petition and answer and accompanying affidavits, the court found against petitioners and denied the relief sought.

Price & Parker for appellants.

Sanders & Watkins for appellee.

1. Parties necessary to *certiorari* proceeding.

COCKRILL, C. J. The order of annexation which the appellant seeks to quash upon *certiorari* was made by the county court upon the petition of owners of the annexed territory. They were parties in interest and parties to the record which the appellant sought to annul. There could be no legal determination therefore of their right to annexation without making them parties to the proceeding, or at least without making the person a party whom they had selected, in accordance with the statute governing such cases, to prosecute the petition for annexation in their behalf. As none of the petitioners nor the agent was a party to the proceedings for *certiorari*, the court did not err in refusing to quash the order of annexation. *Haines* v. *Freeholders of Camden*, 47 N. J. L., 454; see *Smith* v. *Parker*, 25 Ark., 518, 522.

2. Laches.

Moreover, the appellant delayed for more than eight months after the order of annexation was made before filing the petition to annul it. No excuse is offered for the delay. If the circuit court had acted upon the petition at the next term after its presentation, the lapse of time would have been such that it is fair to presume that jurisdiction had been assumed by the municipality over the annexed

territory with whatever of expense is necessarily incident thereto, that taxes had been assessed and paid for municipal purposes, and that the citizens residing within the annexed territory had participated in electing town officers. Great confusion would have arisen from a quashal of the order. It is now nearly four years since the territory was declared a part of the town, and the causes for confusion have multiplied as time has elapsed. We should therefore be slow to hold that the circuit court had abused its discretion in withholding the use of the writ, and slower in exercising that discretion ourselves at this time. The rule is to refuse the writ where the party seeking it fails to show that he has proceeded with expedition after discovering that it was necessary to resort to it, and especially where great public inconvenience will result from its use. *Burgett* v. *Apperson*, 52 Ark., 221; *Fractional School Dist.* v. *Inspectors*, 27 Mich., 3.

The State itself by acquiescence may be debarred of the right to question the legality of the origin of a municipality, even when it was organized under an order of court that is void for want of jurisdiction of the subject matter. *State* v. *Leatherman*, 38 Ark., 81. The reasons which uphold the right of municipal existence in such a case are a sufficient answer to the petitioners' arguments to cast out the territory annexed by the order of the county court in this case.

Affirm.

54 376
58 574
54 376
61 212
54 376
182 481

SUN INSURANCE COMPANY *v.* JONES.

Decided April 4, 1891.

1. *Insurance—Iron-Safe Clause—Keeping Books.*

A policy contained a covenant that the assured, a merchant, should keep a set of books showing all business transacted, and keep them locked in a fire-proof safe at night and at all times when the store was not actually open for business; the books to be produced in case of loss, and, on failure to produce them, the policy to be null and void. The evidence showed a custom among merchants of the locality to continue the business of the day until 10 or 11 o'clock at night; that the front door was kept locked at night, but customers were admitted upon knocking at the door; that, about 9 p. m., while assured's bookkeeper, engaged in writing up the books, had left the store for a few minutes, intending to return and complete the work, the fire occurred and the books were destroyed. *Held:* That the parties are presumed to have contracted with reference to the necessities of the business and the usages which prevail in its management, and that the store was "actually open for business," within the meaning of the policy.

2. *Fire Insurance—Limitation—Date of Loss.*

When a policy of insurance provides that a loss shall be payable sixty days after proof thereof, and that "all claims under this policy are barred, unless presented within one year from the date of loss," the limitation begins to run from the time the loss becomes payable, and not from the date of the fire.

APPEAL from *Pulaski* Circuit Court.
JOSEPH W. MARTIN, Judge.

S. M. Jones & Co. sued the Sun Mutual Insurance Co. in the Pulaski circuit court on a policy of insurance for $2000, on a house and stock of goods which had been destroyed by fire at Riverside, Arkansas.

Defendant answered, alleging that, by the terms of the policy of insurance, it was stipulated as follows:

"The assured under this policy hereby covenants and agrees to keep a set of books, showing a complete record of all business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fire-proof

safe at night, and at all times when the store mentioned in the within policy is not *actually open for business,* or in some secure place not exposed to a fire, which would destroy the house where such business is carried on; and in case of loss the assured agrees and covenants to produce such books and inventory, and in the event of the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

That the plaintiffs failed to keep a set of books showing a complete record of all transactions and a last inventory, and failed to keep said books and inventory securely locked in a fire-proof safe at night, and at all times when their store was not actually open for business, or in a secure place not exposed to fire which would destroy their business house; but they left their books out of the safe at night when no business was being carried on, so that they were destroyed by the fire which consumed the building, and were not produced in accordance with the terms of the said policy.

The defendant also pleaded that, by the terms of the policy, it was provided that no suit should be maintained thereon unless brought within one year after the loss, and that this suit was not brought until the lapse of more than one year.

The case was tried by the court sitting as a jury, and the following findings of fact were made:

"The store house and stock at the time of destruction by fire was covered by insurance in this company for $750 on house and $1250 on merchandise; other insurance on stock, $1000 in New Orleans Insurance Association, and $3000 in Southern Insurance Company. Value of house, $1200; value of stock, $9500.

"The house and stock were destroyed by fire on the 9th day of December, 1887, at about 9:30 o'clock p. m.; that plaintiffs had a fire-proof safe in their store-house in which their mercantile books, such as are ordinarily kept by mer-

chants, were kept when not in use. It was the plaintiff's custom to take the books out in the morning and lay them on the desk for use during business hours; they were kept out until the business of the day was closed and the books were posted and written up, when they were put in the safe and locked up; that it was the custom to write up the books in the evening, after the rush of business was over; the store was kept open for customers and business transacted frequently as late as 10 or 11 o'clock p. m., and their habit was to admit customers as late as those hours, though after night the front door was locked to prevent intrusion of improper characters, but the doors were sash doors with glass in them so that customers could see that the house was open for business, and on knocking they would be admitted; that on the evening of the fire the house was being kept open in this customary manner, and a light in the office and the rear part of the store to advise customers that they could so enter. This was the customary mode of carrying on mercantile business in that section of the country. The clerk was in the office writing up the day's business, as usual, with the books on the desk, the business of the day not being yet closed, the posting of the books not finished, when, upon invitation of a friend, he stepped out the side window across to his friend's in a store next door, to eat a plate of oysters, intending to return in a short time and close up the books and put them away in the safe, as usual, and while so engaged, the fire broke out. At the time of the fire, B. M. Jones, one of the plaintiffs, who occupied, with his family, rooms at the end of the store-house, connecting with it in the rear, was waiting, as was his usual custom, to put the books away and lock the safe after the clerk should have finished posting up the books, as was their usual custom. There was money in the safe, and Mr. Jones carried the key, and it was the usual habit for the clerk to get through posting up at night and then go back and have Mr. Jones come in, put the books away and lock up the safe for the night. The proof of loss was duly made Feb-

ruary 1st, 1888; this suit was commenced on the 10th day of January, 1889."

The defendant asked the court to declare the law to be that the plaintiffs were debarred from recovering by reason of their failure to keep their books in an iron safe at night and at all times when their store was not actually open for business, and that the suit was barred because not brought within one year next after the date of the fire; but the court refused both declarations, and to its action in so doing the defendant excepted at the time.

From a judgment in favor of the plaintiffs defendant has appealed.

U. M. & G. B. Rose and *E. W. Kimball* for appellant.

1. The iron-safe clause has been frequently passed upon and sustained. 5 S. E. Rep., 125; 18 Ins. Law Jour., 813; 13 S. W. Rep., 799; *ib.*, 1103. This clause required the books kept in a fire-proof safe *at night* and when the store was not *actually open* for business. The proof shows that the fire occurred at night, and that the books were not locked in the safe, and that the store was not actually open.

2. The suit not having been brought within one year after the loss, it was barred. The "loss" is the fire, and not the "proof of loss." 7 Gray, 61; 7 Wall., 386; 26 La. An., 298; 16 U. C. Q. B., 135; 83 Va., 741; 91 Ill., 92; 51 Conn., 17; 1 Bradw. (Ill.), 309; 66 Mo., 32; 1 Ohio Ct. Ct., 192; Berryman's Ins. Dig., 792; 21 New B., 544; 20 Bradw., 431; 12 Ont. App., 418, cited Ber. Ins. Dig., 794.

J. M. Moore for appellees.

1. The iron safe clause is to be construed with reference to the well known and long established commercial usages of the country. The store was open for business until the business of the day was closed, which was often as late as 10 or 11 o'clock at night. "At night" means during the night when the store was closed and business suspended. For cases where similar clauses have been reasonably construed, see 38 Fed. Rep., 19, and cases cited; 8 Cush., 79;

8 Metc. (Mass.), 124; *ib.*, 125; 12 Wall., 404; 27 Cent. Law Jour., 284; 6 A. & E., 170; *id.*, 75; 2 C. M. & R., 447; 17 N. E. Rep., 771, 776; 31 Me., 221–4–5; 1 Wood, Fire Insurance, 145.

2. The limitation did not begin to run until the right of action accrued, which, under the provisions of the policy, was sixty days after proof and adjustment of the loss. 2 Wood on Fire Ins., p. 1029; May on Ins., sec. 470; Flanders on F. Ins., p. 580; Bacon on Ben. Soc., sec. 446; 9 Ins. L. J., 113; 39 N. Y., 45; *ib.*, 315; 28 Wisc., 472; 16 W. Va., 658; 33 *id.*, 409; 62 Ia.; 12 Ia., 384; 19 *id.*, 364; 44 Mich., 420; 45 N. W., 285; 17 Fed. Rep., 568; 25 *id.*, 296; 30 *id.*, 668; 83 Cal., 473; 53 Ark., 300; Berryman's Ins. Dig., 782. The policy is construed most strongly against the insurer. 9 Ky. Law. Rep., 147; Ber. Ins. Dig., 783, and cases *supra*.

1. Insurance—Keeping books.

MANSFIELD, J. The only contention made by counsel for the appellant on the first ground of defense is that the store was not "actually open for business" at the time of the fire. And it is argued that the book-keeper, who was last in charge of the store on the night it was burned, had left it locked and unoccupied, and it could not therefore have been at any later time open for business. But the facts as found by the court are, that the book-keeper, who was also a salesman, was engaged in writing up the record of the day's business, a duty which the policy itself enjoined, when, passing out of the building by a window, he went into an adjoining store, expecting to return in a short time and complete his work. He had been absent only a few moments when the fire broke out; and there was nothing in the manner or occasion of his leaving the store to indicate that anything was intended beyond a brief intermission in his labor. No importance is to be given to the fact that the door was locked. The evidence explains that it was the custom to keep it locked after night to prevent the intrusion of persons whose presence was not desirable. The building having

sash doors, customers could see from its being lighted that the store was open for business, and on knocking at the door they were admitted. This was the usual method of keeping the store "open" at night. Nor can the lateness of the hour aid the theory of the defense, for it is shown that it was the custom of merchants in that section of the country to continue the business of the day until 10 or 11 o'clock at night; and that it was necessary to enter the transactions of each day in the books before they were locked up for the night. The policy in effect recites the fact that the plaintiffs kept a country store, and the parties are presumed to have contracted with reference to the necessities of such a business and the usages which prevail in its management. *Jones* v. *Southern Ins. Co.*, 38 Fed. Rep., 19. It is not contended that the store had been actually closed for the day before the book-keeper left it. And we think that, if it was then open within the meaning of the policy, there is no avoiding the conclusion that it would remain so until the transactions of the day were recorded in the books, or until some act had been done indicating a purpose to close it. In the case cited above the precise question now being considered arose and upon the same facts, the plaintiffs and the property insured in that case being the same as in this. And the court there held that the store was "actually open for business" within the meaning of the iron-safe clause, when the fire broke out. The reasoning by which that ruling is supported appears to us conclusive. We therefore hold that the finding of the court below on the issue formed by the first defense is sustained by the evidence, and that it was not error to refuse the first declaration of law requested by the defendant. *Houghton* v. *Ins. Co.*, 8 Metcalf, 114; *Daniels* v. *H. R. Ins. Co.*, 12 Cushing, 416; *Turley* v. *N. A. Ins. Co.*, 25 Wendell, 374.

2. Limitation —Date of loss.

2. The second defense is that the plaintiff's action was not brought within one year after the date of the fire. It was commenced within one year after proof of the loss was made, and the remaining question to be decided is, whether

the time within which the policy required the plaintiffs to sue should be computed from the day on which the fire occurred, or from that on which the loss it occasioned became due and payable.

The 18th clause of the policy fixing the period of limitation is as follows: "All claims under this policy are barred, unless prosecuted within one year from the date of loss." By another clause it was provided that payment of the loss insured against should "be made in sixty days after the loss shall have been ascertained and proved." If the term "loss," in the eighteenth clause is to be taken to mean the destruction of the property, then it evidently does not mean what the same word implies in the provision fixing the time of payment; for in the latter, the "loss" is described as something to be ascertained—to be proved and paid—words which apply more appropriately to the amount of damages which the assured has sustained by the fire than to the fire itself. The loss to be ascertained and proved is also that contemplated by the eighth, tenth and twelfth conditions or clauses of the policy. By the tenth clause the loss on goods and merchandise is to be paid for at a value "to be ascertained by experts mutually appointed." Again in another clause it is stipulated that the company shall be liable only for three-fourths of the loss not exceeding the sum insured, "the other one-fourth to be borne by the assured." Here also the term "loss" is plainly used in the sense of pecuniary damages. Now, the limitation clause declares that all claims shall be barred "unless prosecuted within one year from the date of loss." Standing alone this provision would seem to give the full period of one year in which claims may be prosecuted. But the clause is wholly ineffectual to accomplish that object, if the appellant's construction be adopted, since no cause of action accrues in any case until the expiration of sixty days, and the time of payment may be further deferred by delays which may occur beyond the control of the assured, by an exercise of the right reserved to the company to have the

loss ascertained and adjusted by experts. It is at least a possible thing that the whole period of limitation might thus elapse before the right to sue would accrue. In that event the assured would, without fault on his part, be cut off from any remedy whatever. A construction of the contract which would permit such a result cannot, it is needless to say, be entertained. *Barber* v. *Fire and Marine Insurance Co.*, 16 W. Va., 658.

This brief comparison of the several clauses of the policy is sufficient to show that the meaning of the limitation clause is not free from doubt. And in such case a familiar rule is applicable which requires us to construe it most strongly against the company. 2 Wharton, Cont., 670; May on Ins., secs. 175–179.

As to the construction to be given the limitation clause of a policy, where it is drafted in language similar to that presented by this instrument, the adjudicated cases are not in harmony, but the weight of authority which they furnish is, we think, to the effect that the period of limitation begins to run from the day on which a cause of action accrues to the assured. *Levy* v. *Va. Ins. Co.*, 9 Insurance Law Journal, 113; *Hay* v. *Star Fire Ins. Co.*, 77 N. Y., 242; *Steen* v. *Niagara Fire Ins. Co.*, 89 N. Y., 315; *Mayor* v. *Hamilton Fire Ins. Co.*, 39 N. Y., 45; *Ellis* v. *Council Bluffs Ins. Co.*, 64 Ia., 507; *Spare* v. *Home Mutual Ins. Co.*, 17 Fed. Rep., 568; *Vette* v. *Clinton Fire Ins. Co.*, 30 Fed. Rep., 668.

The text writers, so far as we have had access to their works, also state the rule to be that the limitation will be construed to run from the time when the loss becomes payable, and not from the date of the fire. 2 Wood on Insurance, p. 1029; May on Insurance, sec. 479; Bacon on Benefit Societies, sec. 446.

The plaintiff's action was not barred, and the judgment is affirmed.

HAYCOCK v. WILLIAMS.

Decided April 11, 1891.

Partnership liability—When incurred.

To establish a liability against a party as a partner for the acts of others, it must appear that a partnership was formed by express agreement, or that the party sought to be charged has been guilty of some act by which he is estopped from proving that he is not in fact a partner. No partnership is created by an agreement whereby one party is to furnish the labor and another the capital necessary to make a kiln of bricks, and the latter to have control of the bricks until enough are sold to repay advances made by him to the former, when the remainder is to be equally divided.

APPEAL from *Jefferson* Circuit Court.

JOHN M. ELLIOTT, Judge.

Williams & Bowie sued the Bryants and Buchanan and procured an attachment to be levied upon a brick-kiln. Haycock interpleaded for the brick.

Haycock testified as follows:

"About the 9th day of March, 1889, the defendants in this action came to me and asked me to furnish them money with which to make brick on a yard east of Mr. Hilliard's in the city of Pine Bluff. I asked them what it would take, and they said they would need some money, some wheelbarrows, shovels and a pair of mules. I then entered into a contract with them, which was read to the jury, and is in words and figures as follows:

"'Agreement made between George Haycock and P. S. Bryant, J. M. Bryant and Ben Buchanan, for the purpose of making and burning brick on brick-yard east of Hilliard's, in the city of Pine Buff. The three persons, J. M. Bryant, P. S. Bryant and Ben Buchanan, are to make and burn the brick, say 125,000; the parties to put in all their time; and also for other help to be hired to the amount of $120, also 3000 feet of lumber, six wheelbarrows and three shovels George Haycock is to furnish the amount of $60 in cash of the $120, to furnish the 3000 feet of lumber, the wheelbarrows and the shovels, the use of two mules and feed for the

same, also furnish the wood at $1 per cord, the hauling to be done by the three, P. S. Bryant, J. M. Bryant and Ben Buchanan. When the brick is sold (George Haycock to have the sale of same), the amount of cost of lumber, wheelbarrows, shovels and wood and the amount paid out by him is to be taken out of the first sale of brick, and then the parties, named P. S. Bryant, J. M. Bryant and Ben Buchanan, are to have half of the kiln of brick and George Haycock to have the other half. It is understood that there will be due them $25, so as to equalize for the labor. The balance due of $120 to be paid as soon as the brick is sold.'

"When the contract was made, I then furnished such material as it called for, and paid the hands the money, which I had agreed to pay, as it was earned. When the kiln was about two-thirds completed, plaintiff Williams came to me and asked if I was furnishing the Bryants and Buchanan. I told him I was. He said he had a mortgage upon the brick to the extent of sixty thousand brick, but he was satisfied he could acquire no rights under the mortgage, and that he had advanced only about sixty or seventy-five dollars, and that part of that sum was for a wagon, and that he would advance nothing further. I told him that I would advise him to regain possession of his wagon. He then asked me to let him know when I settled with the defendants, so that he could be present and endeavor to collect what they owed him. I promised to do this and to aid him in anyway I could in the collection of his indebtedness. I never had any further conversation with the plaintiffs until after the bricks were made, and I did not know that they continued to furnish defendants. * * * I furnished the defendants $386 under my contract. This sum was partly in money and partly in supplies for the yard. I did not agree to supply the defendants with provisions while they were making brick. The kiln of brick was sold by me for $500."

Mancil Williams, one of the plaintiffs, testified that the defendants came to him and asked him to furnish them money and provisions, to be secured by a mortgage upon

brick. The mortgage conveyed their half interest in the kiln of brick. He advanced them money and provisions amounting to about $350. He did not know whether the provisions were used by the yard hands or by the families of defendants. The account on their books was charged to the Bryants and Buchanan.

The court instructed the jury against the objections of the interpleader:

1. If the jury believe from the evidence that the interpleader, Haycock, and the defendants, Buchanan and the Bryants, entered into an agreement whereby they were to engage in the business of manufacturing brick for sale or otherwise, and that the business should be carried on by them with money or supplies to be furnished by Haycock, that Buchanan and the Bryants were to contribute their time and labor to the business. and that the parties should share in the profits thereof; and further find that the parties did engage in this business under such agreement, then they were partners so far as third parties were concerned.

2. The jury are instructed that the best evidence and usual test of a partnership is the sharing between the alleged partners in the profits and losses of the business; and if they believe from the evidence that there was an agreement between Haycock and Buchanan and the Bryants to share in the profits and losses of the brick kiln in question, then this would be evidence tending to show that a partnership did in fact exist between them.

The attachment was sustained and the interplea dismissed. Interpleader has appealed.

Met L. Jones for appellant.

Participation in the profits of a business is not the true test of a partnership. The test now is, whether the business has been carried on in behalf of the person sought to be charged as a partner; *i. e.*, did he stand in the relation of principal toward the ostensible traders by whom the liabilities were incurred and under whose management the

profits have been made. 44 Ark., 423. It does not necessarily follow that one who is interested in, and is to receive a portion of, the profits is a partner, either as between the parties, or as to third parties. 12 Conn., 69; 30 Me., 384; 51 N. Y. (6 Sick.), 231; 51 Mo., 17; 54 Mo., 325; 3 Jones & Sp. (N. Y.), 405. A partnership can only exist where there is a voluntary agreement made for that purpose, and there can be no such partnership against the intention of the parties to the contract. A partnership can only exist when such is the actual intention. 7 Ala., 761; 5 Peters (U. S.), 529; 20 N. H., 90; 17 Mass., 107. There is no question as to estoppel, as there is no proof that Haycock held himself out as a partner, or induced any one by his acts to believe that he was. 12 Oh. St., 175; 41 Penn. St., 30; 21 Iowa, 518; 10 B. & C., 140; 29 Ga., 285; 20 La. An., 568; 51 Me., 51; 3 Camp., 310; 60 Ill., 42; 14 Am. Rep., 25.

M. A. Austin for appellees.

An agreement could not well be drawn that would more clearly constitute a partnership. Sharing in the profits *as profits* does constitute a partnership. 38 N. H., 287; 75 Am. Dec., 182. As to third parties, all who participate in the profits *as profits* are liable as partners. 15 Me., 292; 33 Am. Dec., 614; 2 Greene (Ia.), 427; 52 Am. Dec., 526; 4 G. Greene, 23; 33 Ia., 404; 7 *id.*, 446; 13 Gray (Mass.) 468; 2 Stock. Chy. (N. J.), 469; 97 Mass., 97. The rule cited by appellant, that "A partnership can only exist where there is a voluntary agreement made for that purpose, and there can be no such partnership against the intention of the parties to the contract," may be true as to a partnership *inter se*, but is not the law as to third parties. 22 How. (U. S.), 330; 61 Miss., 354; 58 Ala., 230; 4 Md., 59; 31 Wis., 592; 58 N. Y., 272; 37 Conn., 250; 114 Mass., 114; 1 Cliff. (U. S.), 287; 29 Oh. St., 429; 16 Hun (N. Y.), 526; 3 S. W. Rep., 858; Lindley on Part., book 1, ch. 1, sec. 1, subd. 1, 2, 3. As to liability of dormant partners, see Add. on Cont.. secs. 105–6; Lindley on Part., 16. The

definition of a partnership is enough to fix the liability of Haycock in this case. Parsons on Cont., 132, 150.

When a partnership liability arises.

COCKRILL, C. J. The terms of the contract between Haycock of the one part and the Bryants and Buchanan of the other, and the relation of the parties, do not render it probable that they intended to assume the responsibilities and obligations of a partnership. That is not commonly the relation assumed between manual labor and capital—the latter, it appears, being what Haycock was to furnish, while the other parties were to contribute labor.

The usual elements of a co-partnership are lacking. There is no community of interest under the contract in the property employed in the enterprise. The Bryants and Buchanan were to furnish the implements used in making brick, but, being unable to do so, Haycock advanced the money to enable them. Haycock furnished the mules. None of this property became the joint property of the concern, but the title remained separately in the party furnishing it. Again there was no provision for a community of interest in profits as such, for there is a specific contract for a tenancy in common only of the product of the labor employed.

While the terms are somewhat obscure, the contract may be best likened to the very usual one in this State of landlord and cropper on shares, in which the latter receives a part of the product of his labor as wages. See *Tinsley* v. *Craige*, *ante*, p. 346. Such contracts are not construed to constitute a partnership unless the terms used clearly import the intention to do so, because it is the common experience that the parties do not usually intend to enter into that relation.

We conclude that the contract does not import a partnership. But if there is no partnership in fact, Haycock's interest in the attached property is not subject to be seized for a debt contracted by the Bryants and Buchanan. To establish a liability against a party as a partner for the acts

of others, it must be made to appear that a partnership was formed by express agreement, or that the party sought to be charged has been guilty of some act by which he is estopped from proving that he is not a partner in fact. 1 Lindley on Part., 40, n. 1. No evidence tending to show such conduct on the part of Haycock is found in the record.

The only interest in the property that is shown to be subject to the appellee's attachment was one-half of what remained after Haycock was paid for his advances, according to the adjustment provided by the contract.

Reverse the judgment and remand the cause for further proceedings.

RAILWAY COMPANY *v.* DAVIS.

Decided March 21, 1891.

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1. *Unblocked frogs—Risks of employment.*

   Where a brakeman enters the service of a railroad company contemplating the use of unblocked frogs, he assumes the attendant risk; whether in such case the company would have promoted the safety of its operatives by substituting blocked for unblocked frogs, and whether its duty of reasonable care exacted this, are questions that cannot affect its liability.

2. *Master's liability—Defective drawhead.*

   A railway company will be liable to an employee for an injury occasioned by the use of a drawhead which had a patent structural defect, without proof that it had notice of the defect; but not for an injury caused by the depression of a drawhead which might have occurred during the trip and without negligence on the company's part.

APPEAL from *Pulaski* Circuit Court.

JOSEPH W. MARTIN, Judge.

Action by the widow and the next of kin of J. M. Davis against the St. Louis, Iron Mountain and Southern Railway Co. The complaint alleged that deceased, a brakeman in defendant's service, while performing his duties at Bald Knob, Ark., in uncoupling a car, was, by reason of a defective and

unsafe coupling and a dangerous and unblocked frog or switch, detained on the track longer than was usual or necessary, and was run over by defendant's cars and killed.

In attempting to uncouple a car, deceased's foot was caught in an unblocked frog, and the train passed over him, severing his limbs from his body. While under the car he told another that he had tried to pull the pin, but could not; then got his foot caught and tried to throw himself across the rail so as to protect his body, but failed. There was testimony that the hole in which the coupling pin fitted was too small. One witness said that the drawhead "looked as if it would go under too far and catch the pin and hold it."

There was testimony that blocked frogs were required to be used in Missouri by statute, and that some roads in other States used them. As to whether their use would diminish the risk incurred by brakemen, the testimony conflicted. One witness testified that their use would increase the risk of derailment. Deceased had been in defendant's employment as brakeman for two years.

The court charged the jury as follows:

1. It was the duty of defendant to exercise reasonable care and prudence, to furnish and keep safe tools and appliances for its employees to use in carrying on its business of running trains; and if you believe from the evidence that defendant neglected to perform this duty, and that, by reason thereof, Davis, while in the performance of his duties as an employee of the defendant, was killed without fault or neglect on his part contributing directly thereto, you must find for the plaintiff.

2. Davis did not forfeit the right to recover for injuries, if any occurred by reason of defendant's neglect of duty, from merely using defective appliances, unless the defect was so apparent that a prudent man would not have continued in defendant's employ while such appliances were in use. Nor does the knowledge of Davis that open frogs were used excuse defendant, if such frogs were defective or improper appliances and caused the injury, unless you believe

that the defect was such as that it was known to Davis, or ought in the exercise of ordinary care to have been known to him, to be dangerous and unsafe to remain in defendant's employ while such frogs were used.

4. If the jury believe from the evidence that defendant furnished to Davis a defective drawhead and coupling pin, and knew, or by reasonable diligence should have known, of such defect, and that by reason thereof, while in the performance of his duty as a brakeman of defendant, Davis was delayed in his efforts to uncouple the cars, and while so engaged, and in consequence of such delay, he, without negligence on his part, was caught in a frog and injured, and that he would not have been caught and injured if the coupling had not been defective, you must find for the plaintiffs.

From a judgment in favor of plaintiffs defendant has appealed.

Dodge & Johnson for appellant.

1. The verdict is not sustained by the evidence. There was no evidence of the defect of the drawhead or coupling apparatus, or that the injury was caused thereby. 51 Ark., 477; 46 *id.*, 566; 13 S. W. Rep., 382.

2. The using unblocked rail or switch is not negligence, there being no statute requiring it. 35 Ark., 615; 28 A. & E. R. Cas., 488; 118 Ill., 45; 71 *id.*, 418; 110 *id.*, 340; 74 Ind., 447: 49 Mich., 466; 69 Me., 320; 32 Mo., 411; 3 Hun, 338; 42 Ala., 672.

3. The knowledge, or the opportunity of knowing, of the character of the frog, and the election to work with it in the condition it was constructed, bars the right of recovery, for the reason that the employee assumed the risk as one of the usual hazards of the employment. 48 Ark., 347; 14 S. W. Rep., 243; 20 Pac. Rep., 711; 39 Ark., 38; 41 *id.*, 542; 41 *id.*, 392; 30 A. & E. R. Cas., 163; 147 Mass., 603; 135 *id.*, 398; 139 *id.*, 580; 140 *id.*, 150; 71 Mo., 164; 12 A. & E. R. Cases, 210; 13 N. W. Rep., 508; 78 N. C., 300; 22 Ind., 29; 20 Mich., 105; 32 Ia., 357; 50 Mo., 302;

67 Mo., 239; 51 Ark., 476; 4 Or., 52; 13 S. W. Rep, 801.

4. The first and third instructions were erroneous. The question of infancy, minority or no experience was not involved. He knew or ought to have known the frogs were unblocked, and, being *sui juris*, knew of the danger and elected to work over these unblocked frogs, and thus took all risks and hazards of that particular employment. An employee is paid to assume all risks and hazards incident to his employment. Thompson on Neg., 1053; 16 C. B. (N. S)., 692; Wood, Master and Servant, sec., 382; 61 Iowa, 714; 21 Cent. L. J., 53; 33 Mass., 133; 3 Dill. C. C., 320; 50 Mo., 304; 29 Conn., 548; 5 A. & E. R. Cas., 489; 92 Pa. St., 280; 8 Pac. Rep., 415.

Blackwood & Williams and *Sam W. Williams* for appellee.

1. Unblocked frogs, especially those without base or floor, are dangerous. 41 Fed. Rep., 194–196; 4 S. W. Rep., 937; 7 N. E. Rep., 56; 13 S. W. Rep., 716: 14 *id.*, 654.

2. The plaintiff's instructions were taken from 48 Ark., 346; 44 *id.*, 44. The railway company owes it to its servant to provide a *safe track* and sound and sufficient cars. 44 Ark., 300; 48 *id.*, 344; 14 S. W. Rep., 90; Wood, M. & S., secs., 344, 429; Whart. on Neg., sec. 210; 39 Ark., 17; 35 *id.*, 602; Deering on Negl., sec. 198; Beach on Negl., sec. 124; 14 Fed. Rep., 280; 100 U. S., 213, 80 N. Y., 46; 49 N. Y., 60. The same vice runs through them all. They invade the province of the jury. 13 S. W. Rep., 716; *ib.*, 802.

3. The court's instructions, 1, 2 and 3, are taken literally from 48 Ark., 345, 347.

4. Contributory negligence. It is not the law that if deceased knew or might have known of the unblocked condition of the frog, and continued in the employ of the company, that alone would prevent him from recovering. 13 S. W. Rep., 716; 52 Ark., 370; 13 S. W. Rep., 803; 14 *id.*, 655; 4 S. W., 939; 48 Ark., 347. It was not negli-

gence to go in between the cars while they are moving at a slow speed. 37 Ark., 526. Very slight evidence will charge the master with notice of defective machinery, if indeed he is not compelled to know of its condition at his peril. 45 Ark., 297; 1 Greenl. Ev., secs. 78, 79.

1. Risks assumed by brakeman—Unblocked frogs.

HEMINGWAY, J. Whether the defendant would have promoted the safety of its operatives by substituting upon its road blocked for unblocked frogs, and whether its duty of reasonable care exacted this, are questions that cannot affect the result in this case. The plaintiff charges negligence in the use of unblocked frogs, not because they were badly constructed, out of repair, or exposed operatives to latent dangers, but because a different kind of frog would have been less dangerous to operatives. Unblocked frogs were in universal use on the roads in this State, including the entire road of the defendant. The injured employee knew, when he entered the defendant's service, that its frogs were unblocked; and if there was danger in their use, he knew it was an incident to the service he was entering. When a master employs a servant to do a particular work with a particular kind of implement or machine, he agrees that they are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, but does not agree that they are free from danger in their use. The servant agrees to use in the service the particular kind of implement or machine; and if under such circumstances harm comes to him, it must be ranked among the risks he assumed when he entered the service. *Lake Shore R. Co.* v. *McCormick,* 74 Ind., 447; *McGinnis* v. *Canada S. B. Co.,* 49 Mich., 466; *Sweeney* v. *B. & J. E. Co.,* 101 N. Y., 520; *Diehl* v. *Lehigh Iron Co.,* 21 Atl. Rep., 430. Such is the express holding of the courts of Massachusetts, Illinois and Kansas, in cases in which the negligence charged was in the use of unblocked frogs; *Chicago R. Co.* v. *Lonergan,* 118 Ill., 41; *Wood* v. *Locke,* 147 Mass., 604; *Rush* v. *M. P. R. Co.,* 28 A. & E. R. Cases, 484; and this court so ruled in

the case of *Davis* v. *Railway*, 53 Ark., 117; see *Grand* v. *Mich. R. Co.*, 47 N. W. Rep., 837–841.

We think confusion has sometimes crept into cases like this, from the effort to determine them by the rules of contributory negligence. We do not think they necessarily furnish the correct criterion for determination, but that the contract of employment is a necessary element of consideration. It is an elemental principle that an employee, when he enters into service, agrees to assume all risks ordinarily incident to his employment; and if he is of mature years, experienced in the business undertaken, and knows what instrumentalities are to be used by him, he contracts that he will assume the risks incident to using that class of instrumentality, as well as any other risk incident to the business; and if the master uses proper care in providing the kind contemplated, the employee cannot complain, although some other kind would have been less dangerous; his contract hushes his complaint, regardless of the employer's negligence. Such case is to be distinguished from that of the traveler upon a highway who encounters an obstruction negligently erected by another, which he reasonably believes he can pass in safety, but is injured in attempting it, as was the case in *St. Louis R. Co.* v. *Box*, 52 Ark., 368; for in the latter case the right of recovery is unfettered by the doctrine of assumed risks, and will be defeated only if the negligent act of the traveler contributed to his injury. Whether it can be distinguished from the cases in other States where an employee continued service after an instrumentality fell out of repair and thereby received injury, is a question we need not consider. See *Snow* v. *Housatonic R. Co.*, 8 Allen, 441; *Patterson* v. *Pittsburg R. Co.*, 76 Penn. St., 389; *Colorado R. Co.* v. *Ogden*, 3 Col., 500; *Lasure* v. *Graniteville Mfg. Co.*, 18 S. C., 276. As the deceased took employment contemplating the use of unblocked frogs, no instruction should have been given as to negligence predicated upon that fact, and the court erred in giving the first and third instruction on the prayer of the plaintiff.

2. Master's liability for use of defective drawhead.

Defendant insists that the court erred in giving plaintiff's fourth instruction, for the reason that there was no evidence to justify it. We think otherwise. The deceased went between two cars to uncouple them; while thus engaged, he was injured. There was evidence that he attempted to draw the coupling-pin while the cars were slowly moving, and that the pin was fast and detained him in this attempt until he reached a frog where his foot was caught and the injury done. It also tended to show that the hole in which the pin rested was too small and held the pin fast, and that this was the reason why it was not drawn before the frog was reached. If this is true, it tended to prove a discoverable structural defect in the drawhead, and was proper for the jury to consider in determining whether the injury was caused by defendant's negligent failure to furnish safe cars. If there had been no evidence except as to the depression of a drawhead, the instruction would not have been justified, for there was no proof that the defendant knew or could have known of it. It might well have occurred during that trip and existed in spite of all proper care by defendant, and, as the burden of proof was on plaintiff, it would not justify a finding of negligence. *St. Louis R. Co.* v. *Gaines*, 46 Ark., 567.

Reversed and remanded for a new trial.

HILL *v.* DRAPER.

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Decided March 28, 1891.

Partnership—Dissolution by death—Authority of survivors.

When an insolvent partnership is dissolved by death, surviving partners cannot transfer firm property in payment of individual debts; and a transferee with notice will be charged as trustee at the suit of partnership creditors.

APPEAL from *Sevier* Circuit Court, in chancery.

RUFUS D. HEARN, Judge.

Draper, McElroy & Rhyne composed the mercantile firm of Draper, McElroy & Co. After Rhyne's death, the firm being insolvent, the surviving partners conveyed the stock of goods, in satisfaction of an individual indebtedness of McElroy, to John and Kelly Cowling who had full knowledge of the firm's insolvency. Hill, Fontaine & Co., creditors of the firm, brought suit in equity to subject the property in the hands of the Cowlings to the payment of their debt against the firm, alleging the foregoing facts. The court sustained a demurrer to the complaint.

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

The partnership assets must be applied to the payment of the partnership debts, and any device by which the property of an insolvent partnership is diverted to the payment of the debts of a single partner is a fraud upon the rights of firm creditors. 1 Bates on Part., sec. 566; 21 N. Y., 587; 52 *id.*, 146; 2 Vesey, Jr., 243; 16 Fed. Rep., 317; 5 Allen, 183; 1 Fed. Rep., 273; 47 Ill., 272; 70 Iowa, 689; 17 La. An., 75; 36 *id.*, 473; 29 Md., 311; 55 Mich., 64; 56 *id.*, 8; 12 N. H., 438; 21 N. H. (1 Foster), 462; 38 *id.*, 312; 48 *id.*, 384; 6 *id.*, 276; 3 Halst. Chy., 165; 36 N. J. Eq., 572; 3 Barb. Chy., 51; 4 Barb., 571; 34 *id.*, 31; 25 How. Pr., 246; 27 *id.*, 360; 3 Rob., 691; 2 Daly, 45; *ib.*, 231; 60 Wis., 418; *ib.*, 422; 61 How. Pr., 73; 114 Pa. St., 356; 66 Mo., 554; 70 Iowa, 689; 41 Barb., 307; 82 Ala., 169; 13 S. W. Rep., 217.

Feazel & Rodgers for appellee.

The demurrer was properly sustained, because—

1st. The complaint does not negative Rhyne's assent, or the assent of the representatives of his estate, to the sale. If all the partners assented to the sale, there has been no wrong to the firm's creditors. 52 Ark., 556; 8 S. W. Rep., 564; 34 Fed. Rep., 687.

2d. The surviving insolvent partners of an insolvent firm possess the ordinary rights of the firm, and as such may

make a general assignment containing preferences. 16 N. E. Rep., 365; 17 *id.*, 734; 12 Atl. Rep., 659.

3d. While in law Draper and McElroy only were liable for Cowling's debt, in equity it was a firm debt, because it was for the purchase money of goods that went into the firm and helped to continue the firm business. 52 Ark., 556; Colly. Part., sec. 125; Story, Part., 97; 5 Metc., 562; *ib.*, 585.

4th. Partnership creditors have no lien upon firm assets. They have only equities that may be worked out through the partners themselves. Story, Part., secs. 97, 326, 360; 4 S. W. Rep., 831; 3 Head, 515; 6 Lea, 567; 99 U. S., 119; 42 Ark., 430; 106 U. S., 648.

Authority of surviving partner in payment of debts.

HEMINGWAY, J. The real question in this case is, When an insolvent partnership has been dissolved by the death of one of its members, can the surviving partners transfer the firm property in payment of their individual debts, and can a transferee who takes with notice be charged as trustee at the suit of partnership creditors? The question cannot be determined by the rule in cases cited as to the power of one partner, with the assent of his associates, to transfer joint effects in payment of individual debts; for the assent of the associates is a material element in such cases, which, on account of the death of one of them, can never enter into cases like this. The question stated must be determined from the relation which the surviving partners sustain toward the partnership property and creditors, and toward the representatives of the deceased partner.

A surviving partner is entitled to the possession and management of the firm property, but only for the purpose of settling the firm business. *Cline* v. *Wilson*, 26 Ark., 154; *Adams* v. *Ward*, *ib.*, 135; Pars. Part., 441. He holds as trustee for the representatives of the deceased partner, for the firm creditors, and for himself; and he is bound to manage the firm property with a view to the best interests of all concerned. 1 Lindley on Part., p. 342, and *n.*; Pars. on Part.,

p. 442; Story on Part., secs. 344–7. He has such powers as are reasonable and proper to enable him to execute the trust, and, like other trustees, is prohibited from dealing with the property for his personal advantage. Pars. Part., p. 442. It is strictly within the scope of his powers to apply the assets to firm debts, but wholly without such scope to apply such assets to his own debts. In the latter case he devotes them to his personal gain, which he may not do to the detriment of the trust which he is bound to execute.

Each partner, while the relation continues, has a lien on the firm property to provide for the payment of its debts, which descends upon his death to his personal representatives; and where the survivor neglects or violates his trust, such legal representatives may have the property administered in equity, and through his right, if not otherwise, the creditors of the firm are enabled to resort to a like proceeding. *Jones* v. *Fletcher*, 42 Ark., 422; *Couchman* v. *Maupin*, 78 Ky., 33; *Shanks* v. *Klein*, 104 U. S., 18; Story on Part., sec. 347.

The very question stated has been decided by other appellate courts, and the result of the adjudications is a denial of the right of the surviving partner to transfer firm property in satisfaction of his individual debts, and an affirmance of the right of firm creditors to subject the property in the hands of such transferee with notice. And this rule prevails in jurisdictions that affirm the right of a partner with the assent of his associates to apply joint property to individual debts, as well as in those that deny such right. *Scott* v. *Tupper*, 8 S. & M. (Miss.), 280; *Allen* v. *National Bank*, 6 Lea (Tenn.), 558; *Hutchinson* v. *Smith*, 7 Paige, 26; *Holland* v. *Fuller*, 13 Ind., 195; *Roach* v. *Brannon*, 57 Miss., 490.

As the surviving partner's interest in the partnership property consists only of his portion of it after all its debts are paid, one who holds under him by an unauthorized transfer, with notice, can have no greater interest. *Scott* v. *Tupper*, 8 S. & M., *supra*.

If the principles herein announced are correct, it would follow that the demurrer to the complaint should have been overruled.

The judgment will be reversed and the cause remanded, with directions to overrule the demurrer.

RAILWAY COMPANY *v.* LEAR.

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Decided April 4, 1891.

Carrier's Lien—Connecting Line—Recoupment.

A shipper of horses who is present and permits a carrier to receive his horses from a prior carrier and pay advance charges, so as to have a lien therefor on the horses, cannot recoup damages done to the horses by the prior carrier against such lien, though the connecting carrier knew of the damages, and that the shipper intended to demand compensation from the prior carrier.

APPEAL from *Ouachita* County.

CHARLES W. SMITH, Judge.

James B. Lear and another brought replevin against the St. Louis, Iron Mountain and Southern Railway Company for a carload of horses and mules.

It was proved that the plaintiffs were the owners of the horses sued for; that, on August 2, 1888, they shipped the horses from San Antonio, Texas, over the International and Great Northern Railway, via Longview Junction and Texarkana, to Camden, Arkansas; and that said carloads were billed through to that point; that at Longview Junction the International and Great Northern Railway Company delivered the said stock to the Texas and Pacific Railway Company, which, in turn, delivered the same at Texarkana to the defendant railway company, which transported them to Camden, Arkansas, the place of final destination. There was testimony tending to prove that, prior to the delivery of the stock to the defendant at Texarkana, two of the horses, of the value together of $90, had been

killed through the negligence of the International and Great Northern Railway Company, and others had been damaged in the sum of $25, and that the plaintiffs notified the agent of the defendant at Texarkana of this fact, and that they intended to claim damages therefor. It was further proved that, after such notice, the defendant paid to the Texas and Pacific Railway Company the proportion of the freight and charges due it and the International and Great Northern Railway Company by the way-bill, and also the feed charges paid by said companies; that the proportion of the freight due the defendant for transporting said horses from Texarkana to Camden was $35.21; that said stock suffered no injury while in possession of the defendant; that, on the arrival of the horses at Camden, plaintiffs tendered to the defendant the sum of $85.80, claiming a right to recoup the $115 damages suffered by the loss of the two horses and the injury to others against the freight charges of the International and Great Northern Railway Company, and the Texas and Pacific Railway Company; that the defendant refused to surrender the possession without first being paid the total freight and charges, $178.60, and the feed charges paid by it, $22.

The court refused to charge the jury, at defendant's request, as follows:

"3. A common carrier receiving goods in the ordinary course of business, and in the proper line of transit from a connecting carrier, has a lien on the goods for the freight and charges of such connecting carrier, although the goods may have suffered damages before they reached him, while in the hands of such connecting carrier.

"4. When a party ships goods over a line of transit which requires its transportation over the lines of two or more connecting carriers, and does not prepay the freight thereon, but leaves it to be collected by the carrier who transports the goods to the point of final destination, he is presumed to know the rules, regulations and customs among the several carriers as to the responsibility of the last car-

rier to preceding carriers for their proportion of the freight earned by the carriage over their several lines, and should damage occur to the goods while in transit over the roads of the preceding carriers, it would not be just, nor is it allowable in law, to offset such damage against the freight and charges either paid or assumed by the last carrier. The remedy of such shipper is against the carrier doing the damage."

From a judgment in plaintiffs' favor defendant has appealed.

Dodge & Johnson for appellants.

Where goods are carried by successive connecting carriers, the last carrier has a lien on them for his freight and for charges paid prior carriers, and the consignee cannot set off against the lien the damage done to goods by the prior carrier. 13 R. I., 572; 16 Ill., 411; 11 Allen, 295; 99 Mass., 220; 32 Pa. St., 270; 4 Greene, Ia., 516; 3 Blatchf., 279; 104 U. S., 146; 107 *id.*, 102; 21 Fed. Rep., 30; 31 *id.*, 248; 131 Mass., 455; 13 B. Mon., 239; Waterman on Set-off, secs. 279–301; Schouler, Bailment, 543–4; 8 Gray, 262; 6 Allen, 246; 6 Humph., 70; 25 Wis., 241, 248, 255; 1 Hilton, 499.

The railroad could not refuse to receive the stock. 12 S. W. Rep., 530, 637. See also Hutchinson on Car., sec. 108; 48 N. Y., 507; 98 Mass., 240; Hutch. on Car., sec. 478; 27 Mo., 17; 18 Ill., 488; 25 Mo., 79. The railroad was not liable for damages to the stock before it reached its hands. 42 Ark., 471–2.

Thornton & Smead for appellees.

The only question raised by the transcript and appellant's brief is, Has a common carrier a lien upon goods received by it, from a connecting carrier who has given through bill of lading and made through freight, for freight charges paid to such connecting carrier, notwithstanding the goods may have been damaged before reaching him while in the hands of such connecting carrier, and his attention was called to the injury before he advanced, or in any wise became liable for,

such freight and charges, and he was notified that damages would be claimed therefor; and can such damages be set up by way of defense to an action for such back charges?

We concede that where goods are carried by successive connecting carriers, the last carrier has ordinarily a lien for his freight, and that this lien extends to and embraces advances, made in good faith and without notice of damage, to the preceding carrier for their freight, but we contend that this lien only extends to legal charges or such as could have been enforced by law. In other words, that a carrier's lien on goods transported is only co-extensive with his right to claim and recover freight, and that if the International and Great Northern Railway Company and the Texas and Pacific Railway Company, by reason of damage to the stock caused by their negligence, had no legal right to freight, then they had no lien; and, having none themselves, they could not give any to appellants. 6 Whart., 435; 13 Allen, 381; 15 Gray, 223; 42 Vt., 441; 1 Watts, 39; 5 *id.*, 446; 1 Scam., 462; 37 Fed. Rep., 533; 1 Woods, 186; 31 Cal., 53; 36 Ind., 425; 1 Daly, 308; 4 Ind., 358; 1 Lans., 130; 24 N. Y., 278; 40 Ind., 172; 45 Ind., 189; 29 Barb., 56; 4 Seld., 37; 6 Gray, 539; 23 Am. & Eng. R. R. Cases, 732; 9 *id.*, 395; 9 Am. Law Reg., N. S., 539; 93 U. S., 872; 13 Fed. Rep., 37; Lawson on Cont. of Car., secs. 235, 243.

Recoupment against carrier's lien.

HEMINGWAY, J. Each of several lines of connecting carriers, engaging in the transportation of property under a bill of lading for a continuous carriage, may ordinarily pay the charges of previous carriers, and have a lien on the property for the amount advanced, as well as for its own charges. This rule is a part of the commercial law of the land, and, as it is said, of the world, springing from commercial convenience and necessity. It is to the special advantage of the shipper, as well as of the public; for it facilitates rapid transit without breaking bulk, and tends to lower rates. Each carrier is entitled to hold the property until its proper charges are paid, and, but for the rule above

stated, the shipper would be required to arrange in some way for the payment thereof at each point on the route where carriers changed. Convenience and necessity therefore authorize successive carriers to receive property billed, and to advance previous charges and assert a claim for the amount advanced. But as the authority is raised by implication, it will not be presumed where its exercise would apparently prejudice the rights or interests of the shipper. The subsequent carrier should act with a just and proper regard for the owner's interests, and should decline to take the property or advance the charges whenever it has been so damaged in the course of its transit, that it would appear to be against the owner's interest to accumulate charges by further carriage. But as the prior carrier will not deliver the property without payment of its charges, or, what is the same thing, an agreement by the succeeding carrier to pay them, such succeeding carrier cannot be expected or asked to receive it, except in cases where it is authorized to pay the charges. It could not be asked to assume the burden of another's controversy; and if such conditions were imposed, each line would make its own contracts, and thus interrupt the course of transit, to the expense, annoyance and inconvenience of shippers and the public. But the law does not exact this, and is satisfied when the carrier exercises reasonable care and a just regard for the interests of the shipper. *Bissel* v. *Price*, 16 Ill., 408; *Guesnard* v. *L. & N. R. Co.*, 76 Ala., 453; *Bowman* v. *Hilton*, 11 Oh., 304; Jones on Liens, sec. 289.

In this case, the defendant might have declined to receive the horses under the original bill of lading, or, if consistent with its duty to the shipper, might have received them under it and advanced previous charges. Before receiving them and advancing charges, it would ordinarily have been its duty to use due care to ascertain whether such course was to the owner's interest; but in this case the shipper was present, and knew that the horses were tendered to defendant, and did not object to its receiving them. If it was

prejudicial to his interests, good faith required him to declare it; not having done so but having permitted the defendant to receive them, he should not be permitted to recoup damages done by a previous carrier against defendant's claim for freight and charges. The fact that two horses had been killed and that he intended to demand compensation from a prior carrier, was not inconsistent with the belief that it was to his interest to have the other horses carried quickly to the point of consignment. That was all the defendant knew or was told, and that does not show any bad faith as against it, or justify a reduction of its claim. *Knight* v. *Prov., etc., R. Co.*, 13 R. I., 572.

The court's refusal of the defendant's third and fourth prayers for instructions is sustained by decisions of eminent judges, but they are placed on the same ground—that the last carrier is liable for damage done by any previous carrier, a rule condemned by this court and by the courts of most of the States. *Hot Springs R. Co.* v. *Trippe*, 42 Ark., 471. As there was no evidence of defendent's bad faith in receiving the horses and paying previous charges, the instructions refused should have been given. For the error in their refusal, the judgment must be reversed, and the cause remanded.

SIMPSON *v.* GRAYSON.

Decided April 11, 1891.

1. *Seduction—Action for damages.*

   A father may sue for the seduction of his minor daughter, though he has allowed her to receive her earnings in the service of another of whose household she is a member, if he has not relinquished, past the power of recall, his right to control her services.

2. *Damages—Previous unchastity.*

   The damages which the father is entitled to recover are intended as compensation to him (1) as master for the loss of his daughter's services and for her lying-in expenses, and (2) as parent for the pain and disgrace which follow the wrong. Proof of her previous unchastity is admissible

to mitigate the recovery of the second class of damages; but if she was notoriously unchaste, and had so disgraced her family that defendant's conduct added nothing to her parent's suffering or to the danger of corrupting the family's morals, no damage can be awarded beyond what is suffered by the master as distinguished from the parent.

APPEAL from *Clay* Circuit Court.

J. E. RIDDICK, Judge.

The complaint alleges that, on December 10, 1888, appellant seduced appellee's daughter, from which she became pregnant, causing loss of her services to appellee. The answer denied each allegation of the complaint.

The daughter testified that she was living at appellant's house upon terms of intimacy with his family, though she worked for his wife; that she was under 18 years of age; that appellant paid her wages, but that her father did not receive any part of them; that appellant made frequent advances toward her, which she repelled; that he kept on until she consented, and he had sexual intercourse with her; that she never had intercourse with any other man. On this last point the testimony conflicted. Appellee testified that his daughter, while in appellant's employment, was subject to his right of recall, and that he had not emancipated her; that after returning from defendant's employment she was delivered of the child; that his actual expenditures on account of her confinement were $30, and the loss of services about $50; that, on account of this trouble and his daughter's condition, he suffered a great deal in mind.

There was a jury trial, and a judgment for the plaintiff in the sum of $750.

F. G. Taylor and *W. S. McCain* for appellant.

1. An unchaste woman cannot be the subject of seduction. While the father might recover actual damages if the daughter is unchaste, he cannot recover for wounded feelings. 21 Pac. Rep., 129; 22 Wis., 424; 40 Ark., 486; 2 Caines' Cases, 292; 24 Ark., 68.

2. If the daughter was in the service of another, the relation of master no longer exists, and the father cannot re-

cover. Cooley on Torts, 272; Hastings on Torts, 159; 59 Eng. Com. Law; 6 M. & W., 55.

G. B. Oliver for appellee.

The American authorities, almost without exception, sustain the instruction (No. 2) given by the court. 24 Ark., pp., 65–6–7; 2 Gr. Ev., sec. 572, and note A, p. 576; Suth. on Dam., vol. 3, p. 737; Moak's Underhill on Torts, p. 342; Bishop, Non-Cont. Law, sec. 380; Bliss, Code Pl., sec. 28; 32 F., 66.

2. Evidence of bad character only goes *in mitigation* of damages. 6 Rob. (N. Y.), 138; 17 Iowa, 30; 7 Car. & P., 308; 13 Ind., 46; 2 Gr. Ev., sec. 577; Moak's Underhill on Torts, pp. 87, 348; 3 Suth. on Dam., p. 743, n. 6; 24 Ark., 65.

1. What proof of service sufficient in action for seduction.

COCKRILL, C. J. The common law regarded the father's action for the seduction of his daughter as an action of trespass for assaulting his servant, whereby he lost her services. It was based upon the relation of master and servant, and not upon that of parent and child; and the measure of damages was such only as a master would recover for a disabling physical injury to his servant. The extent of the recovery has been enlarged by the courts, from the necessity of the case rather than from the principles which govern the action (see remarks of Lord Ellenborough in *Irwin* v. *Dearman*, 11 East, 27), until compensation is awarded to the parent as such for the shame and mortification which the wrong brings upon him and his family. No action could be maintained by the father for the injury in his parental capacity; but, in the struggle between substantial justice to the parent and the precedents in actions for seduction, the courts in England and America have clung to the latter and striven to attain the former, until the anomaly has been produced of requiring the action to be prosecuted by the father for an injury inflicted upon him in his relation of master, and permitting a recovery in his relation of parent. The theory of an injury to the master is pertinaciously retained as the essential basis of the father's action, but it is now little

more than a legal fiction, used as a peg to hang a substantial award of damages upon as compensation, not to the master, but to the head of the family.

It is a logical sequence from that state of the law that proof of the mere nominal relation of master and servant should be sufficient to give the parent a footing in court to recover damages commensurate with his injury. It is accordingly established, in this country at least, that the father may maintain his action for the seduction of his minor daughter, although she is not a member of his household, but is in the actual employment of another, enjoying the fruits of her labor with her father's consent, if he has not relinquished, past the power of recall, his right to control her services. *Patterson* v. *Thompson*, 24 Ark., 55; *Kennedy* v. *Shea*, 110 Mass., 147; note to *Weaver* v. *Bachert*, 44 Am. Dec., 166; Bishop, Non-Contract Law, sec. 380.

The plaintiff in this case brought himself within the rule above stated, and was entitled to maintain his action.

2. Damages—Previous unchastity.

There was proof in the case tending to show that the debauched daughter had had illicit intercourse with other men prior to her intercourse with the defendant. It is argued that the court should have instructed the jury that if they found that to be true, they could return damages only for the loss of services and lying-in expenses. That brings us to the other feature of the case already adverted to.

As the injury which the father, as distinguished from the master, sustained by the seduction of his daughter depends, as Addison expresses it, "upon the value of her previous character" (2 Addison on Torts, *p. 89), it is competent for the defendant to show that she did not have a good character for chastity before his intercourse with her. Such proof diminishes the father's right of recovery, for the damages should be commensurate with the pain and disgrace which follow the wrong, and must vary according as the daughter has been unblemished or profligate. 1 Taylor, Evidence, section 356. If it is proved that she was notoriously unchaste prior to the defendant's intercourse with her, and had

thereby disgraced her family to such extent that the defendant's conduct added nothing to her parent's suffering or to the danger of corrupting the family's morals, no damages could be awarded beyond what is suffered by the master, as distinguished from the parent. 2 Hilliard on Torts (3d ed.), p. 518. If the proof falls short of that mark, evidence of previous incontinence only mitigates the damages, for to whatever extent the defendant's act, when it can be made the foundation of a suit, has contributed to the girl's downward tendency, to that extent he has injured the parent, and must respond to him in damages. 2 Greenl. Ev., sec. 577; 1 Taylor, Ev., sec. 356; 2 Addison on Torts, 589; Moak's Underhill on Torts, 348; *Stoudt* v. *Shepherd*, 73 Mich., 588, 598. The action is in this respect like that of criminal conversation by the husband, in regard to which it has been ruled that proof that the wife had formerly been unchaste and sought illicit intercourse with the defendant did not excuse his adultery with her, but mitigated the husband's damages. *Ferguson* v. *Smethers*, 70 Ind., 519.

It has been held that when carnal intercourse with a girl takes place without seduction—that is, without the aid of flattery and artifice, no recovery can be had by the father beyond the loss of service and incidental expenses. *Hill* v. *Wilson*, 8 Blackf. (Ind.), 123; *Comer* v. *Taylor*, 82 Mo., 346.

As the girl's willing assent in the absence of the seducer's arts is only evidence at most of a want of chastity, it would follow that direct proof of unchastity should have the same effect upon the father's recovery. But, as we may have seen, such proof goes only to mitigate the damages. The cases holding that criminal connection without seduction cannot be the basis of the father's action appear to be based upon a false analogy. They seem to confound the statutory right conferred in some of the States upon the female for the redress of her own grievance against her seducer with the father's common law action for the injury which he sustains. In the statutory suit by the girl, as in the criminal prosecution for the offense, there must be proof of seduction in its tech-

nical signification. *Polk* v. *State*, 40 Ark., 482. But the father's action is independent of the daughter's, and is based upon a different injury. When the ignominy which is heaped upon him is the measure of damages, the daughter's willingness does not excuse the defendant, for without his act the father had not been injured. It is not a case for the application of the maxim, *Volenti non fit injuria*, unless the father himself is at fault, as by connivance at the act.

It follows that the court did not err in rejecting the appellant's prayers for instructions. The charge of the court indicates a clear conception of the law applicable to the case when read in the light of the testimony. None of the assignments of error was prejudicial to the appellant. The judgment should therefore be affirmed.

RUCKS *v.* RENFROW.

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Decided April 11, 1891.

1. *County seat election—Parties—Appeal.*
   In a county seat contest the voters have a right to become parties and appeal from the judgment of the county court in favor of one of two competing places.

2. *Election—Evidence—Declaration of voters.*
   The declarations of voters, made after or before an election, are incompetent to show their want of qualification to vote.

3. *When illegal votes do not affect result.*
   The reception of illegal votes will not change the result of the election, unless it is shown for what place they voted.

APPEAL from *Cleveland* Circuit Court.
CARROLL D. WOOD, Judge.

U. M. & G. B. Rose and *D. H. Rousseau* for appellants.

1. The declarations of voters made after and before the election as to their qualifications were competent evidence. Story, Eq. Pl, sec. 97; Pom. Eq. Jur., sec. 260; Gr. Ev., sec. 180; 27 N. Y., 59; 23 Wis., 319; 9 Ind., 477.

2. The offer to build a school, if proved, would be unobjectionable. 49 Ark., 227.

3. The court did not err in allowing testimony as to illegal votes not specified in the notice. Payne on Elections, sec. 827; McCrary on Elections, sec. 394; Mansf. Dig., secs. 2720, 2722.

4. The identity of name raises a presumption of identity. When it is shown that a man has voted, and the man of that name in that township is disqualified, then the burden is on the other side to repel the presumption of identity. 1 Bar. & Ald., 182; 9 M. & W., 798; *ib.*, 47; 46 Mich., 320; 32 *id.*, 48; 46 Cal., 49; 8 Ala., 746; 33 Ill., 339; 61 Mo., 276; 18 *id.*, 274; 17 Mo., 435; 29 Vt., 179; 5 Watts, 14; 57 Penn. St., 397; 3 A. K. Marsh., 202.

Met L. Jones for appellees.

1. The constitution and laws of this State make no provision for the contest of a county seat election, and appellants had no *authority* to bring this suit. Mansf. Dig., secs. 2720, 2722.

2. Proof of the declarations of voters as to how they voted is hearsay and incompetent. 41 Ark., 112; 9 Kans., 581; 76 Ill., 46; 81 Ill., 549; 1 Gr. Ev., 124, s; 79 Ind., 282; McCrary on El., secs. 272–3; 12 S. W. Rep., 960, 970.

3. The offer to build a colored school was in the nature of a bribe. It rendered the election unfair and unequal. 41 Ark., 63.

HUGHES, J. This is an appeal from a judgment of the circuit court of Cleveland county that, at an election held on the 17th day of August, 1889, to determine whether the county seat of that county should be located at the town of Rison or the town of Kingsland in said county, Rison had received a majority of the legal votes cast at said election, and that the county seat be removed to said town of Rison from the former county seat location at Toledo, and that Rison should thereafter be the county seat of said county. The case was brought to the circuit court on appeal from

the judgment of the county court, in which court, upon the canvass of votes cast at the election by the clerk of the county courts and the filing of his certificate in said court showing that Rison had received 1009 votes and Kingsland 1002 votes, the appellants and others gave notice that they would contest the election, and afterwards filed a written notice of contest setting out the ground upon which they relied, upon which the county court made orders for the taking of depositions, and set the cause for hearing. This was before the court had proceeded to judgment, and thus appellants became parties to the record, and made the appellees parties, the former representing Kingsland and the latter Rison. The judgment of the county court was for Kingsland, from which appellees have appealed to the circuit court, where a trial *de novo* was had, resulting in a judgment for Rison from which this appeal was taken.

1. Parties to contest of county seat election.

It will be observed that there was no independent suit to contest the election, after the judgment of the county court was rendered, but that appellants made themselves parties in the interest of Kingsland and made the appellees parties in the interest of Rison, pending the determination of the election by the county court, and before any judgment had been rendered. They had a right to become parties, and appeal from the judgment of the county court, though no provision has been made by statute for an appeal in such a case. *McCullough* v. *Blackwell*, 51 Ark., 159, and authorities cited.

2. Declaration of voters as evidence.

It is contended and shown by evidence that many illegal votes were cast at the election, some by minors, some by persons convicted of infamous crimes, and some by non-residents of the county, and some by persons who had not resided long enough in the county and townships in which they voted, to become legal voters. The circuit court refused the following declaration of law asked for by appellants, and gave the converse asked for by the appellees: "The declarations of voters made after or before the election showing their want of qualifications to vote, so far as

age and residence are concerned, are competent and legal testimony to show that such voters did not possess such qualifications." Exceptions were saved, and it is insisted here that this is the law.

The adjudicated cases on this question are not numerous, and are divided. The principal cases that hold such declarations admissible are, *People* v. *Pease*, 27 N. Y., 59; *State* v. *Olin*, 23 Wis., 319; *People* v. *Cicott*, 16 Mich., 283. Among those which hold such evidence inadmissible, are *Gilleland* v. *Schuyler*, 9 Kansas, 582, by Judge Brewer; *Davis* v. *State*, 12 S. W., 960 (Tex.); *Beardstown* v. *Virginia*, 81 Ill., 542, where it is held that: "The declarations of a person made sometime after having voted at an election, admitting or stating facts showing he was not a legal voter, are inadmissible to show his disqualification to vote." The declarations of a voter as to his qualifications may be so contemporaneous with his voting as to be part of the *res gestæ*, and as such competent evidence. *Patton* v. *Coates*, 41 Ark., 117. Judge McCrary, in his work on Elections, sec. 448, says: "The English authorities, though not entirely uniform, are generally in favor of admitting such declarations, and perhaps the weight of authority in this country is the same way, though it cannot be denied that the tendency in the more recent, and we think also the better considered cases, is to exclude this evidence as hearsay." The case of *People* v. *Pease*, 29 N. Y., *supra*, was decided by five judges against three dissenting. The case of *People* v. *Cicott*, in 16 Mich., *supra*, was decided by an equal division of the judges. Judge Cooley says: "If votes were taken *viva voce*, so that it could always be determined with absolute certainty how every person had voted, the objection to this species of scrutiny after an election had been held would not be very formidable. But when secret balloting is the policy of the law, and no one is at liberty to inquire how any elector has voted, except as he may voluntarily have waived his privilege, and when consequently the avenues to correct information concerning the votes cast are carefully

guarded against judicial exploration, it seems exceedingly dangerous to permit any question to be raised upon this subject." Cooley's Constitutional Limitations (6th ed.), p. 789.

Such declarations of a voter are not admissible on the ground that they are in derogation of an existing right of the voter, and against his interest. They are hearsay, and their admission would violate a sound rule of law and also a sound public policy. There was no error in the circuit court's declaration of the law in this behalf.

3 Effect of illegal votes.

We have reached a conclusion in the case which makes it unnecessary to discuss or to determine the other questions of law raised upon the trial and presented here by the bill of exceptions. Of the persons under age who are said to have voted for Rison, we find that there are nine as to whom the evidence does not show for what place they voted. It is charged that five convicts whose names are given voted for Rison, and that six persons whose names are given voted for Rison out of their townships. Again, it is contended that two persons who had not been in the State, and ten who had not been in the township in which they voted, long enough to become qualified electors, voted for Rison, but the evidence fails to show how any of these persons voted. It is insisted that a number of persons, who had not been residents of the county long enough to become qualified voters, voted for Rison, and yet no evidence appears showing for what place nine of these voted. The disqualification as voters of nine of the minors included in the above was shown only by their admissions made after the election. Unqualified persons voting at the election could not change the result unless it were shown for what place they voted. *People* v. *Cicott*, 16 Mich., 283.

Of the minors who are said to have voted for Kingsland, we find no evidence showing for what place four of them voted. Of those who are said to have voted in the wrong township for Kingsland, there is one as to whom there is no evidence how he voted. All of the above have been ex-

cluded in the estimate we make of the vote, under the rule laid down above. We have estimated that the following illegal votes were cast for Rison at the election: Two by persons under 21 years of age, nine by persons voting in the wrong townships, three by persons not long enough in the State, three by persons who were non-residents of the county—in all, seventeen. And that the following illegal votes were cast at the election for Kingsland: Four by persons under age, ten by persons voting in the wrong townships, three by persons convicted of infamous crimes, four by persons who did not reside in the county, eight by persons who had not resided in the county long enough to become qualified voters—total twenty-nine. Deducting from the 1009 votes returned for Rison 17 illegal votes cast for Rison, we have 992 legal votes for Rison. Deducting from the 1002 votes returned for Kingsland the 29 illegal votes cast for Kingsland, we have 973 legal votes for Kingsland. It thus appears that there was a majority of nineteen legal votes for Rison. In this estimate two votes are counted about whose identity there might have been some contest, but the exclusion of these could not change the result.

In the view we have taken of the case, it is unnecessary to consider the exclusion of certain depositions offered at the trial in behalf of Rison, or to consider the offer by citizens of Kingsland, made before the election, to pay $675 for the purpose of building a high school for colored people at Kingsland, if the county seat should be located at Kingsland.

The judgment of the circuit court is affirmed.

PAYNE *v.* PAYNE.

Decided April 18, 1891.

Will—Execution—Witnesses.

A will is duly executed where it was subscribed in the presence of one attesting witness, and then taken by the testator to a justice of the peace to whom he pointed out his signature, declared the writing to be his will, and procured the justice to sign and certify the will in his official capacity. The certificate, though superfluous, does not vitiate the attestation by the justice.

APPEAL from *White* Circuit Court.

M. T. SANDERS, Judge.

W. R. Coody for appellant.

1. The testimony is sufficient to show that T. L. Payne used unfair, improper and undue influence with the testator to induce him to make a will in the interest of himself.

2. The will was not properly executed. Mansf. Dig., sec. 6492; 10 Paige, 85; 43 Am. Dec., 644; 37 *id.*, 251; 36 N. Y.; 18 N. E. Rep., 433.

House & Cantrell for appellee.

1. There is no testimony to warrant a conclusion or even an inference that there was any undue influence exerted by Thomas L. Payne or any one else. But this question was submitted to a jury, and they have found against that contention. The instructions on this point are the law. 49 Ark., 371; 13 *id.*, 475; 19 *id.*, 551.

2. The testimony shows a substantial compliance with the statute with regard to the execution and attestation of the will. Mansf. Dig., sec. 6492; 13 Ark., 475; 17 *id.*, 292. No form of words is necessary; a substantial compliance is enough. 26 Wend., 332; 36 N. Y., 416; *ib.*, 486; 27 *id.*, 9, 29–30; 25 *id*, 425, and note; 23 *id.*, 9–16; 52 *id.*, 1; 110 *id.*, 278; 2 Barb. Eq. (N. Y.), 40; 6 Ohio St., 307; 33 *id.*, 598; 1 Metc., 349; 9 Jacob's Fisher's Dig., 13674; 3 Curtis, 151, 547; 1 Vesey, Jr., 11; 9 P. D., 149; 13 P. D., 102; 2 L. R. P., 1; 9 Jacob's Fish. Dig., 13686; 44 L. J. P., 6;

2 L. R. P., 300; 33 Miss., 624. Beam by signing the certificate became an attesting witness. 39 Miss., 220; 17 Ark., 292; 23 N. Y., 9; 51 Ark., 48.

HEMINGWAY, J. The appellant contested the probating of the bill of his father, and from a judgment admitting it to probate prosecutes this appeal.

The first ground of his contest was that the will was obtained by the undue and improper influence of one of the devisees. The court submitted to the jury the issues arising upon this ground, upon a charge which seems to present a fair enunciation of the law. The learned counsel for the appellant directs our attention to no error of the court in its charge in this respect, either in giving or refusing prayers for instructions. The facts are resolved, by the verdict, against the appellant, and we can not say as matter of law that they lead to a different conclusion.

Execution of wills.

The other ground of the contest was that the will was not published and attested as the statute directs. It provides that every will shall be executed and attested in the following manner: "*First.* It must be subscribed by the testator at the end of the will, or by some person for him, at his request. *Second.* Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses. *Third.* The testator at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his will and testament. *Fourth.* There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator." Mansf. Dig., sec. 6492. It is conceded that the testator subscribed the will in person, and this meets the first requirement. It is further conceded that he subscribed it in the presence of the witness Conner, declared that it was his will, and requested Conner to sign it as a witness. But it was not signed in the presence of any other witness, and it is urged by the appellant that the re-

quirements of the law as to acknowledging the subscription were not observed as to the witness Fisher; that Beam was not asked to sign the will as a witness, but to certify it as a justice of the peace, and that there was but one lawful witness to the will.

The testator handed the will to Fisher, told him that it was his will and asked him to sign it as a witness. It was so folded that Fisher could not see his signature, and he made no acknowledgment that he had subscribed it, unless one may be implied from the statement that it was his will. The court in effect charged the jury that such was the legal implication. This, it is contended, ignores and nullifies the requirement that the testator shall acknowledge that he has made the subscription. Be that as it may, we do not think the court's charge could have prejudiced the appellant. It is an undisputed fact that the testator took the will to Beam, pointed to the signature, said it was his, declared the writing to be his will, and asked Beam to put his certificate as a justice of the peace to it. Beam was a justice of the peace, and signed and certified the will in his official character; but the form in which he attested it is immaterial. The question is, Did the testator acknowledge the signature, declare the writing to be his will, and request Beam to sign it as a witness to those facts; and if so, did Beam sign it in evidence thereof? The evidence shows, as applying to this question, a literal compliance with the law in every respect, except that the testator asked Beam to put his official certificate to the will, instead of formally asking him to sign it as a witness. Was this substantially a request of Beam to sign the will as a witness? He could not make the certificate to the will without signing it, and, in response to the request to make a certificate, did sign it in the presence of the testator. The only object the testator could have had in acknowledging his signature, declaring his will and asking a certificate, was to get Beam as a witness to those facts. They may have ascribed to the certificate of a justice an evidentiary force and dignity not accorded it by the law,

but this mistake cannot impair the force which the law accords to attesting signatures, without regard to the station of the signer. The testator, in asking for Beam's certificate, sought to make him a witness to the facts he had acknowledged and declared, and perhaps believed that the official form of attestation would import such indisputable verity as would dispense with further testimony from the witness. While this effect can not be accorded to it, we can see no reason in law or justice why the effect of an ordinary attestation should be denied to it. Whether testifying through his certificate or as a witness in a probate proceeding, Beam was asked to bear witness to the fact that the writing had been subscribed by, and was the will of, the testator. That is the ordinary office of a witness, and as such Beam signed the will.

Upon a state of case much similar to this the Supreme Court of Mississippi ruled that a justice of the peace should be considered as a witness to a will. *Murray* v. *Murphy*, 39 Miss., 219. As the facts relating to Beam's signature are undisputed, the verdict of the jury could not have been different, under any proper instructions. If there was error, it was not prejudicial, and the judgment must be affirmed.

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KING *v.* RUBLE.

Decided April 18, 1891.

Assignment for creditors—Reservation of exemptions.

The reservation by an insolvent assignor, from the proceeds of personal property assigned, of a sum of money equal to his exemptions is an unlawful benefit to the assignor at the expense of his creditors, and renders the deed of assignment void.

APPEAL from *Boone* Circuit Court.

RICHARD H. POWELL, Judge.

Attachment to test the validity of an assignment for the benefit of creditors. The court held the assignment void.

The assignee appeals. The opinion states the facts necessary to its understanding.

Crump & Watkins for appellant.

The reservation of the exemptions allowed by law in the manner in which they are claimed does not render the deed void. The debtor reserves nothing that the creditors could reach, or were interested in. 31 Ark., 554; Warvelle on Vendors, p. 621, sec. 17. The assignor has the right to assign all his property and demand his exemptions in money from the assignee. Thomps. on H. & Ex., sec. 436; Burrill on Ass. (4th ed.), sec. 96, and notes; 15 Mo., 544; 26 Penn. St, 473; 49 *id.*, 465; 76 *id.*, 279; 16 N. Y., 562; 22 Tex., 708; 18 Ind., 507; 63 Ia., 25; 12 Mich., 180; 17 *id.*, 38; 41 *id.*, 632; 2 Heisk. (Tenn.), 404; 35 Ga., 180.

W. F. Pace and *Sanders & Hill* for appellee.

A deed of assignment, deed or mortgage, which conveys *all* the property of the assignor to the assignee, and then reserves "the exemptions allowed by law," without specifying the property claimed as exempt, is, under the laws of Arkansas, void. 41 Ark., 70; 4 N. W. Rep., 481; 41 Ark., 495; 44 Barb., 263; 25 Conn., 311.

The cases in Michigan, Indiana and Pennsylvania, cited by appellant, are upon local statutes, differing from ours in terms and intent, and are not decisive authority. 52 Ark., 41. In those States the statute exempts the property itself. Burrill on Ass. (5th ed.), sec. 96. In Arkansas the debtor has only a *right* to claim property as exempt, which must be exercised in the manner pointed out by law. Const., art. 9, sec. 2; Mansf. Dig., sec. 3006; 47 Ark., 400; 49 *id.*, 116; 13 S. W. Rep., 729; 52 Ark., 547.

HEMINGWAY, J. The claim of the interpleader was founded upon an assignment. On the trial of his interplea he offered the assignment in evidence, and the court excluded it for fraud upon its face. This ruling is the only matter presented for our consideration.

The interpleader contends that the ruling was erroneous, while the appellee contends that it may be justified upon either of four grounds. The contention of the appellee opens a wider field than we have thought it necessary to examine; for, in the view that we have taken as to one ground of the contention, but one conclusion could be reached as to the disposition of the appeal.

The deed, by the express terms of its granting clause, transfers all the grantor's property, of every character and description, except his homestead. It contains a *habendum* clause in the form that is usual in such instruments, immediately following which directions to the assignee are set out. The first direction is as follows: "That the assignee dispose of the property in the manner provided by law for the disposition of such trust property; that he pay me a sum which, in addition to my wearing apparel and those of my family and such other property as I may select at its appraised value, will make me, the said Thomas A. Coulter, the amount of $500, which I hereby claim and reserve as the amount allowed me by law as exempt from sale."

Reservation of exemptions in assignment.

The form, as well as the substance, of the above direction shows that it was not intended to curtail the grant or to exclude from the transfer such property as the assignee was entitled to claim under the exemption laws; but it leaves the scope of the granting clause unimpaired, and directs the assignee to pay to the assignor out of any money realized from the property assigned a sum equal to the amount of his authorized exemptions. Its effect upon the assignment therefore presents a question essentially different from that presented in the many cases cited, in which it was held that the title to the exempt property never passed from the assignor. The question in this case is one which has been seldom, if ever, presented or considered upon a similar state of fact in reported decisions. Mr. Burrill seems to think that an assignor may well except from the grant of his assignment his authorized exemptions, by terms of general description, but that if he includes them in the grant and

transfers title to the assignee, he cannot reserve to himself a benefit by way of compensation out of the assigned property. Burrill on Assignments, sec. 202. And this distinction is made under the general rule that an insolvent debtor can make no assignment of his property in trust for himself to the injury of his creditors. It is contended that the provision under consideration does not come within this rule, because it does no injury to creditors, taking from them nothing to which they were entitled. If the assignor had not assigned all his property, but had excepted from the grant personal property of the value of $500 and no more, the contention would carry much force. But while the debtor is entitled to hold, as against his ordinary creditors, personal property of the full present value of $500, they are equally entitled to subject to their claims all that he has, on the day of the assignment, in excess thereof. So a provision which only denied to the creditors satisfaction of their claims out of the authorized exemptions, would not injure them, but one which charged the residue with any burden for the benefit of the assignor would injure them. In this case the assignor transferred all his property—made up principally of merchandise and choses in action—to the assignee, whose duty it became to take charge of the property in possession and sell it at public auction upon thirty days' notice, and to reduce the choses in action to possession. The reservation provided that out of the proceeds the assignor should be paid, in preference to every one else, a sum equal to all the personalty he was authorized to claim. Does that imply a benefit to the injury of creditors?

That a forced sale of property at public auction would result in its partial sacrifice is so probable that it might well be anticipated as certain. If this be true, the assignor imposed upon his creditors the duty of making good to him out of the property legally subject to their claims the difference between the value of the exempt property at the date of the assignment and the price for which it should sell; that is, if the full amount of property which the assignor

might have claimed as exempt on the day of the assignment should sell for only four hundred dollars, the reservation provides that the further sum of one hundred dollars should be paid the assignor out of the property which he could not have claimed. In order to reduce the choses to possession, and to sell the property in possession, the assignee was authorized to employ necessary agents, custodians or attorneys, or to incur expense in litigation. As all the property passed to the assignee, such expense would be incurred with respect to the authorized exemptions, but the assignor bears no part of it, casting its entire burden upon the creditors. Moreover, the compensation of the assignee may be, and usually is, fixed according to the value of the property assigned; so, if the assignor assign his authorized exemptions, and reserve, by way of compensation therefor, the payment to him of their full value, he increases the commissions of the assignee and charges the payment of such increase upon the property to which the creditors are entitled. For example, the entire property, including exemptions, is worth one thousand dollars; if the exemptions had been excepted, the creditors would have received five hundred dollars, less the commissions and costs for administering that sum, but as the exemptions were included, the creditors receive five hundred dollars, less the commissions and costs for administering the entire property. Besides, while the assignor was entitled to hold, as against his creditors, personalty of the full value of five hundred dollars, he was not entitled to exact indemnity from the residue against loss, in respect of the exemptions, occasioned by its injury, waste, or declining value, pending its conversion into money. Such indemnity is secured by the terms of the clause set out. We think its necessary effect is to reserve an unlawful benefit to the assignor to the injury of his creditors, in that it secures to him the service of the assignee in keeping, caring for and selling the exempt property at the expense of property not exempt, and provides indemnity to him, out of property not exempt, against loss in respect

of the exempt property, occasioned by waste or injury to the property, declining markets, or sale for an inadequate price.

Affirm.

COOK *v.* HAWKINS.

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Decided April 18, 1891.

Evidence—Custom.

Evidence of a custom is inadmissible to vary the express terms of a contract; where a contract to build a house called for three-coat plastering, it is inadmissible to show, in an action for the balance due on the contract, that it is the custom of plasterers in that vicinity to slight their work and do two-coat plastering.

APPEAL from *Miller* Circuit Court.

CHARLES E. MITCHEL, Judge.

W. H. Arnold for appellant.

The court erred in admitting testimony as to the custom of plasterers in Texarkana. Evidence of a custom or usage is inadmissible to vary or control the legal effect of a written instrument, or contradict its terms. 45 Am. Rep., 51; 16 N. Y., 392; 34 *id.*, 417; 44 *id.*, 495; 51 *id.*, 431; 54 *id.*, 353; 55 *id.*, 200; Wood's Pr. Ev., 145–7; 10 Wall., 383; 13 *id.*, 363; Gr. Ev., sec. 295.

Evidence of custom to vary contract.

HUGHES, J. Appellee sued appellant for balance due on contract to build a house and for extra labor, and obtained judgment, from which this appeal is taken. Appellant denied liability, and contended that appellee failed to do the work according to contract, whereby he was damaged and offered to recoup. The contract called for good three-coat plastering on the walls and ceiling of the building. The evidence tended to show that the plastering was not three-coat work, but what is called "drawn work," which was two-coat work. Over the objection of defendant, the plaintiff was permitted to show by evidence that "very little three-

coat plastering is ever done in Texarkana" (where the house was erected), and that "it is the custom of most plasterers here (there) to slight their work and do 'drawn work,' when three-coat work is contracted for."

This was not competent evidence. The contract called for three-coat work. The fact that plasterers were in the habit of slighting their work and violating their contracts by doing "drawn work," when three-coat work was contracted for, could not excuse the violation of such a contract. For the error in permitting this testimony to go to the jury, the judgment is reversed, and the cause remanded for a new trial.

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RAILWAY COMPANY *v.* KNOTT.

Decided April 18, 1891.

1. *Railway—Right of way—Fencing.*

   A railway company which has acquired the right to construct its road through a farm owes no duty to keep up the fencing on the right of way unless it has bound itself to do so.

2. *Trespass—Independent contractor.*

   A railway company is not liable for a trespass committed off the right of way by the servants of an independent contractor, though its engineer supervised the work of opening the right of way, so far as to see that it was performed according to contract.

APPEAL from *Lafayette* Circuit Court.

CHARLES E. MITCHEL, Judge.

Appeal from a judgment for the recovery of damages for a trespass committed by the employees of defendant, the St. Louis, Arkansas and Texas Railway Company, "by throwing down the fences on and around plaintiff's farm, both on and off the right of way." The facts are stated in the opinion.

Montgomery & Moore and *Sam H. West* for appellant.

The injuries or trespasses complained of were committed by Holman & Son, sub-contractors, who were not servants

of the company. A railroad company is not liable for injuries occasioned by the trespass or negligence of the servants or laborers of an independent contractor. The mere fact that the work of construction is to be done by a contractor, under the direction and to the satisfaction of a superintendent employed by the company is not such a reservation of control as to render the company liable for the negligent execution of the work by the contractor or his servants. 2 Wood, Ry. Law, 1008–9; 1 Rorer on Rys., 468; Wood, Mast. & S., 602, *et seq*; 58 N. H., 52; 4 Exch., 254; 35 N. J. L., 17; 80 Penn. St., 102; 38 Barb. (N. Y.), 653; 36 Mo., 202; 61 N. Y., 180; 40 Mo. App., 456; 84 Mo., 117; 13 S. W. Rep., 333; Story on Agency, sec. 454, and note; Mecham, Agency, sec. 747; Cooley on Torts (2d ed.), 643. The entry on the land was lawful, and the evidence shows that the trespass was not authorized or assented to by the railroad or its engineer. 30 A. & E. R. Cases, 384; 29 *id.*, 590, and notes; 15 *id.*, 100.

1. Railway's duty to keep up fencing.

MANSFIELD, J. At the time of the injury complained of the plaintiff held the lands on which the alleged trespass was committed as the tenant of John Taylor. The latter had previously granted to the defendant company a right of way over the lands for its road. Whether such grant was made before or after the lease to the plaintiff, is not shown by either the pleadings or the evidence. The lease was for only one year, and was probably by parol. But if it was prior to the defendant's purchase of the right of way, and the plaintiff was in the actual possession of the lands at the time of such purchase, then the defendant was charged with notice of his lease-hold interest, and took the right of way subject thereto. *Ullman* v. *Hannibal R. Co.*, 67 Mo., 118; *McKinley* v *Chicago Ry. Co.*, 40 Mo. App., 456; *Turman* v. *Bell, ante*, p. 273. In that event the defendant had no right of entry as against the plaintiff, unless it was acquired by contract with him, or by proceedings under the statute to condemn to the use of the road his estate as

lessee in so much of the land as was to be occupied by the right of way. And if the company's contractors by its direction entered upon the lands before it had thus acquired a complete right to do so, it was a trespasser jointly with them and liable to the plaintiff as such. *Ullman* v. *Hannibal R. Co.*, 67 Mo., *supra*. But the record discloses no contest as to the right of way, and this action was apparently not for a wrongful entry on the lands, nor for any injury resulting directly from the work of constructing the roadbed. The complaint alleges that the damages sued for resulted from the act of Holman & Son in throwing down and leaving down the fencing of the Taylor farm "both on and off of the right of way of said * * railroad," thus causing the destruction of the plaintiff's crops. The language quoted would seem to recognize the existence of a right of way belonging to the defendant; and on the trial the plaintiff in effect disclaimed any right of action for an injury suffered by the work of grading the road through his fields. There is no express allegation of a wrongful entry, and the only controversy between the parties in the court below, as indicated by the evidence on both sides, was as to the liability of the defendant for damages caused by the wrongful acts or negligence of Holman & Son.

The complaint states that the fencing was left down "both on and off the right of way." If the defendant had acquired the absolute right to construct its road through the farm, then it was not its duty to keep the fencing up on the right of way unless it had bound itself to do so. *Cockrum* v. *Williamson*, 53 Ark., 131; *Clark* v. *Hannibal R. Co.*, 36 Mo., 218. As to the fencing off the right of way, the work contracted for did not, so far as shown by the evidence, require it to be removed or taken down. And the defendant cannot be presumed to have authorized its removal by merely directing the contractors to enter upon the right of way.

2. Liability for trespass of independent contractor.

But it is alleged that Holman & Son were the employees of the defendant, and that they committed the acts com-

plained of under orders from its engineer. These allegations are both denied by the answer, and neither of them is supported by the evidence. It is admitted that the Holmans were sub-contractors under Ball & Co., and that the latter were sub-contractors under McCarthy & Kerrigan, who were the contractors with the defendant for building its entire road. The evidence shows that while the defendant's engineer supervised the work, so far as to see that it was performed according to the contract of McCarthy & Kerrigan, he exercised no immediate control over their employees or sub-contractors. The Holmans were not employed by the defendant, and there is nothing to show that they were under its control or subject to the orders of its engineer. The relation of master and servant evidently existed between them and the laborers they employed. But if they were themselves the servants of any of the parties interested in the work on the road, they sustained that relation to Ball & Co., and not to the defendant. *Clark* v. *Hannibal R. Co.*, 36 Mo., *supra.; Blumb* v. *City of Kansas*, 84 Mo., 112; *McKinley* v. *Chicago Ry. Co.*, 40 Mo. App., 449; *Wray* v. *Evans*, 80 Penn. St., 102; *Railway* v. *Yonley*, 53 Ark., 503, and authorities cited. The defendant was not therefore liable for any injury committed by Holman & Son, unless the act was done by its direction. And there was no testimony to show that the engineer authorized or directed them to leave open the plaintiff's fencing on the right of way or to throw it down off the right of way. The evidence, as set forth in the bill of exceptions, is not sufficient to sustain the verdict of the jury, and the judgment must on that ground be reversed. The cause will be remanded, with directions to the court below to grant the defendant a new trial, and to permit the plaintiff to amend his complaint if he should desire to do so.

Having indicated our view of the law applicable to the facts of this case as they are presented in the record, we do not think it necessary to pass upon the correctness of every part of the court's charge to the jury. But it may be proper

to say that, as we understand the complaint, the first four instructions embrace propositions that are not strictly pertinent to the issue formed by the pleadings nor to any question raised by the evidence. And we think the phrase "superintending control," as used in the fifth and sixth instructions, was misleading. From these instructions, as qualified by that phrase, the jury may have inferred that the general supervision exercised by the engineer over the construction of the road was of itself sufficient to create the relation of master and servant between the defendant and the sub-contractors.

PENZEL COMPANY *v.* JETT.

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Decided April 25, 1891.

Mortgage—Assignment—Construction.

A deed which provides for immediate surrender of the property conveyed to a trustee for certain creditors, with directions to sell at private sale without delay and to pay the debts, whether mature or not, as fast as funds can be realized, is an assignment for the benefit of creditors, and not a mortgage; notwithstanding it provides that the deed is to be void if the debtor shall pay the debts as they fall due. The defeasance clause under such circumstances amounts to no more than an express reservation of a right which the law implies, and therefore does not change the legal effect of the instrument.

APPEAL from *Hempstead* Circuit Court.
CHARLES E. MITCHEL, Judge.

A deed of trust in the nature of a mortgage was executed by W. A. Jett, an insolvent merchant, for the benefit of certain of his creditors. Suit in attachment was brought to test its validity. Plaintiff has appealed from a judgment sustaining the conveyance and dismissing the attachment. The case depends upon the construction to be given to the instrument on its face, plaintiffs contending that it was in effect an assignment for the benefit of creditors, and void

because not executed in compliance with the statute regulating assignments.

The instrument, after the *habendum* clause, which is similar to that in the deed construed in *Robson* v. *Tomlinson*, *ante*, p. 229, continues: "Now, if I shall well and truly pay said sums as they fall due, then this obligation is to be void; otherwise to remain in full force and effect. The said trustee is hereby authorized to take possession of said property immediately upon the execution of this conveyance, and 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, preferring them in the order in which they appear herein. If, at the expiration of ninety days, the said debts, or any part thereof, remain unpaid, the said trustee is hereby instructed to sell the remainder of said goods that may remain on hand at public auction, in bulk or by the piece as may be most advantageous, for cash, after giving ten days' notice of the time, place and terms of sale, by advertisement in some newspaper published in said county. Said trustee is hereby authorized to collect all indebtedness in such manner as in his judgment may seem best, and may sue in my name for the benefit of my said creditors for any claim or indebtedness hereinbefore mentioned. And it is further provided, that if said goods should sell for more than enough to pay said indebtedness and the expense of this trust, that he pay the further sum to the following creditors, preferring them in the order in which they appear, to wit: [Naming them.] And it is hereby further provided, that the expense of this trust be first paid, and that said trustee is hereby instructed to hold a sufficient sum to pay the expenses of the execution and carrying out of this conveyance, and that, after retaining a sum sufficient for said purpose, he immediately pay off said debts, upon the receipt of sufficient funds, in the order in which they appear."

J. M. Moore for appellant.

The instrument is an assignment to pay debts, and not a mortgage to secure them. The conveyance was not to a creditor, but to a stranger, and provided for immediate possession and sale, and the application of the proceeds to the preferred debts. The clause of defeasance does not change its character or effect. The rule of construction applicable is stated in 31 Ark., 439; 52 *id.*, 30; 13 S. W. Rep., 423.

J. D. Conway, *D. W. Jones* and *Thomas B. Martin* for appellee.

The deed is on its face a mortgage, with a reservation of the right to pay off the debts, and thus procure reinvestment of title in the grantor, and there is no evidence to show an intention different from that expressed by it. It was a mortgage. 31 Ark., 437; 52 *id.*, 30; 53 Ark., 101; 16 Ohio, 216; 5 *id.*, 130; 21 N. Y., 131; 14 Fed. Rep., 160; 67 Tex., 315; 19 Iowa, 479; 58 *id.*, 589; 47 Ind., 372; 49 Wis., 486; 62 *id.*, 554; 66 Iowa, 237.

R. B. Williams, *amicus curiæ.*

When mortgage construed to be assignment.

COCKRILL, C. J. It is contended that because there is a defeasance clause and no evidence *dehors* the instrument to control its meeting, it must be construed to be a mortgage, and cannot be declared an assignment for the benefit of creditors. But to ascertain whether the parties intended the instrument as a security for debts, or as an absolute appropriation of the property described to raise a fund to pay the debts, all its provisions must be read together. If, when viewed as a whole, the intent of the parties is found to be the former, the instrument must be declared a mortgage; if the latter, an assignment. *Robson* v. *Tomlinson*, *ante* p. 229, and cases cited. It provides for the immediate surrender of the possession of the property described to a trustee for numerous creditors, with directions to proceed to sell it at private sale without delay, and to pay the debts, whether mature or not, in the order enumerated, as fast as funds could be realized from the sale. These are the main provisions of the instrument, and it is apparent from them that the

appropriation of the property to raise a fund to pay debts is its primary object. It is then an assignment, unless the defeasance clause converts it into a mortgage. The defeasance in a mortgage rests upon a future contingency, as after so many days, or when the debt matures. But here there is an immediate appropriation of the property without any contingency. It may be said that the intention was to reserve the right to redeem at any time before the goods were sold. That right exists in every assignment for the benefit of creditors, although not expressly reserved. The debtor always has the right to resume control of the assigned property, upon paying the debts and remunerating the assignee, for the trust is then fully executed, and no one can complain. An express reservation of a right which the law implies does not change the legal effect of the instrument. It remains then an assignment for the benefit of creditors, and is void for non-compliance with the statute.

The case is practically controlled by the decision in *Box* v. *Goodbar*, *ante* p 6.

Reverse the judgment and remand the cause with instructions to sustain the attachment, and for such further proceedings as may be necessary to subject the property to the payment of the appellant's judgment.

RAILWAY COMPANY v. CULLEN.

Decided April 25, 1891.

Accident at railway crossing—Contributory negligence.

One who is injured in attempting to cross a railway track at a public crossing ahead of an approaching train cannot recover, though the train approached at unusual speed without signals, if he either knew of the proximity of the train and took the hazard of a leap across the track in front of the engine, or else failed to look and listen for the train when he knew it was approaching, and when, if he had used his senses, he could not have failed both to hear and see it.

APPEAL from *Conway* Circuit Court.

JORDAN E. CRAVENS, Judge.

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Henry Cullen, a boy sixteen years old, was struck by an engine while crossing the track of the Little Rock and Fort Smith Railway Company. This suit was brought to recover damages for injuries sustained by him.

He testified in substance as follows:

I was at Mr. Zindorf's shop when he started to the depot. I came right along behind him. He ran around a box-car on the side track and across the main track right in front of me. I was crossing on the track when the engine struck me and knocked me off. A box-car was standing on the side track and extended out on the crossing about three or four feet. Mr. Zindorf crossed before me. I was two or three feet behind him; could almost touch him. I couldn't see the train. I didn't look for it before I ran in behind the box-car or after I got between the side track and main track. I came straight across the track. Just as they whistled, they struck me and knocked me out of my senses. I didn't look because the box-car in the street would have prevented me from seeing if I had wanted to look. I heard no whistle or bell before or while I was going around the box-car that was standing in the street. The train came darting up and struck me without any warning. All the time I was going from Mr. Zindorf's to the track I never looked at the train. I followed along behind Mr. Zindorf. I never looked at the train to see where it was until I got to the corner of the platform. I have good hearing and good eyesight. I heard the whistle when it blew at me. Soon as it whistled it ran against me and knocked me out of my senses. I went straight across the main track after going around the box-car. I didn't stop to see if the train was there. I just went right straight across.

Zindorf testified as follows:

I was at my shop at work, and the boy was with me. I heard the noon train whistle, and I remembered that I had a letter to mail, and I picked up my hat and started for the depot to mail it on the train. I told the boy I was going to the train to mail a letter. I started towards the depot,

and the boy came along after me. I walked in a brisk walk, and although I didn't look around to see if the boy was following me, still I knew he was there. My shop is about a square east of the street crossing, east of the depot. There was a box-car standing on the side-track, and the end of this car was standing a few feet out over the sidewalk. I walked around the west end of the box-car and started across the main track. I checked myself between the two tracks to see if I could get over before the train came up. I saw I could make it, and ran across the main track only a few feet in front of the engine. I had to jump to make it, but I got across and had taken a few steps towards the depot, when the engine passed me. Just as I was in the act of jumping across the main track, I heard two or three sharp whistles of the engine. I didn't see the engine run against the boy. He was behind me. Just as I had straightened myself up, after jumping across the track, and had taken a step or so, the boy was knocked off the track by the engine and rolled over in the street, stirring up a big dust. I had forgotten about the boy being behind me when I started across the track. I never heard any bell ringing. I think I would have heard it if it had been ringing. The train was running mighty fast—faster than usual, and faster than I ever saw it coming into town. I could have gotten across the track a little sooner than I did if it hadn't been for the box-car standing across the sidewalk, necessitating me to go around it, which made it a little further for me to go, and took a little longer time.

A few moments after the accident, Cullen made this statement to the physician who attended him: "The railroad is not to blame; I am to blame; I just wanted to cross the track; I had no business to cross at that time. I thought I could make it ahead of the train."

There was verdict and judgment for plaintiff. Defendant has appealed.

Dodge & Johnson for appellant.

1. The plaintiff is barred by undisputed contributory negligence on the part of the injured party. Cullen alone was to blame for the injury.

2. Defendant's servants were only required to keep a careful lookout ahead, and, after discovering a person on the track, to do all that an ordinarily prudent and careful person would do to prevent injury. One who enters upon a track at a crossing, with knowledge of an approaching train, without looking to see whether a train is near, is guilty of contributory negligence, and cannot recover for negligence on the part of the company's servants, unless they saw the plaintiff's danger in time to have avoided the injury, and failed to do so. 36 Ark., 41; 47 *id.*, 497; 46 *id.*, 513.

E. B. Henry and *W. L. Moose* for appellee.

The jury in this case has passed upon the question of the negligence of the appellant, the issue of contributory negligence, and there is evidence to support their finding. The burden was on the appellant to establish contributory negligence, and this issue the jury resolved against it. 34 Ark., 613. A failure to stop and look is not *per se* negligence, but an element for the jury to consider. 53 Ark., 202; 42 Am. & E. R. Cases, 160, and notes; *ib.*, 163, 165. Contributory negligence is one of fact for the jury. 28 A. & E. R. Cases, 639; 89 Pa. St., 59–64; 97 *id.*, 55; 107 *id.*, 8; Black, Proof & Pl. Ac. Cases, p. 109. Whether or not a person crossing a highway is negligent in not stopping and looking and listening is for the jury. 28 Wis., 487; 63 Wis., 145; 19 A. & E. R. Cases, 285. The failure of the railway employees to give proper warning may relieve the traveler of the necessity of stopping to look and listen. 35 Pa. St., 60; 47 *id.*, 244; 42 Am. & E. R. Cases, 185–189.

Accident at railway crossing—Contributory negligence.

COCKRILL, C. J. A traveler upon the highway is bound to exercise ordinary care and diligence at the intersection of a railway, to ascertain whether a train is approaching, in order to avoid collision with it. An ordinarily prudent man will use his eyes and ears to apprehend the danger, and, if

the circumstances require, he will stop to enable him the better to do so. If the traveler neglects to do what an ordinarily prudent man would do under the circumstances, he is guilty of negligence. A failure to look and listen is therefore evidence of negligence on his part; and if an injury is the consequent result, and his want of precaution is unexplained by circumstances which might mislead an ordinarily prudent man or throw him off his guard, he cannot have reparation for the injury, because his own want of care is the author of his misfortune. Patterson's Railway Accident Law, secs. 174–5; *Continental Imp. Co.* v. *Stead,* 95 U. S., 191; *Railway Co.* v. *Amos, ante,* p. 159.

The fact that the train approaches the crossing at a greater rate of speed than is usual, coupled with the neglect of the employees in charge of it to sound the whistle or ring the bell, does not relieve the traveler from the necessity of taking ordinary precautions for his safety. "Negligence of the company's employees in these particulars is no excuse," says the Supreme Court of the United States, "for negligence on his part." *Railroad Co.* v. *Houston,* 95 U. S., 697; *Schofield* v. *Railway,* 114 U. S., 615.

His want of care is not excused by the neglect to give the usual signals, because a reasonable person of ordinary care will not be misled by their omission into rushing headlong upon a railway track without some use of his senses to ascertain if there is danger. *Davey* v. *Railway Co.,* 12 Law Rep., Q. B. Div., 70, 73.

In *Dublin Railway Co.* v. *Slattery,* 3 Appeal Cases, 1155, the following case is put by way of illustration by Lord Cairns: "If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. * * *

The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction." The hypothetical case was approved, and the doctrine applied by Lord Coleridge in *Davey* v. *Railway Co.*, 11 Law Rep., Q. B. Div., 213, in a case where the facts were as strong for the plaintiff as those here presented. And many cases may be instanced to the same effect. *Railway Co.* v. *Houston*, 95 U. S., *supra; Scofield* v. *Railway Co.*, 114 U. S., *supra.; Fletcher* v. *Railway Co.*, 149 Mass., 127; *Cullen* v. *Railway Co.*, 113 N. Y., 667; *Penn. Ry. Co.* v. *Righter*, 42 N. J. Law, 180; *Penn. Ry. Co.* v. *State.*, 61 Md., 108; *Daily* v. *Ry. Co.*, 42 Am. & Eng. Ry. Cases (N. C.), 124.

The language quoted describes this case, and, with the cases cited, shows that there was really no evidence to base a verdict for the plaintiff on. There was conflict in the testimony as to the speed of the train and the failure to sound the whistle and ring the bell. We assume, as the jury might have found, that the train approached the crossing at a greater rate of speed than was usual without giving the usual signals; but the uncontroverted facts left the jury no latitude, save to find that Cullen knew of the close proximity of the train, and, in reckless disregard of his safety, took the hazard of the leap across the track in front of the engine; or else failed to look or listen for the train when he knew it was approaching the crossing, and when, if he had used his senses, he could not have failed both to hear and see it. His injury was therefore the result of his recklessness, or of his own culpable negligence. As the testimony shows that the injury could not have been prevented by the trainmen after the plaintiff's perilous condition was discovered, either alternative would deprive him of the right to complain of the conduct of the railway.

The court erred therefore in refusing to grant the defendant a new trial.

Reverse the judgment and remand the cause.

JOHNSON *v.* MEYER.—NO. 1.

Decided April 25, 1891.

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1. *Master's report—Manner of taking testimony.*

Where a master's report contained *an abstract only* of the evidence taken before him, a party present at the examination of witnesses, who did not at the time except to the form of preserving the evidence, nor object in court to its substantial correctness, cannot complain that the evidence was not reduced to writing in the form required by the statute.

2. *Interest.*

On any agreement to pay interest at the rate of 10 per cent., nothing more being specified, only 6 per cent. interest will be allowed after maturity.

3. *Mortgage—Notice of sale.*

A provision in a mortgage fixing the length of time for giving notice of a sale under the power therein has no application to a sale under a decree of foreclosure.

APPEAL from *Chicot* Circuit Court in chancery.

CARROLL D. WOOD, Judge.

In June, 1881, W. W. Johnson mortgaged certain lands to Adolph Meyer to secure a note for $934 and advances. Later, in March, 1883, he gave a deed of trust, conveying certain lands and personalty, to secure a debt to Meyer of $860, as evidenced by account; also to secure $1000 advances to be made by Meyer. The trustee was authorized to sell on thirty days' notice. There was a written agreement dated the same day as the deed of trust, purporting to be made between Meyer and Johnson, to the effect that notice of sale under it should be for twelve months instead of thirty days, as therein declared; that Meyer should make advances at cash prices, and that he should charge 10 per cent. interest thereon.

In 1884 Meyer had the lands advertised for sale under both mortgages. Johnson brought suit to enjoin a sale under the first mortgage, claiming that the indebtedness it secured was embraced in the second mortgage. Meyer answered, denying that the note for $934 was embraced in the second mortgage; by way of cross-complaint he asked that

the mortgages be foreclosed. A master was appointed to take testimony. Upon his report a decree of foreclosure of both mortgages was rendered, from which Johnson has appealed. The grounds of his exceptions are stated in the opinion.

D. H. Reynolds for appellant.

1. The court erred in overruling the third exception to the master's report. He did not take and reduce to writing and return, as required by law, the evidence upon which he based his findings, and plaintiffs were thus deprived of such testimony upon the hearing.

2. It was error to allow interest at 10 per cent. on the account for 1883, after its maturity.

3. The preponderance of the evidence is that the $934 note was merged and paid in the settlement of March 31, 1883

4. The court erred in directing a sale to be made on notice, as required by law for sales under execution. The deed of trust fixed the time, and the court could not make a new contract for the parties.

U. M. & G. B. Rose and *James F. Robinson* for appellees.

1. Unless the order of reference requires the master to reduce the testimony to writing and return same into court, it is not incumbent on the master to do so. 36 Me., 116; 27 Vt., 693; 5 Ind., 422; 52 Me., 132; *ib.*, 147; 3 Cliff., 149; 82 Va., 751. The statute does not require him to return it into court. Mansf. Dig., sec. 5266.

2. No exceptions were taken to the ruling on the master's report, and there is no question as to that ruling on appeal. 36 Ark., 452; 41 *id.*, 535; 51 *id.*, 442; 52 *id.*, 318.

4. The agreement fairly imports that the agreed rate of interest shall continue until the account is paid, but if not, we ask leave to remit excess.

5. The testimony supports the finding as to the $934 note.

6. The notice in the deed relates only to a sale under the power. All sales under decrees are governed by the statute. Mansf. Dig., sec. 3049. The matter otherwise was within the discretion of the court. 2 Jones, Mortg., sec. 1612; 23 Ark., 39.

HEMINGWAY, J. This appeal presents several matters of alleged error, the first of which goes to the entire decree, while the others relate to the determination of the several matters in controversy. The court below made an order of reference to a master, directing that he take proof and report: (1) Whether the note executed by W. W. Johnson to A. Meyer, in June, 1881, had been included in subsequent settlements between the parties; and (2), What amount was due from Johnson to Meyer growing out of transactions for the year 1883. The master reported that the note was not included in any subsequent settlement, and that there was due to Meyer, on account of the transaction of 1883, a balance of $514.56 with interest; and further reported that this sum was exclusive of $566 which had been sued for in another case. The master appended to his report what he certified to be "an abstract of the evidence taken before" him. The appellants excepted to his report, and for grounds alleged the following:

1. The master computed interest at 10 per cent. instead of 6 per cent, and same was against plaintiffs.

2. The master did not take and reduce to writing and return the evidence as required by law and custom, and plaintiffs were deprived of such testimony in presenting their case to the court.

The court overruled the second ground of exception, but took no formal action as to the other. Error is charged both as to the action taken and the court's failure to act. The point raised by the ground not formally passed upon was involved in the final consideration and determination of the cause, and the decree settles it adversely to appel-

lants; so whatever of force it possesses may be directed against the decree.

1. Master's report—Mode of taking testimony.

1. As to the second ground, we are satisfied that the master's report does not meet the requirement of the statute. It provides that the master shall reduce to writing the testimony of all the witnesses examined by him and return the same to the court with his report. Mansf. Dig., secs. 5266–5270. But it further provides that he shall give notice to the several parties of the time and place of taking testimony by him, and this is provided in order that they may attend and guard their interests. Mansf. Dig., sec. 5264. The master in this case seems to have given the notice required, and the several parties attended the taking of testimony. They saw the manner in which it was being taken, and appear to have interposed no objection to it, and to have made no demand that it be taken in formal depositions, as the statute seems to contemplate. Mansf. Dig., sec. 5270. If the appellants had excepted at the examination to the form of preserving the evidence, or in court to its substantial correctness, a different question would be presented. But we think it is too late, after a report is made upon the evidence taken and a result arrived at not satisfactory to appellants, for them to raise exceptions to the mere form in which the testimony was reduced to writing. We understand the master to certify that he appends the substance of the testimony taken, which he further certifies was reduced to writing by him at the time of the examination, though not read to or signed by the witnesses. That he faithfully attempted to present every material fact of the evidence, is implied from the certificate; and though a failure in such attempt is so probable as to condemn the practice without reserve, still, if the attempt is made with the knowledge and acquiescence of the parties, it will be presumed to embody the evidence, if unchallenged in that regard. The exception contains no allegation that the abstract made omits any material fact, or in any way fails to reflect the statements of the witnesses; but it is silent as to this, and challenges the report because

the evidence was not reduced to writing in the form required. We think the court properly overruled it, because it failed to allege that the abstract in material respects did not contain the evidence really given by witnesses. If it did contain the evidence, the failure complained of was without prejudice. The appended abstract should be treated as the evidence taken, and the decree as overruling the other exceptions.

2. Mode of computing interest.

2. By the terms of the mortgage sued on, dated March 31, 1883, the debt for advances that year matured on the 14th of February, 1884, and, by the terms of a contemporaneous agreement, the several items of such indebtedness were to bear interest at the rate of 10 per cent. per annum. The court found that Johnson owed Meyer a balance for such advances of $514.56 on January 1, 1884, and decreed payment of that sum with interest at 10 per cent. per annum until paid. It is insisted that the court erred in fixing the amount due, and also in allowing 10 per cent. interest after maturity of the debt. We think the testimony sustains the court's finding as to the amount due; but, as Johnson had agreed to pay the sums owing for advances on February 14, 1884, with interest on the several items at 10 per cent. per annum, we think the agreement for interest should be construed as similar agreements in notes, and should not control after maturity of the debt. The interest should have been allowed at 10 per cent. until February 14, 1884, and after that at 6 per cent. per annum.

3. Notice of mortgage sale.

3. It is urged in the last place, that the court erred in directing a sale to be made upon twenty days' notice, because the mortgage provides for a notice of thirty days, while the contemporaneous agreement provides for a year's notice. The provisions relied on have reference to notice of sale under the power in the deed, and have no reference to sale under judicial decree.

The decree was right in all respects, except in allowing interest on the account for 1883 at 10 per cent. until paid. In this it was erroneous, and must be modified, as we have

above indicated. The judgment will be reversed, and the cause remanded with directions to enter judgment in accordance with this opinion and for further proceedings.

JOHNSON v. MEYER—NO. 2.

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Decided April 25, 1891.

Practice—Premature suit—When objection taken.

Upon appeal objection cannot be made for the first time that a suit to foreclose a mortgage was brought before its conditions were broken.

APPEAL from *Chicot* Circuit Court in chancery.
CARROLL D. WOOD, Judge.

D. H. Reynolds for appellant.

U. M. & G. B. Rose and *James F. Robinson* for appellee.

HEMINGWAY, J. This was a suit brought against W. W. Johnson to foreclose a mortgage on personal property executed by him to Meyer. Johnson having died, the cause was revived against his personal representative, and a decree of foreclosure rendered. We are asked to reverse the judgment of the court below because it erred in not dismissing the suit, it having been brought before a breach of the conditions of the mortgage. There was no motion to dismiss or other objection urged to the prosecution of the suit on this ground. On the contrary, the appellant's testator answered, and asked that a reference be made to a master to state an account between him and the plaintiff. The appellant cannot now for the first time object that the suit was prematurely brought.

Affirmed.

AIREY *v.* WEINSTEIN.

Decided April 25, 1891.

Landlord's lien—Advances to make crop.

Money furnished by a landlord to a tenant to make necessary repairs, which the landlord by contract was not bound to make, is an advance to make a crop for which the landlord is entitled to a lien, under the act of April 6, 1885. (Acts 1885, p. 225.)

APPEAL from *Miller* Circuit Court in chancery.

CHARLES E. MITCHEL, Judge.

Weinstein & Kosminsky brought suit against H. F. Smith to foreclose a mortgage upon a crop. T. L. Airey & Co. intervened, claiming a landlord's lien for advances made to Smith. From a judgment disallowing their claim, intervenors have appealed.

W. H. Arnold for appellants.

1. Appellants had a lien as landlord for advances to enable their tenant to make a crop. The repairs were just as necessary as any other labor connected with the farm. 51 Ark., 46.

Scott & Jones for appellees.

Betterments upon a landlord's land cannot be construed into necessary supplies for the making of a crop. Acts April 16, 1885; 90 N. C., 276. A landlord has no lien for the cost of improving his own plantation, upon a tenant's crop.

Landlord's lien for advances.

HEMINGWAY, J. The appellants let a farm for the year 1889, under a contract that excused them from putting it in repair; while it did not bind the lessee to make repairs, it bound the lessor to advance him as much as $150 for that purpose, and thereby implied that he should make such as he found necessary to the purpose of his tenancy. The lessor advanced $125; that it was used in opening ditches and repairing fences and houses on the demised farm, is not disputed; nor is it alleged that the sum advanced or

the work done exceeded what was reasonable and necessary. That such annual work is usually incident to the making of a crop is well known, and it is just as necessary as farming implements or food. There is no reason why the tenant may not rent a farm needing such repairs, and excuse his landlord from making them; if he does so, he can not make the crop without them. We are of opinion that money advanced for that purpose comes within the statute providing for a landlord's lien to secure money advanced by the landlord to the tenant necessary to enable him to make a crop. The court should have declared a landlord's lien for the advance made, prior to the lien of the mortgage by the tenant. The judgment is reversed, and the cause remanded with directions to enter judgment as above indicated.

ATKINSON *v.* COX.

Decided April 25, 1891.

1. *Amendment—Substitution of issue.*

   Where a cause has regularly come on for trial, a jury been empaneled, the cause stated, and the witnesses sworn, it is within the court's discretion to refuse to permit an amendment which would change the issue.

2. *Debt—Appropriation of payments.*

   A landlord cannot apply to an account against his tenant for supplies the proceeds of cotton delivered to him by the tenant, with directions that its proceeds be applied to the payment of rent.

APPEAL from *Jefferson* Circuit Court.

JOHN M. ELLIOTT, Judge.

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

1. The court erred in refusing to allow plaintiff to amend his complaint. Mansf. Dig., secs. 5075 to 5084, and notes; 42 Ark., 57; 30 Ark., 396.

2. The act of 1885 gave appellant a lien for supplies advanced, and appellee is estopped to deny the right of appellant, his landlord, to enforce his lien. 2 Herm. on Estop-

pel, pp. 859, 872, 1125; McAdam on Land and Ten., pp. 423–5; 11 S. W. Rep., 735; 47 Ark., 269; 52 Ala., 155; Beach on Receivers, p. 695; 106 U. S., 468; Sedg. St. & Const. Constr., p. 73; Acts 1885, p. 225.

N. T. White for appellee.

1. The court exercised a sound discretion in striking out the amended complaint. Mansf. Dig., secs. 5075–5084; 26 Ark., 360; Bliss, Code Pl., secs. 428–9; 30 Ark., 396. There was but one issue before the court, and that was whether the rent had been paid, and the court properly rejected all evidence as to supplies furnished, which is a separate action under Acts 1885, p. 225.

HEMINGWAY, J. The plaintiff brought action to recover a balance claimed to be due him on a note given for rent of a farm, and sued out an attachment in pursuance of the provision of the statute relating to landlord's liens. The defendant answered, admitting the execution of the note and alleging that it had been paid.

1. Amendment—Substitution of issue.

The cause regularly came on for trial, and, after a jury had been empaneled to try it, the cause had been stated, and the witnesses had been sworn, the plaintiff asked leave to file an amended complaint, alleging that the amount claimed was due for balance of rent and on account for surplus furnished in making the crop. The court refused to permit the amended complaint to be filed, and this is the principal error complained of. The only issue up to that time made by the pleadings was upon the defense that the note had been paid. The parties had prepared for trial upon that issue and upon no other. The defendant's liability upon account for advances had never been asserted. To have permitted the amendment, substituting another claim for the one originally sued on, would have entirely changed the issue, if it had not been the bringing of a new suit. If it be conceded that such change is within the statute regulating amendments, its allowance is within the discretion of

the court, and under the circumstances of this case the discretion does not appear to have been abused.

2. Appropriation of payments.

There was no error in the court's refusal to charge the jury as requested by plaintiff. There was uncontradicted proof that the defendant had delivered to the plaintiff cotton to be sold, with directions that its proceeds be applied to the rent note, and that the proceeds exceeded the amount of the note. It was therefore the plaintiff's duty to have applied such proceeds to the extinguishment of the note, and a failure to do so could not be excused upon the ground that such application had been made to an account against the defendant. For this reason the plaintiff's second instruction was properly refused.

As the action was for rent due on a note, no recovery could have been asked on an account for supplies; for this reason, if no other, plaintiff's first and third prayers were properly refused. Upon the facts of the case, as above stated, the charge given by the court was proper.

As the testimony offered by the plaintiff and excluded by the court related to a claim not in issue, it was incompetent and inadmissible.

There was no error prejudical to plaintiff, and the judgment will be affirmed.

BOARD OF IMPROVEMENT *v.* MCMANUS.

Decided March 21, 1891.

Mandamus—Board of Improvement—Warrant.

A mandamus to a board of improvement to draw a warrant on its treasurer will be denied if there is no money in its treasury to pay it.

APPEAL from *Sebastian* Circuit Court, Fort Smith District.

JOHN S. LITTLE, Judge.

Petition for mandamus to require the board of improvement of sewer district No. 1 of the city of Fort Smith to

draw a warrant on its treasurer for the amount of a judgment against the board. The writ was granted, and the board appealed.

Sandels & Warner for appellant.

1. The action is improperly brought against the corporate body, and contrary to the statute so far as it affects the members of the board upon personal liability. Mansf. Dig., secs. 880, 882, etc; 17 Wall., 604.

2. The writ should not have been granted, because the judgment is for damages, payable out of the "improvement fund." This fund was exhausted. There were no funds on hand, and the revenues were pledged to borrow money. Mansf. Dig., secs. 882, 868, 865–6. The answer of *no funds* was sufficient. High Ext. Leg. Rem., sec. 352. The full limit had been levied, and no further levy could be made. Mansf. Dig., sec. 867; 30 Ark., 435.

3. The appeal operated as a supersedeas. Mansf. Dig., sec. 6394; 29 Ark., 97.

The appellees *pro se.*

1. The writ was properly against appellant as a corporate body, and is not a personal action. 99 U. S., 624; 103 U. S., 480; 18 B. Mon. (Ky.), 9; 87 Ill., 190; 14 Am. & Eng. Enc. Law, 220; 42 Ark., 152; Mansf. Dig., sec. 895.

2. The appellees simply asked for a warrant, and this it was the duty of the board to give. "No funds" is no answer to a petition for mandamus to compel the issuance of a warrant. Mansf. Dig., sec. 865–6; 85 Am. Dec., 539; 22 How. (N. Y.), Pr., 71; 28 La. An., 132; *ib.*, 85, 47, 72; 35 Ohio St., 435; 65 Cal., 481.

3. An appeal does not stay proceedings unless a supersedeas issues. Mansf. Dig., secs. 1293–4; 29 Ark., 85.

HEMINGWAY, J. The only question before us is as to the sufficiency of an answer to a petition for mandamus. The petition alleged that the petitioner had a judgment against the board, and prayed that it be required to issue to him a warrant on its treasurer for the amount thereof; the

answer was in effect that there was no money in the treasury of the board, that all its possible assessments for a stated number of years to come had been pledged to other creditors, and that an assessment had been levied for the year next thereafter out of which its other debts would be paid. The answer was adjudged insufficient, and, the respondent declining to amend, the court ordered that it issue a warrant in accordance with the prayer of the petition. The respondent appealed.

As a general rule the writ will only be issued where the petitioner has a legal right, is entitled to a specific remedy to enforce it, and the officer whose duty it is to afford that remedy withholds it. Mansf. Dig., sec. 4569; Wood on Man., p. 27; *People v. C. & A. R. Co.*, 55 Ill., 95. Did the petition and answer disclose a right in the petitioner, for which the respondent was bound in law to afford a remedy which it withheld? In other words, did the law authorize the petitioner to demand, and require the respondent to issue, a warrant on an empty treasury? The statute contains no provision that warrants shall issue upon the allowance of all demands against boards of improvements, as it does with reference to allowances against the county. Mansf. Dig., sec. 1415. There is no express requirement that any warrant shall issue, but it is inferential from the provision that the treasurer shall pay out no money except upon a warrant. Mansf. Dig., sec. 865. This seems intended to promote an orderly administration of the affairs of the board, and not to contemplate the issue of warrants for use by their holder in anticipation of funds to pay them, as is the case with county warrants. *Worthen* v. *Roots*, 34 Ark., 356. Board of improvement warrants are not receivable for its assessments, for the act expressly provides that assessments may be pledged by the board to borrow money. Mansf. Dig., sec. 872. The creditor of the board is entitled to a warrant only as a means to collect his claim, and whenever the court would be authorized to order the principal act of payment, it could order the issuance of the

warrant as an incident; but the court could not order payment in this case because such order could not be obeyed and would be unavailing, and, as the petitioner had no independent right to a warrant, the court should not have ordered one issued. *People* v. *Tremain*, 17 How. Pr., 142; *Commonwealth* v. *The Com'rs, etc.*, 6 Binn., 5; *Commonwealth* v. *Com'rs.*, 1 Whar., 1; *Clay Co.* v. *McAleer*, 115 U. S., 616.

It follows that the court erred in sustaining the demurrer to the answer, and that the judgment must be reversed, and the cause remanded with directions to overrule the demurrer.

REYNOLDS *v.* JOHNSON.

Decided April 25, 1891.

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1. *Fraud—Mistake.*

An overstatement of the amount of the debt secured by a mortgage, if made by mistake, is not fraudulent.

2. *Mortgage—Power of sale—Fraud.*

A provision in a mortgage authorizing the mortgagee to sell the property, either at "wholesale or retail, as soon as possible consistent with the most profitable disposition that can be made," is not *per se* fraudulent, as putting the property out of the reach of creditors for an indefinite time.

3. *Partnership property—Individual debts.*

An insolvent firm may mortgage their partnership property to secure individual, in preference to partnership, debts.

APPEAL from *Washington* Circuit Court.

O. W. WATKINS, Special Judge.

Winchester & Bryant for appellants.

1. The damages awarded are excessive, for more than were proved.

2. A firm cannot appropriate firm assets to the payment of individual debts, to the injury of firm creditors. Bump, Fr. Conv., p. 389, and notes 2 and 3, and pp. 229–230; 24 Ark., 16., 222; 31 *id.*, 666; *ib.*, 314; Bigelow, Fraud, 476–478.

3. The mortgage was vicious on its face. It puts the property out of the reach of creditors for an indefinite time. Bigelow, Fraud, Vol. 2, 296; 21 N. Y., 168–9; 13 *id.*, 215–20; 2 Bigelow, Fraud, 299, note 3, 306–8, note 1; 8 Md., 418; 2 Kent, Com., 533.

T. M. Gunter for appellee.

1. The mere preference of individual debts, by mortgage to secure them, over partnership debts is not such a fraud upon partnership creditors that a court of equity will set it aside. Jones, Ch. Mortg., sec. 44; 20 N. J. Eq., 13; 23 Hun (N. Y.), 494. But all these debts were assumed by the firm, and hence were partnership debts.

2. The mere overstating the debt by mistake was not even a circumstance to show fraud. Jones, Ch. Mortg., 339; 7 N. W. Rep., 300.

3. Creditors may proceed to collect their demands from the property if its value exceeds the amount secured by the mortgage, without waiting for the party who holds the mortgage to cause a sale. Bump, Fr. Conv., 39–60; Jones, Ch. Mortg., sec. 354; 31 Ark., 429.

HUGHES, J. This is an appeal from a judgment in favor of appellee in a suit upon a bond of indemnity executed by appellants to a constable, who, at the instance of appellants, levied an execution on a stock of goods as the property of the firm of Johnson Bros., which was composed of T. B. and J. F. Johnson. The goods were, at the time of the levy, in the possession of the appellee, and were claimed and held by him under a mortgage executed by said firm to him. They were sold to satisfy the execution in favor of appellants, and the appellee recovered a judgment for $200 damages.

1. Mistake as to amount of debt.

The mortgage was for $200, while the real amount of appellee's demand was only $180. It is contended that this was evidence of fraud. Unexplained it would be, but it was shown that the real amount of the indebtedness of Johnson Bros. to appellee was not known at the time, and

that the amount was fixed in the mortgage at $200, to cover what was due. If the amount was overstated by mistake, this was not evidence of fraud. Jones on Chattel Mortgages, 339; *Kalk* v. *Fielding*, 7 N. W., 300.

2. Power of sale.

The mortgage provided: "Now the said party of the second part [appellee] is to take possession and control of said goods and convert the same into cash, either at wholesale or retail, as soon as possible, consistent with the most profitable disposition that can be, under the circumstances, made in the premises." It is contended that the effect of this clause was to put the property out of the reach of creditors for an indefinite time, and that as against them it was fraudulent. Such a provision is not fraudulent *per se*, but only evidence of fraud to be left to a jury. *Marks* v. *Hill*, 15 Gratt., 400; *Williams* v. *Lord*, 75 Va., 390; *Cunningham* v. *Freeborn*, 11 Wend. (N. Y.), 241; *Woodward* v. *Marshall*, 22 Pick., 468; 2 Bigelow on Fraud, p. 299, n. 4, and cases.

3. Mortgage of firm property for individual debts.

The evidence tended to show that the debts, which the mortgage was made to secure, were in part debts of the firm of Johnson Bros. and in part the individual debts of members of the firm. It is contended that the firm could not appropriate the partnership property to the payment of the individual debts of members of the firm, in preference to partnership debts.

Bump on Fraudulent Conveyances, p. 389, does indeed lay down the rule broadly that "An appropriation of firm property to pay the individual debts of one of the partners, is, in effect, a gift from the firm to the partner, and the attempt to assign partnership property to pay the private debts of one of the partners, before the firm debts are paid, when the firm is insolvent, affords a conclusive presumption of an actual fraudulent design on the part of the debtors." See authorities referred to in note 2 to said page. A majority of adjudicated cases on this question, outside of this State, perhaps sustain the rule as laid down by Mr. Bump.

But the court laid down a different rule upon this question in *Jones* v. *Fletcher*, 42 Ark., 423, adhering to the doc-

trine of the Supreme Court of the United States in *Case* v. *Beauregard*, 99 U. S., 119, where it is held in effect that the right of a creditor of a partnership to have the partnership property applied to the payment of partnership debts, in preference to those of an individual partner, is not a lien or trust, but an equity derived from the partners, enforcible and made effective, not in the right of the creditor, but only through the equity of the individual partner, to which the creditor is practically subrogated. It cannot be enforced by the creditor, if the partner is not in a condition to enforce it. If, before the claim of the creditor is sought to be enforced by the creation of a trust in some mode, "the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property, either of one partner or a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end."

It is held in the *Carver Gin Company* v. *Bannon*, 85 Tenn., 712, that "the general creditors of a firm have no lien upon the partnership assets, if the partners themselves have none. The claim of the firm creditors must be worked out through the equities of the partners. And a joint conveyance by partners of their partnership property in trust to secure their individual debts operates to defeat their own lien or equity thereon, and, *a fortiori*, that of the firm creditors, and gives priority of satisfaction out of the assets conveyed to the individual creditors." In *National Bank* v. *Sprague*, 20 New Jersey Chancery, 13, it is held: "Partners have the power, while the partnership assets remain under their control, to appropriate any part of them to pay or secure their individual debts. A mortgage given by them to secure individual debts fairly due is not rendered void by the mere fact that it operates to give individual debts a preference over demands against the firm; nor will such mortgage be set aside for that reason by a court of equity, unless, perhaps, when created in contemplation of insolvency to give an improper preference."

The mortgage in the case at bar was not found to have been fraudulently made; hence it follows that the fact that it conveyed partnership property to secure the payment of an individual debt of one of the partners, did not render it invalid, though the partnership was at the time of the conveyance insolvent.

We find that the judgment in this case should have been for only $180. If the appellee elect to enter a *remittitur* for $20, the judgment is affirmed; but otherwise it is reversed on account of the $20 excess in the damages, which it appears the plaintiff below intended to, but did not, remit.

BROWN *v.* BUCK.

Decided May 2, 1891.

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1. *Materialman's lien—Railroad—Act of 1887.*

   The railroad lien act of March 19, 1887, creates a lien in favor of one who furnishes materials to build any railroad, whether incorporated or not.

2. *Against whom enforced—Limitation.*

   The lien may be enforced by suit against a purchaser of the railroad, within one year after the lien accrued, although his title was acquired without notice of the lien.

APPEAL from *Craighead* Circuit Court, Jonesboro District.

J. E. RIDDICK, Judge.

M. M. Buck & Co. furnished to the Missouri Lumber Company rails and spikes to build a spur track from the Kansas City, Fort Scott and Memphis Railroad to a cypress brake a mile distant. The lumber company sold the track and appurtenances to S. A. Brown & Co., who purchased without notice of the lien of Buck & Co. Subsequently and within a year from the time the materials were furnished, Buck & Co. instituted this suit to enforce their lien upon the railroad. Brown & Co. interpleaded, and have appealed from a decree enforcing the lien.

J. C. Hawthorne for appellants.

The intention of the legislature was to provide for liens on railroads constructed by railway companies and owned and operated as such, and not temporary tracks, used to haul timber only, owned by private parties. Acts March 19, 1887; 99 N. Y., 43; 1 Blacks. Com., pp. 59–60; 93 U. S., 451; 27 Ark., 564.

J. M. Moore for appellee.

This was a railroad, within the meaning of the act of 1887. Bouvier, L. Dict.; 70 Pa., 210; 3 Cal., 241. Any one may build and operate a railroad. Rorer on Railroads, page 8; 30 Vt., 182; Pierce on Railways, 2; Beach on Railways, vol. 1., sec. 22; Wood on Railways, 1, 2, 3. Statutes giving liens are now usually liberally construed, so as to give full effect to the remedy. 1 Jones on Liens, sec. 105; Phillips on Mech. Liens, 2d ed., sec. 16; 46 Mo., 595; Houck on Liens, 38. As to liens against railways, see 3 Cal., 241; 4 Met. (Ky.), 316; 25 Ark., 490; 41 Conn., 454; 11 Wis., 220; 31 Wis., 451; 12 N. Y., 630; 24 Mo., 587; 3 Mo. App., 559; 39 A. & E. R. Cases, 242; 101 U. S., 446; 43 A. & E. R. Cases, 622; 23 Pac. Rep., 670; 77 Mo. 315. The language of the act is "*any railroad.*"

1. Construction of railroad lien act.

PER CURIAM. The act of March 19, 1887, creates a lien in favor of one who furnishes materials to build "any railroad," upon the road-bed, equipments and appurtenances to the road. The language is broad enough to embrace every railroad, whether incorporated or unincorporated. The lien may exist therefore where the railroad is constructed by individuals who own the road as a co-partnership or in common without incorporation.

2. Limitation.

The act manifests the intent to preserve the lien as against the "owners" and others for the space of one year after the lien accrues (with the right to continue it by the institution of a suit to enforce it), whether the ownership was acquired before or after the lien attached. One who becomes the owner within the year takes the property subject to the lien, as in the case of a purchase of property subject to a me-

chanic's lien before the expiration of the time fixed by the statute for filing the evidence of the lien.

The interest in the railway claimed by the interpleaders was subject to the lien asserted by the plaintiffs. The judgment is therefore affirmed

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BRUCE *v.* PATTON.

Decided May 2, 1891.

Swamp lands—Sale by United States—Confirmatory act of 1875.

The title to all swamp lands, sold by the United States prior to the passage of the indemnity acts of Congress of 1855 and 1857 and undisposed of by the State at the date of its passage, were confirmed by the act of the General Assembly of December 14, 1875.

APPEAL from *Washington* Circuit Court in chancery.

J. M. PITTMAN, Judge.

C. R. Bruce instituted ejectment against W. J. Patton to recover the northeast quarter of the northeast quarter of section 17, in township 17 north, and range 29 west. His title was derived from the State, as follows: The land was selected by the Surveyor General of Arkansas as swamp land, and reported by him as such to the general land office on February 3, 1853; was approved to the State by the Secretary of the Interior August 31, 1876; was patented to the State April 19, 1877; was sold by the State to Grace Watson May 3, and patent issued May 23, 1879; was conveyed by her to Bruce, March 3, 1886.

Patton derived title from the United States as follows: David Walker purchased the land from the United States at cash entry March 15, 1853; sold it to I. C. Patton, father of defendant, December 22, 1857; on November 20, 1880, a patent from the United States was issued to Walker; I. C. Patton died, and defendant purchased the interests of all his other heirs. He filed a cross-complaint asking that the

cause be transferred to the equity docket and his title quieted.

The cause was accordingly so transferred, the complaint dismissed, and decree rendered quieting Patton's title. Bruce has appealed.

E. P. Watson for appellant.

This is swamp land. 33 Ark., 833; 9 Wall., 89-95 7 Otto, 345. The United States could not change its character, nor dispose of the State's rights by act of Congress. 1 Lester Land Laws, 553, 571; 4 Copp. L. L., 149. The patent to the State followed up the grant. 3 Otto, 169; 13 Wall., 72; 46 Ark., 1. The subsequent patent is void, as the United States had parted with its title. Congress could not legislate upon the title to this land after 1850. The act of 1875 only referred to such lands as had not been confirmed to the State. This act could only prove effective *after the State had received the indemnity.* 20 Ark., 100. The grant to the State was in *præsenti,* and carried the title *proprio vigore.* The State, having elected to take swamp land by field notes and plats of survey, is bound by them, as is also the United States. Sec. Int. Decisions, Oct. 4, 1855; 1 Lester Land Laws, 553, 571; 4 Copps L. L., 149; 97 U. S. (7 Otto), 345. Parol testimony to show that the land is not swamp, after confirmation, is inadmissible. The report of the Secretary of the Interior is conclusive. 3 Otto, 160; 9 Op. Atty. Gen'l, 253; 13 Wall., 72; 46 Ark., 21; 33 *id.*, 833. All selections made prior to act 1857 were confirmed to the State. 9 Wall., 89, 95; U. S. Digest, sec. 2484.

Williams & Shinn for appellee.

The decision of the land department is not conclusive. 121 U. S., 488. The act of 1875, p. 134, confirmed the title in Walker, and was a direct grant to persons holding lands under the United States entries. 112 U. S., 693; 6 Wall., 402; 93 U. S., 78. The patent to the State was void. 4 Wall., 210; 5 Cranch., 234; 6 Wall., 402; 101 U. S., 260; 21

Wall., 660. Bruce was a mere trustee for Patton. 46 Ark., 23; 44 *id.*, 452; 14 How., 377; 115 U. S., 392; 3 How., 441. The character of the land may be shown. 93 U. S., 169; 112 U. S., 165; 28 Fed. Rep., 708; 46 Ark., 23; 6 Cal., 341; 33 Ark., 833.

Sale of swamp land by United States.

PER CURIAM. The United States government disposed of the lands in question by cash entry to Walker, the defendant's vendor, after they had been selected and confirmed as swamp lands, but prior to the passage of the acts of Congress offering indemnity to the State for swamp lands sold by the government. No disposition had been made of the lands by the State when the legislature passed the act of December 14, 1875. The effect of that act was a confirmation by the State of the sale made by the United States to Walker, and an election to look to the United States for indemnity for the lands. *Chism* v. *Price*, *ante*, p. 251. The most that can be claimed for the patent issued to the State in 1877, in pursuance of the swamp land grant, is that it vested the legal title in the State, to be held in trust for Walker's vendee, who had the equitable title. *Coleman* v. *Hill*, 44 Ark., 452.

There is no error against the appellant, and the judgment is affirmed.

WHITMORE *v.* TATUM.

54	457
64	215
54	457
84	306

Decided May 2, 1891.

Mortgage—Equity of redemption—Sale on execution.

A mortgagee of real estate, who has caused the equity of redemption of the mortgagor to be sold under execution upon a judgment at law for part of the debt secured, may enforce the lien of the mortgage against the purchaser.

APPEAL from *Saline* Circuit Court in chancery.

JAMES B. WOOD, Judge.

Tatum sold certain lands to R. A. Whitmore, and, to secure payment of the four purchase notes, took a mortgage on the lands and had it recorded. The first note being unpaid, he obtained a judgment on it and had an execution levied upon the lands. At the sale he publicly announced that he held a mortgage for the balance of the purchase money, and that the purchaser would take the lands subject to his lien. J. B. Whitmore became the purchaser at the sale.

This suit was subsequently brought against R. A. and J. B. Whitmore to foreclose the mortgage. The latter contended that, through the purchase at the execution sale, he became the owner of the fee in the land, freed from the mortgage lien. The court decreed that the mortgage be foreclosed.

J. B. Whitmore has appealed.

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

A sale of the mortgaged property, under an execution issued by the mortgagee on the mortgage debt, is a waiver of the mortgage. 15 Ohio, 467; *id.*, 84; 2 Blackf., 243; 73 Ind., 304; 88 Ill., 90; 1 Greenl., 297; 52 Me., 405; 75 *id.*, 399; 7 Watts, 475; 10 Pa. St., 472; 11 *id.*, 282; 18 *id.*, 215.

Thos. B. Martin for appellee.

The equity of redemption was alone sold, and the purchaser took subject to the mortgage lien. Mansf. Dig., sec. 3001; 25 Ark., 277; 6 *id.*, 269; 27 *id.*, 673; 2 Gr. Chy., 513. The precise point is settled by 31 Ark., 109; *ib.*, 436; and has become a rule of property in this State. 43 Ark., 513.

Execution sale of equity of redemption.

COCKRILL, C. J. It has been commonly considered oppressive to the mortgagor for the mortgagee to levy an execution issued upon a judgment for the recovery of an installment of the mortgage debt, upon the equity of redemption in the mortgaged premises, while he retains his title and lien as mortgagee. To avert that evil, some courts have held that a sale under the execution extinguishes the lien of the mortgage. Chancellor Kent, however, expressed

the opinion that the true and only remedy for the mischief (where the equity of redemption is the subject of sale under execution, as it is in this State), was for the court of equity to prevent the mortgagee from proceeding at law to sell the equity of redemption. *Tice* v. *Annin*, 2 Johns. Chy., 130. The Supreme Court of New York, while Kent was Chief Justice, in a *per curiam* opinion most probably delivered by him, had previously ruled that the interest of the mortgagor passed by such an execution sale, and that the interest of the mortgagee was affected no further than the price paid for equity of redemption went to diminish the mortgage debt. *Jackson* v. *Hull*, 10 Johns., 481. In the case of *Rice* v. *Wilburn*, 31 Ark., 108, this court followed the latter case and others in line with it, in preference to those adopting the remedy first mentioned. The question whether the sale in this case might have been enjoined at the suit of the mortgagor is not presented by the record, for he did not complain. But the case of *Rice* v. *Wilburn* is controlling authority against the complaint of the purchaser at the execution sale. It is there ruled that he takes only the equity of redemption, and the ruling is adhered to.

The appellant in this case was such a purchaser, and was apprised by the record of the lien which he now seeks to defeat. He had also actual knowledge of the fact that there was a balance due upon the mortgage debt, and he must have heard the announcement at the execution sale that the land was to be sold subject to the mortgage lien. There is then nothing upon which to base an estoppel by conduct against the mortgagee.

Finding no error, the judgment is affirmed.

54 460
84 224

JAMES v. MILES.

Decided May 2, 1891.

Landlord and tenant—Unlawful detainer—Tramway.

The tenant of a tramway, after termination of the tenancy, cannot dispute his landlord's right of possession.

APPEAL from *Clark* Circuit Court.
RUFUS D. HEARN, Judge.

Atkinson, Tompkins & Greeson for appellant.

Force is the gist of an action of forcible entry and detainer. Implied force is not sufficient. 38 Ark., 257; 38 *id.*, 584. The proceedings show this to be an ordinary action of unlawful detainer, and the relation of landlord and tenant must exist or the action will fail. 31 Ark., 296; 33 *id.*, 682. The tram in controversy was held under a mere license, *passing no interest in the land,* and there could be no relation of landlord and tenant. 19 Ark., 32–33; 1 Washb., R. P., sec. 9, p. 664. While title is not involved, it is admissible to introduce evidence of title to show right to possession. 77 Am. Dec., 550, and note.

Murry & Kinsworthy for appellee.

The testimony shows the relation of landlord and tenant. The agreement of the parties must determine the relation between them. 48 Ark., 415. The pleadings show this to be an action of unlawful detainer.

HUGHES, J. The appellant built a tramroad, under a verbal contract with Jacob Kern, from the saw mill of said Kern to the railroad. The agreement between him and Kern was, as shown by the evidence of the witnesses, that Kern should furnish the material, and that appellee should build the tramway and have the use of it for five years, and Kern should pay him stipulated prices, according to the character of the lumber, for hauling lumber from the mill to the railroad. Afterwards Kern's mill fell into the hands of a receiver, who was to and did have it sold.

Appellee wanted to buy the mill at the sale and, learning that the appellant had some claim to the tramway, he sought him and entered into an agreement with him, orally, that the appellant should haul all the lumber cut at the mill, if appellee should buy it, for one year, over the tramway, and that appellee should pay him an agreed price for the hauling, and that appellant would surrender possession of the tramway to appellee after the expiration of the one year. Appellee then bought the mill and tramway. When the year expired, the appellant refused to deliver possession of the tramway, and appellee brought this suit of unlawful detainer, recovered judgment for possession of the tram, from which this appeal was taken.

Appellant denied leasing the tramway from appellee, but admitted that he had grown tired of the tramway and had agreed to surrender the possession of it to the appellee, after the expiration of one year, if appellee would pay him what he had been receiving for hauling lumber over it, provided he should be paid an amount which he claimed Kern owed him. Appellee said in his testimony that he did not agree to pay appellant what Kern owed him, and that its payment was not a condition upon the performance of which the surrender of possession of the tramway by appellant to him was to depend.

The cause was tried before a jury, which found for the appellee. We think there was evidence to warrant a finding that appellant built the tramway for Kern, and that he entered into an agreement with Kern for the use of it for five years, and that he was the tenant of it under Kern; that he afterwards waived his rights under this contract with Kern, and agreed with appellee to hold under him for one year, and did attorn to him, and that this constituted the relation of landlord and tenant between them.

Tenant cannot dispute landlord's title.

A tenant cannot dispute his landlord's title or right to possession. To do this, the general rule requires that he must first surrender possession to his landlord. Unlawful detainer is an action to recover possession, and no proof of title is re-

quired to sustain it. Taylor's Landlord and Tenant, 2 vol., sec. 705; *Fordyce* v. *Young*, 39 Ark., 135; *Hoskins* v. *Byler*, 53 Ark., 543. The appellant, having recognized and attorned to the appellee as his landlord, could not afterwards dispute his right to possession at the end of the term.

In the case of the *Iron Mountain & Helena Railroad* v. *Johnson*, 119 U. S., 608, it is held: "There is nothing in the nature of the possession of a railroad, or of a section of a railroad, which takes it out of the operation of the language of the statutes of Arkansas against forcible entry and detainer, or out of the general principle which lies at the foundation of all suits of forcible entry and detainer, that the law will not sanction or support a possession acquired by violence, but will, when appealed to in this form of action, compel the party who thus gains possession to surrender it to the party whom he dispossessed, without inquiring which party owns the property or has the legal right to possession."

The principle decided in the case applies in an action of unlawful detainer for a tramway. A tenant, after the termination of the period for which he is to hold, under a contract with his landlord, has no better right to hold possession against his landlord than one who gains possession by force has to hold against another of whom he has thus obtained possession.

We find no error in the instructions given, or in the court's refusal to give those refused.

The judgment is affirmed.

ESTES *v.* CHESNEY.

Decided May 9, 1891.

1. *Appeal—Bill of exceptions—Petition for change of venue.*
   A petition for a change of venue with the supporting affidavits must be brought upon the record by bill of exceptions.

2. *Wrongful attachment—Evidence of damages.*
   In assessing damages for a wrongful attachment evidence is admissible to prove the value of the property before seizure and the extent of its depreciation at the time of its restoration; but not to show that, had the levy not been made, the debtor would probably within a short time have sold the property at a reduced price.

APPEAL from *Yell* Circuit Court, Danville District. JORDAN E. CRAVENS, Judge.

Appellants sued out an attachment for the property of appellees, alleging a fraudulent disposition thereof. The attachment was dissolved. Judgment against appellants was rendered on the attachment bond for damages sustained by the wrongful issuance of the writ. The facts are stated in the opinion.

Davis & Bullock for appellants.

1. The court erred in refusing a change of venue. Mansf. Dig., sec. 6479; *ib.*, sec. 5060.

2. The court erred in discharging the attachment. *Ib.*, sec. 69; Bump. Fr. Conv., pp. 34, 50.

3. The court erred in admitting incompetent testimony and excluding competent testimony. 34 Ark., 710. The damages must be compensatory merely, or in case of closing business the probable profits during stoppage only. *Ib.*, 37 Ark., 612; *ib.*, 614; 51 Ark., 380; Drake on Att., sec. 175. Prospective profits and change in market value cannot be assessed as damages. Drake, Att. (5th ed.), sec. 175; 34 Ark., 710.

Hall & Harrison for appellee.

The petition for change of venue was properly denied, and the attachment properly dissolved. This court will not reverse upon the mere weight of evidence. As to the

measure of damages the instructions were less favorable to defendant than the rule laid down in 34 Ark., 710, and 37 *ib.*, 612. The evidence shows that no ground of attachment existed, and the damages were compensatory merely.

1. Bill of exceptions should contain petition for change of venue.

HEMINGWAY, J. 1. The appellants insist that the judgment should be reversed because the court improperly denied their motion for a change of venue. This is a question which we cannot consider, for the reason that the petition for a change of venue and supporting affidavits are not brought upon the record by bill of exceptions. *Stearns* v. *Ry. Co.*, 94 Mo., 317; *Wolff* v. *Ward*, 16 S. W., 161.

2. Evidence of damages in wrongful attachment.

2. It was competent for the defendant to prove the value of his goods before their seizure under the attachment, and also the extent of their depreciation in value at the time of their restoration to him, as the testimony tended to show that the depreciation was occasioned by the seizure. For this reason we think the appellants' objection to the admission of testimony was properly overruled.

3. The appellants could not reduce the appellee's recovery for damages occasioned by attaching his goods and closing his store by proving that he would probably have sold them in bulk within a short time after the levy at a reduced price. The sale was entirely conjectural and might never have been made, and proof that it was contemplated was therefore incompetent. The proof that such sale if made would have been at reduced price was further incompetent for the reason that it had no tendency to fix the real damage. One whose property is injured by the wrongful act of another is entitled to recover to the extent of its injury, although he may have intended to give it away or sacrifice it in the near future. For the reason indicated we think there was no error in excluding the testimony offered by appellants.

Finding no error in the record, the judgment will be affirmed.

REUTZEL v. MCKINNEY.

Decided May 9, 1891.

Estoppel—Declaration.

A representation by a tenant in common that he had sold his interest to his cotenant will not estop him from asserting title to his moiety, where the representation was made in good faith to one who applied to rent the land, though he subsequently purchased it.

APPEAL from *Sebastian* Circuit Court, Fort Smith District.

JOHN S. LITTLE, Judge.

Wall and McKinney were tenants in common of a tract of land. Wall executed to Gill a deed purporting to convey the entire tract of land, and delivered possession. Gill conveyed the land to Reutzel. McKinney brought ejectment for an undivided half interest in the land.

Upon the trial of the cause the defendant relied upon the defense of estoppel, growing out of the declarations and conduct of plaintiff. Upon that question the evidence stands as follows: William H. Gill, defendant's vendor, after detailing the circumstances of the purchase of the property by him from Wall and the payment of the money by him, says: "Prior to the time I purchased the property from Wall, I had a conversation with the plaintiff, McKinney, in regard to the matter. It was only a few days before the purchase. It was at the plaintiff's house. I told him that I wanted to rent the property. He said that he had nothing to do with it—it was Wall's; and that he had sold it to Wall. I then went to Van Buren to see Wall, and made him an offer for the property, and he told me that he would meet me at Fort Smith on a certain day. I met him there and closed the trade. The consideration for the property was $275, of which $175 was cash, the balance due in one year. In the conversation I had with Mr. McKinney before I bought the property, he told me that I could purchase the property from Wall, as Wall wanted to sell it."

Again witness stated: "I made no further investigation of Wall's title to the property because Mr. McKinney had told me that Wall was the owner of the property, and I relied upon his statement in making the deal with Wall. If I had supposed that McKinney had had any interest in the property, I would not have taken a deed from Wall alone." Defendant Reutzel also testified that plaintiff had stated to him, before and after the sale of the property by Wall to Gill, that the property belonged to Wall; that, at the time he purchased the property, Gill was in possession of it.

Plaintiff testified in his own behalf that he remembered the conversation between Gill and himself in regard to renting of the property; that Gill spoke to him about renting it; that he did not know Gill wanted to buy it. When Gill spoke to him about renting the property, witness told him to go to Wall, but did not tell him that Wall wanted to sell. That he *did not at the time know whether Wall wanted to sell or not.*

A decree was rendered for the plaintiff, in which the court held as follows: "That the declarations of said Charles D. McKinney to said W. H. Gill and Henry Reutzel, as established by the evidence, do not estop said plaintiff from setting up his title to said lands, nor does his conduct prior or subsequent to such declarations amount to an estoppel."

Clendenning & Read for appellant.

The facts in this case constitute an equitable estoppel. Herman on Est. and Res. Adj., vol. 2, p. 909; *ib.*, p. 863; 10 S. W. Rep., 365; 3 Litt. (Ky.), 340, 351; 23 Ark.. 468; Bigelow on Estoppel, p. 627; 103 Mass., 501; 2 Ex., 558.

B. A. Youmans and *L. P. Sandels* for appellee.

The facts in this case do not amount to an estoppel. 106 U. S., 437; 93 *id.*, 336; 109 Mass., 53; 18 Wall., 271; 14 Cal., 368; 26 *id.*, 23; 10 Pa. St., 531; 28 Me., 239; 6 Hill, 616; 1 Curtis, C. C., 136; 3 Watts, 240; 4 Harr., 361; 33 Ark., 468.

Estoppel by declaration.

HEMINGWAY, J. A "representation in order to work an estoppel must be of a nature to lead naturally, *i. e.*, to lead a man of prudence, to the action taken." Bigelow on Est., p. 572. The question in this case is, Where the party setting up the estoppel applied to the party against whom it is set up to rent land, and was told that he had sold to another and had nothing to do with renting it, does this representation naturally lead a prudent man to purchase the land of such third party without making further inquiry as to the rights of the person who had made the representation?

Persons having the beneficial ownership of land usually control the renting of it, and those desiring to rent go to them to obtain leases. Persons holding liens or equitable charges do not generally act in making leases, and renters seldom take account of their interests. Gill's question and McKinney's answer should be interpreted in the light of this fact. For when McKinney stated that he had sold the land to Wall, Gill had only indicated a desire to rent it, and this called upon McKinney to make only such disclosures as he might fairly understand would be expected by one contemplating renting, but it did not call for a disclosure of further facts which would be deemed material only to one contemplating a purchase of the land. Upon the representation made, Gill was warranted in concluding that McKinney had no interest in the land which would authorize him to rent it, and that Wall was authorized to rent it as against him. But as one desiring to rent would not ordinarily be concerned about the liens or reserved rights of the vendor of his lessor, the proposition made would not naturally call for a disclosure as to such rights, and the representation should be construed in connection with the proposition. McKinney made the representation without any design to misrepresent the facts, and, as the record discloses, after he had agreed to sell to Wall in consideration of and upon the surrender of a note of McKinney held by Wall. The representation was not inconsistent with a sale entirely on credit, with title retained as security for the purchase money, and did not

warrant a conclusion that it was not thus held; for, if such had been the case, Wall alone would have been authorized to make a lease of it. While Gill was warranted in concluding that McKinney had no interest which would authorize him to make a lease, we do not think he was justified in assuming that McKinney had no interest at all, or could purchase without further inquiry in faith of such assumption.

The statements to Reutzel, so far as the evidence discloses, were casual and made without inquiry from him or knowledge on part of McKinney that he contemplated a purchase. They are wholly insufficient to work an estoppel.

Affirm.

MERRITT v. SCHOOL DISTRICT.

Decided May 9, 1891.

1. *Apportionment of school fund.*

   Where a school district, though detached from a county, was included in the enumeration upon which the superintendent of public instruction apportioned the school fund to that county, it is entitled to share therein in the proportion which its children of school age bear to the children included in the enumeration.

2. *Mandamus.*

   Mandamus will lie to compel a county judge to apportion to a school district the funds belonging to it.

3. *Construction of pleading.*

   The character of a pleading is to be ascertained from its allegations, and not from its name. Accordingly where a pleading filed in the circuit court contained all the essential allegations of a petition for mandamus, and brought in the proper parties, and was treated as such by the court, the judgment will not be reversed because it was indorsed "an application for an appeal."

APPEAL from *Arkansas* Circuit Court.

JOHN M. ELLIOTT, Judge.

Appeal from a judgment awarding a mandamus, directed to James H. Merritt, county judge of Arkansas county, to allot its proportion of the school fund to School District No.

9 of Jefferson county, which had been detached from Arkansas county. The facts sufficiently appear in the opinion.

W. H. HalliBurton for appellant.

1. The county court of Arkansas county had no jurisdiction of the petition, School District No. 9 being in Jefferson county. Mansf. Dig., secs. 6175, 6176, 6177.

2. There was no final order or judgment for or against petitioners, and there was nothing for them to appeal from. The appellees were not proper parties to the record, and hence not entitled to appeal. 28 Ark., 479; 36 *ib.*, 578; 47 Ark., 412; 52 *id.*, 99; *ib.*, 343. The clerk had no authority to grant the appeal. Mansf. Dig., sec. 1436; 26 Ark., 415. A remedy is given, by sec. 6180, Mansf. Dig., to the counties and not the school districts.

Gibson & Holt for appellees.

1. The county court had jurisdiction of the subject matter (Mansf. Dig , sec. 6172); and appellees had a right to appeal under sec. 1436, *ib.* Art. 7, sec. 51, const. 1874. The court had done *all* that could be done; nothing was left for future action, and hence the judgment was final. Section 6180 does not preclude all other remedies.

1. Apportionment of schoo fund.

HEMINGWAY, J. It is unnecessary to consider the point pressed by the appellant, that the school district could not appeal from the order of the county court directing the distribution of the school fund received from the State. As the district, though detached from Arkansas county,* was included in the enumeration upon which the superintendent apportioned the fund to that county, it was entitled to share therein in the proportion which its children of school age bore to the children included in the enumeration. This was an absolute right, not dependent upon the discretion of any officer or tribunal. It was the duty of the appellant, as county judge, on receiving notice of the amount apportioned to the county, to proceed to apportion the same to the several districts upon whose enumeration the superin-

*See Acts 1889, p. 22.

tendent made his apportionment. The duty was absolute—involved only a matter of mathematical calculation—and in its performance the county judge had no discretion; but he proceeded to discharge it, and by his apportionment excluded the detached district from all participation in the fund, thus denying a right for which, as we have seen, he was bound to afford a remedy. This entitled the district to seek relief by mandamus in the circuit court.

2. Mandamus to compel apportionment.

It is argued that the superintendent was authorized to rectify the wrong in his subsequent apportionment, and this is true. Mansf. Dig., sec. 6180. But the county judge should have averted the wrong to the district, and awarded it the sum due it before the superintendent could make another apportionment. There is no reason why a district should be kept out of its funds for any time on account of a change of county lines, and it is in the power, and is the duty, of the county judge to prevent it. If he fails to do his duty, its performance should be coerced, because serious embarrassment might result to the wronged district before the superintendent could furnish the proper relief.

3. Construction of pleading.

The petition filed in the circuit court contained all the essential allegations of a petition for mandamus, and brought in the proper parties. It was indorsed as "an application for appeal;" but the appellant treated it as the statement of a cause of action, for he demurred to it on the ground that it did not state facts sufficient to constitute a cause of action. If he had considered it a prayer for appeal, he would have interposed no demurrer, for his learned counsel well knew that a prayer for appeal need not set out facts sufficient to constitute a cause of action. It not only appears that it was so treated, but also that such was its real nature. Its character was to be ascertained from its allegations and not from its name, and by this test it was a petition for mandamus. The proof sustained the allegations, and the judgment awarded the relief to which the district was entitled. It would conserve no rule of practice or principle of justice to reverse the judgment and turn the district out of court, only

to compel it to rename and refile its petition and upon the same proof obtain a similar judgment.

Affirm.

LINCOLN v. FIELD.

54 471
58 561
54 471
59 64

Decided May 9, 1891.

1. *Assignment for creditors—Delivery "forthwith."*

A deed of assignment for the benefit of creditors, which provides that the assignee shall "forthwith" take possession of the property, contemplates a delivery before the bond and inventory of the assignee are filed, and is void on its face, though the bond and inventory were in fact filed before delivery, and though the deed provided that the assignors would, as soon as convenient, make and attach to the deed a complete inventory and that the assignee should dispose of the property "within the time and in the manner provided by the laws."

2. *Assignment—Construction.*

The rule that where two different constructions of an instrument are possible, one of which will uphold and the other avoid it, the former should be chosen, may be resorted to only where its meaning is uncertain, and cannot be invoked, where its meaning is certain, to extend or limit its terms or to import into its provisions matters not incorporated by the parties.

APPEAL from Benton Circuit Court.

JAMES M. PITTMAN, Judge.

Appeal from a judgment sustaining an attachment brought to test the validity of a deed of assignment for the benefit of creditors. It is dated August 9, 1889, purports to be the deed of George T. Lincoln and J. C. Arthur, and conveys all of their partnership property to I. R. Hall, for the benefit of their creditors, with preferences. After describing the property in general terms, but specifying particularly the stock of goods, it provides as follows: "A schedule containing a more particular description of the property herein conveyed will be made out as soon as conveniently can be done by the parties of the first part, and when completed will be annexed to this deed, marked 'Schedule A,' and made a part thereof." The following are the directions to the assignee: "The said

party of the second part shall forthwith take possession of all the estate, property and effects above conveyed and assigned to him, and shall, with all reasonable diligence and within the time and in the manner provided by the laws of the State of Arkansas, sell and dispose of said property."

Upon the trial the circuit court found that possession of the property was not delivered to the assignee until he had filed the inventory and executed the bond required by the statute, but held the deed of assignment void on its face.

L. H. McGill for appellants.

No actual fraud having been proved, the court erred in declaring the deed fraudulent in law upon its face. The whole instrument should be considered in determining its meaning. 11 A. & E. Enc. of Law, 513. If considered as a whole the intention of the parties is apparent, it must prevail over the literal interpretation of detached words or phrases. 4 L. R. An., 203, and notes; 1 Wait, Ac. & Def., 116, 117; Bump, Fr. Conv., 366. Where two different constructions are possible, one of which upholds, the other renders it void, the former is to be chosen. 84 N. Y., 368; Bish. on Cont., sec. 392; 3 N. W. Rep., 945. See also, 34 N. W. Rep., 154; 11 N. E. Rep., 386; 12 *id.*, 174; 32 N. Y., 209; 34 Kans., 142; 9 N. E. Rep., 449. "Forthwith" means "within a reasonable time." 67 N. Y., 274; 13 Pac. Rep., 73; 58 Md., 261; 14 Allen, 66. The other stipulations in the deed show that no immediate surrender of possession was intended. Burrill, Ass., secs. 139, 151. The deeds in 47 Ark., 347, and 51 *id.*, 56, contained similar provisions. The word "forthwith" was used without any well-defined purpose, following some precedent, as in Burrill on Ass., pp. 768–9. And this is customary. *Ib.*, pp. 307, 314, 318, 768, 781, 783. The practical interpretation put upon an instrument by the parties, as shown by their acts and conduct, is entitled to great, if not controlling, weight, where there is doubt. 11 A. & E. Enc. Law, 518; Bish. on Cont., sec. 412. By possession is meant actual possession, and not constructive

possession. The deed passes *title* to the assignee and the right to access to it for the purpose of making inventory, etc., but the assignee has no right to the possession until he has filed bond and inventory. 36 Ark., 421; 37 *id.*, 64; 24 Fed. Rep., 462. In all the cases heretofore decided by this court and by the federal court the possession was *actually* delivered to the assignee before he filed his bond and inventory, thus violating the statute. In this case, no such possession was either contemplated or given.

1. Assignment for creditors—Delivery "forthwith"

HEMINGWAY, J. The determination of this cause depends upon the interpretation of the clause in the deed of assignment containing directions to the assignee. The clause is as follows: "The said party of the second part shall forthwith take possession of all the estate, property and effects above conveyed and assigned to him, and shall, with all reasonable diligence and within the time and in the manner provided by the laws of the State of Arkansas, sell and dispose of said property, * * * and shall dispose of such proceeds when so converted into money in the following manner." As applicable to it, the court made the following declaration of law: "The deed of assignment gave immediate possession to the assignee before bond filed, and upon its face is fraudulent and void as to creditors."

It is conceded that if the deed directed an immediate change of possession, the legal conclusion was right. What was meant by the direction that the trustee should "forthwith take possession of the property and estate conveyed?" The appellant contends that it meant only that he should take possession within a reasonable time, considering the character and situation of the property and the legal duty imposed upon him in the premises; and that as the law required him to make and file an inventory and bond before taking possession, the direction should be construed as not providing that the taking of possession should precede the discharge of this duty.

To sustain his contention he relies first upon what he contends is an accepted meaning of the word forthwith. Webster defines forthwith as meaning "Immediately, without delay, directly," while Worcester gives the same definition, omitting "directly." In this sense if an act is directed to be done forthwith, it seems to exclude the idea of other acts intervening between the direction and its execution. But as some time is necessary to the doing of everything, varying in length with the thing to be done, the word has in law received a more liberal interpretation. Bouvier's definition is, "As soon as by reasonable exertion, confined to the object, it may be accomplished." This seems to be the accepted legal sense of the word. Applying it, how stands the clause under consideration? It will be observed that nothing is said of making an inventory or giving a bond, and that the only thing directed to be done forthwith, and the only object thus to be accomplished, is to take possession of the assigned property; so it should be construed to require that he take possession as soon as by reasonable exertion he could acquire it, while the right to possession was immediate. The property comprised a stock of goods in a store in the town in which the deed was executed, and by reasonable exertion the trustee might have obeyed the direction before it was possible to have complied with the law.

It is contended that the deed, when looked at as a whole, shows that the grantors intended that possession should be taken after the statutory requirements had been satisfied. We are cited to the provision that the trustee should sell according to law, and should receive such compensation as the court might allow; and this, it is claimed, shows that no fraud was intended. This might tend to show that there was no actual corrupt intent, but does not show that the parties did not intend what they plainly said—to do an act which the law stamps as fraudulent without regard to intent. The deed recites that the assignors would make and file a complete inventory of the property assigned, and it is

argued that this shows that there was no intention to change the possession until an inventory could be made. The conclusion does not seem a necessary sequence from the fact. The law requires the trustee to make an inventory before he takes possession, and it is sometimes observed; if he can make an inventory before he acquires possession, the assignor can make one after he parts with possession. So we cannot say from this provision that the parties did not intend that the direction should mean what its terms imply. That they intended what is said, might be inferred from the other part of the same sentence; for, when fixing the time when possession shall be taken, it says forthwith; and, when fixing the time when a sale shall be made, it says, with all reasonable diligence and within the time and in the manner fixed by law. It thus appears from the context that a direction to do a thing "forthwith" was not regarded as synonymous with a direction to do it with "all reasonable diligence." The direction is one found in old precedents, formulated at a time when it was held a badge of fraud for the assignor to retain possession after executing the deed, and was intended to accomplish an immediate transfer of the property. We have been able to find nothing in this deed to show that the word was used in a sense different from its earlier uses.

2. Construction of assignment.

Counsel contends that the ordinary meaning should not be placed upon the word, and relies upon the lawful conduct of the parties under the deed, and further upon the rule that where two different constructions of an instrument are possible, one of which will uphold and the other avoid it, the former should be chosen. But those aids in the construction of an instrument may be resorted to only where its meaning is uncertain, and cannot be invoked, where its meaning is certain, to extend or limit its terms or to import into its provisions matters not incorporated by the parties.

We think the deed admits of but one construction, and that one stamps it as fraudulent in law. The judgment is affirmed.

CINCINNATI SAFE CO. *v.* KELLY.

Decided May 9, 1891.

Conditional sale—Forfeiture—Demand.

Appellant sold appellee a new safe, in consideration of the payment of a sum of money and the delivery of an old safe, and retained title until the consideration was paid. The money was paid. Appellant demanded that the old safe should be delivered at the depot platform. Appellee applied to the depot agent, who refused to receive it on the platform *except for shipment.* Appellee thereupon declined to deliver it to him, but never notified appellant or asked any instructions. A month afterward appellant brought suit to recover the new safe. *Held:* Appellee was in default, and judgment should be for appellant.

APPEAL from *Monroe* Circuit Court.

M. T. SANDERS, Judge.

N. W. Norton for appellant.

When a chattel is sold with a reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed. 47 Ark., 363. The agreed statement of facts shows due demand on the vendee to perform the conditions of sale, and failure on his part. The vendor then had the right to claim a forfeiture and bring replevin. 47 Ark., 363.

John C. Palmer for appellee.

Part performance of the condition required some notice that he was going to claim a forfeiture. It is the duty of the vendor to inform the purchaser, in order that he may pay or tender the amount due. 14 Sup. Ct. N. Y., 525; 41 N. Y., 155; 3 Johns. Chy., 23; 15 N. Y. Com. Law, An., 375. The vendee should have had notice. 17 Atl. Rep., 638; 6 So. Rep., 93. There was no demand in this case. The appellant's agent simply "urged" Kelly to put the old safe on the depot platform. He gave him no notice that he would claim a forfeiture.

HUGHES, J. This is an appeal from a judgment in replevin for the return of an iron safe, or its value $225, which

the appellant sold and shipped to the appellee, Kelly, at Brinkley, Arkansas, upon the express condition in the written contract of sale that the title thereto should not pass until said safe was paid for in full, and that the same should remain the property of the appellant until that time. By the terms of the written contract the appellee agreed to pay for said safe two hundred and twenty-five dollars to the order of appellant, as follows: Cash on arrival one hundred and twenty-five dollars, together with the old safe of appellee at depot at Brinkley, Arkansas, valued at one hundred dollars. The new safe was to be delivered on board of cars at Cincinnati, Ohio.

When the new safe arrived at Brinkley, the appellee refused to receive it and pay the one hundred and twenty-five dollars in money and to deliver the old safe; whereupon the appellant sued appellee and recovered judgment in the circuit court, at its September term, 1888, for the one hundred and twenty-five dollars and costs, against the appellee, Kelly, which judgment he paid. The appellant then sued the railroad company and recovered judgment in replevin by default for the new safe, and upon appeal from this judgment, rendered by a justice of the peace, Kelly was, upon his motion, made a defendant in the circuit court, where he recovered judgment for the return of the new safe, or its value, two hundred and twenty-five dollars. The appeal pending here is from the latter judgment.

The cause was tried before the court without a jury, upon an agreed state of facts, from which it appears that the new safe was shipped to Kelly by appellant on December 5, 1887; that appellees, by their attorney, N. W. Norton, on the 26th November, 1888, at the appellee Kelly's place of business, in the town of Brinkley, urged appellee Kelly to put the old safe referred to in the contract on the depot platform in Brinkley; that Kelly afterwards applied to the railroad agent for permission to place said old safe on the depot platform, which the agent declined to permit unless Kelly would place the safe there for shipment, which Kelly

could not do, because he had no shipping instructions. When this occurred, is not shown. It does not appear that Kelly ever tendered the old safe to the appellant, or that he even notified it that he was ready to ship it or deliver it, or that he asked any instructions from the appellant in regard to what he should do with it. There were no declarations of law at the trial other than a general declaration that the law was for the appellee, as we infer from the bill of exceptions. The appellant excepted, filed a motion for a new trial, which was overruled, and appealed.

"Where a chattel is sold with a reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed." *McIntosh* v. *Hill*, 47 Ark., 363; *McRea* v. *Merrifield*, 48 Ark., 160; *Simpson* v. *Shackleford*, 49 Ark., 63.

Forfeiture under conditional sale.

It does not appear from the agreed statement of facts or otherwise that the appellant waived its right in the premises in any respect at any time. Appellant brought suit to recover the new safe on December 27, 1888, a month after his attorney had urged appellee to deliver the old safe on the depot platform at Brinkley, and in the meantime he did not notify the appellant or his attorney that he was prepared and ready to deliver it, or that he had asked permission to place it on the platform at the railroad depot and been refused by the railroad agent. We think he was clearly in default, and that, upon the facts presented in the bill of exceptions, judgment should have been rendered for appellant.

The judgment is reversed and remanded for new trial.

BATTLE and HEMINGWAY, JJ., concur.

DISSENTING OPINION.

COCKRILL, C. J. The consideration for the new safe was a sum of money and the old safe. The title to the new safe was to remain in the vendor (the plaintiff) until the defendant fully complied with his contract of purchase. He paid the money consideration, but failed to deliver the old safe at the railway station house as his contract bound him to do.

It is settled by the decision of this court that the defendant did not forfeit his right to the new safe by a failure to deliver the old one until there was a specific demand therefor in accordance with the terms of the contract. *Nattin* v. *Riley*, *ante* p. 30. Forfeitures are not favored, and the party claiming a right by virtue of a forfeiture should be held to strict proof of the facts which work the forfeiture. The question in this case then is, Did the plaintiff prove a demand for the delivery of the old safe in pursuance of the contract of purchase? A demand for delivery not in pursuance of the terms of the contract would not work a forfeiture of the defendant's right to the new safe. The terms of the contract called for delivery of the old safe at the railway station-house. Standing alone, that is, without other directions by the owner or purchaser, that meant delivery for shipment to the owner or purchaser at his place of residence, Cincinnati in this case. If therefore there had been a demand for delivery in accordance with the terms of the contract, the defendant could not have excused himself by answering that he had no directions for shipment. The agreed statement of facts is that the plaintiff's attorney urged the defendant to put the safe on the platform at the railway station-house. Did that mean that it should be placed there for shipment to the plaintiff at Cincinnati, or to await the order of the plaintiff? It appears that the defendant placed the latter construction upon the request; and if that was a proper construction, the request was not a demand in accordance with the terms of the contract; and as the defendant was prevented from complying with the request by the refusal of the railway agent to permit the safe to be stored on the platform, the forfeiture should not be declared. There is room for a difference of opinion as to the inference which might be fairly drawn from the conceded facts in reference to the demand. The issue was therefore one of fact (*Robson* v. *Tomlinson*, *ante* p. 229; 1 Shearman & Red. on Neg., sec. 54), and the finding of the court is conclusive. The finding was general for the defendant, and, taking it most strongly

for the defendant, it was in effect that the plaintiff's demand was to deliver the old safe at the railway depot, not for shipment, but to remain there subject to the plaintiff's order. It may be correct to say that it was the defendant's duty to notify the plaintiff that the railway agent would not permit him to leave the safe on the platform without directions to ship, but such failure could not work a forfeiture of the defendant's right to the possession of the new safe. The judgment for the defendant is right, and ought to be affirmed. As it is reversed, the defendant can doubtless be relieved of the effect of the forfeiture by a proper appeal to equitable doctrines.

MANSFIELD, J., concurs in this opinion.

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ALEXANDER v. HARDIN.

Decided May 9, 1891.

1. *Guardian's sale—Confirmation.*

   A guardian's deed, executed in pursuance of an unconfirmed guardian's sale, passes no title.

2. *Ejectment—Equitable defense.*

   A confirmed guardian's sale, under which the purchase price was paid and possession delivered but no deed executed, conveys an equitable title and a right to the legal title which would be a sufficient defense in ejectment.

3. Feme covert *as guardian.*

   A sale of a minor's land by a guardian who is a married woman, made upon proper application, is valid against collateral attack after confirmation if the sale was made prior to the passage of section 3486 of Mansfield's Digest.

APPEAL from *Craighead* Circuit Court, Jonesboro District.

FRANCIS JOHNSON, Special Judge.

N. W. Norton for appellant.

The deed recited no authority to convey the ward's land. *Prima facie* it did not pass the ward's title. The sale was never confirmed. Incompetency in the party making the

sale is a jurisdictional defect. Freeman, Void Jud. Sales, sec. 10; 10 Tex., 319; 34 Miss., 314. At that time, it is true, there was no statute prohibiting a *feme covert* from acting as guardian, so we must see how the chancery courts dealt with a female guardian when she married. See 1 Beav., 347; 19 Ind., 88; 1 Paige, 488; 29 Miss., 195. This court will not extend the rule in 52 Ark., 344; 1 Wall., 636. The orders of December 18 were made after the sale, and they are not relevant.

W. M. Randolph for appellees.

1. Taking the deed and acknowledgment together, it sufficiently appears that the conveyance was by Mrs. Witt as guardian. 4 Kent, Com., pp. 334–6. It is ordinarily necessary to only refer to the power, and never required to recite it in words. 3 Johns. Chy., 551; 34 Ark., 534; 20 *id.*, 114.

2. The probate court has jurisdiction, and the manner and terms of the sale are wholly immaterial. 3 Head, 517.

3. The marriage of a *feme sole* guardian does not avoid the guardianship, but leaves it in force until some competent tribunal revokes the appointment. Schouler, Dom. Rel., p. 418. Mansfield's Digest, section 3486, was not passed until after the sale. Mrs. Witt was a guardian *de facto*. 13 S. W. Rep., 510.

4. When the sale was confirmed, all defects and irregularities were cured. 26 Ark., 421; 12 S. W., 703; 52 Ark., 341.

HUGHES, J. The appellant sued in ejectment to recover lands described in his complaint, which he claimed by inheritance from his father, James A. Alexander. Judgment was rendered for the appellee, Mrs. Lydia C. Hardin, the real defendant, from which he appealed.

Mrs. Hardin, in her defense to the action, admitted that she was in possession, and claimed to be the owner of the lands under a deed of conveyance, duly recorded, made to her by her husband, since deceased, on the 7th day of July, 1873, and averred that he derived title to the same by con-

veyance executed to him by Merrill Witt and his wife, Nancy Witt, who was formerly the wife and the widow of the said James A., and was the mother and guardian of appellant. She exhibited with her answer a copy of an order of the probate court of the county, made at the January term, 1872, upon her application as guardian of appellant, authorizing a sale of the lands, and appointing R. C. Wallace commissioner to make the sale, and a deed executed on the 4th of December, 1872, to W. D. Hardin by Mrs. Witt and her husband. Wallace never executed the order of the court, and she and her husband sold the lands at private sale to Hardin for $1000 in cash. On the 18th day of December, 1872, she as guardian made a report of this sale to the probate court, and an order was indorsed on the report confirming the sale, but the order was not entered of record. On the same day she filed her petition in the probate court, and prayed that the order of January, 1872, for the sale of the lands and appointing Wallace commissioner, be revoked, and that she, as guardian of appellant, be authorized to sell the same lands at private sale for cash. An order was thereupon made, revoking the order of January, 1872, and authorizing her as such guardian to sell the said lands at private sale for cash. On the same day she reported to the probate court that she had sold the lands at private sale for cash to W. D. Hardin, and had executed to him a deed; and the court made an order confirming the sale. The latter petition, the order of confirmation and the deed are exhibited with the answer of Mrs. Hardin.

1. Unconfirmed guardian's sale conveys no title.

The appellant excepted to the title exhibits filed with and relied upon in Mrs. Hardin's answer, and his exceptions were overruled, to which he excepted. The only deed to Hardin made by Mrs. Witt refers to the order of sale of January, 1872, and bears date prior to the order of December the 18th, 1872, for the sale of the lands; and as to it the exception should have been sustained.

2. Equitable defense in ejectment.

But the appellant has not been prejudiced by the failure to sustain the exceptions to it as a muniment of title, because

there was an order of sale on the 18th of December, 1872, a report of the sale, and an order of confirmation of the sale by the court, which are exhibited with the answer. These, coupled with the possession of Mrs. Hardin, gave her an equitable title and the right to the legal title to the lands, if the proceedings in the probate court on the 18th of December, 1872, and the sale thereunder, were valid when collaterally attacked.

3. Can a *feme covert* be a guardian?

It is insisted that these proceedings and the sale were invalid because they were at the instance of and by a guardian who was at the time a married woman. The act of the legislature (sec. 3486, Mansfield's Digest), providing that the marriage of a female guardian should operate to revoke her appointment, was not passed until the year 1873, after the sale had been completed under which appellee, Mrs. Hardin, claims. Mrs. Witt was appointed guardian while she was unmarried, and the proceedings were had while she was *feme covert*, no order of revocation of her appointment having been made. Was she competent? were her acts void?

In *Palmer* v. *Oakley*, 2 Douglass (Mich.), 433, this question is discussed at much length, the authorities are reviewed, and it is held that a decree of the probate court appointing a *feme covert* guardian would bind until reversed, and that the acts of such guardian would be valid; that at common law a married woman was competent to be guardian with the assent of her husband, but not without such assent; that letters of guardianship granted to a wife without the assent of her husband would be voidable merely and not void; and that the husband's assent may be presumed unless his dissent expressly appears. In *Allen* v. *McCullough*, 2 Heiskell, 194, it is said that if the wife still acts as guardian at the time of the marriage, and "continues to act after the marriage, it is with her husband's assent, and is, in law, his act."

The constitution of 1836 conferred upon the probate court such jurisdiction relating to the estates of deceased

persons, executors, administrators and guardians, as may be prescribed by law, until otherwise directed by the general assembly. Art. 6, sec. 10. Section 180, chap. 4, of Gould's Digest (being a part of the act of the legislature of December 23, 1846), under which this sale was made, provided that "The probate court shall have power, upon the proper affidavit being filed as hereinafter provided for, to grant orders to executors, administrators and guardians, to sell any or all real estate belonging to any estate, not otherwise provided for." Section 5 of article 7 of the constitution of 1868 provided that "The inferior courts of the State, as now constituted by law, except as hereinafter provided, shall remain with the same jurisdiction as they now possess." The act of 1846, above referred to, was in force when the sale in this case was made. That act vested in the probate court jurisdiction to order the sale of lands by a guardian at public or private sale, as the court in its discretion might direct. The probate court is a superior court, and its judgments, rendered in the exercise of its jurisdiction, cannot be collaterally drawn in question. The confirmation of a sale made in pursuance of an order of the probate court, jurisdiction of the subject matter appearing, cures all defects or irregularities, unless it is attacked in a direct proceeding. *Fleming* v. *Johnson*, 26 Ark., 421; *Borden* v. *State*, 11 Ark., 519; *Sturdy* v. *Jacoway*, 19 Ark., 516; *Apel* v. *Kelsey*, 47 Ark., 419; *Adams* v. *Thomas*, 44 Ark., 270; *Shumard* v. *Phillips*, 53 Ark., 37.

The sale under which Mrs. Hardin claims in this case, having been ordered by the probate court upon the application of the guardian, reported to and confirmed by the court, must be treated as valid in a collateral proceeding.

The judgment is affirmed.

COCKRILL, C. J., did not participate.

HAZER *v.* YOST.

Decided May 16, 1891.

Bond for title—Assignment—Covenant.

The words, "*grant, bargain and sell,*" employed in the assignment of a bond for title, do not import, nor does the act of assignment imply, a covenant that the vendor will comply with his contract to convey, or that the assignor will repay to the assignee all sums expended in obtaining title; the assignor undertakes merely that he is owner of the bond for title, and to invest the assignee therewith.

APPEAL from *Pulaski* Chancery Court.

DAVID W. CARROLL, Chancellor.

Yost, being assignee of a bond for title to land, sought to recoup against the purchase notes executed to his assignor, Hazer, certain expenses incurred in obtaining a deed from Edwards, the vendor. There was judgment for Hazer, from which Yost appeals. The facts are stated in the opinion.

S. W. Williams for appellant.

1. The assignment was but a means to an end, *i. e.*, perfecting the former verbal contract for the sale of the land. It does not purport to set out or embody the entire contract or the considerations or motives that prompted it, and parol evidence was admissible to show what the contract was. Jones on Com. & Trade Cont., sec. 284, *et seq.*; Abb. Tr. Ev., p. 362, sec. 10; *ib.*, p. 5, sec. 10, and p. 385; 27 Ark., 510.

2. The parol agreement bound Yost to return purchase money if the title failed. 7 Cr., 408. Even if he sold only the bond, by the assignment he guaranteed to return the purchase money if the bond was void or could not be made good, and to make good all outlays. 1 Bibb (Ky.), 547; 2 *id.*, 424; 6 Black. (Ind.), 40. The words "grant, bargain and sell" raise the statutory covenants for title. The assignment raises a *contingent obligation* on the obligor's failure to make title. 3 T. B. Mon. (Ky.), 95; *ib.*, 290; 3 J. J. Marsh., 636; 3 T. B. Mon., 565. The assignee can recover of the

assignor expenses of suit, etc. 2 B. Monroe, 191. He undertook to pass the title to the land, and is bound to make it good. 14 B. Mon., 18. See on the relative rights of the parties. 2 Wash. (Va.), 219; 2 H. & M. (Va.), 105, 536; 29 Ark., 358.

G. W. Williams for appellee.

1. If appellant paid more than Edwards had a right to demand or claim, under the title bond, this did not bind appellee to repay him. 2 B. Monroe, 193.

2. The oral negotiations were resolved into the written contract, and oral testimony was inadmissible to vary it. 1 Sugd. on Vendors, sec. 4, p. 80; 1 Johns. Chy., 273; 13 Ark., 496; *ib.*, 598; 45 *id.*, 177; 50 *id.*, 393; 24 *id.*, 210; 11 Johns., 202; 2 Lead. Cases in Equity, part 1, note to p. 946; 9 Md., 436; 2 L. C. in Eq., p. 963, 975, 980; Fry on Sp. Perf., sec. 512; 91 U. S., 291; 16 Wall., 564.

2. Before the assignee of a bond for title can hold the vendee in the bond liable, he must first show that he has exhausted his remedy against the vendor, and that the vendor is insolvent. 3 T. B. Mon., 73; *ib.*, 290; 3 J. J. Marsh, 633; 2 B. Mon., 191. In this case there was no failure of title. Appellant obtained his deed at the time promised and entered into possession.

HEMINGWAY, J. Yost held land under a bond for title, whereby one Edwards bound himself to convey the land to Yost on the 28th of September, 1885, upon the payment to him on that day of the sum of $500 and interest from the date of the bond. Before the time arrived for the payment of the money to Edwards and the execution of the deed by him, according to the terms of the bond, Yost executed to Hazer the following assignment of the bond:

"Know all men by these presents, that I, E. B. Yost, of Hennepin county, State of Minnesota, in consideration of the sum of five hundred dollars, lawful money of the United States, to me in hand paid, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold,

assigned and transferred, and by these presents do grant, bargain, sell, assign and transfer, to James H. Hazer of Hennepin county, State of Minnesota, party of the second part, a certain bond for a deed dated the 8th day of May, 1883, given by H. H. Edwards to me, E. B. Yost, the property described in said bond being a piece or parcel of land described as the south half of the southwest quarter of the northwest quarter of the northeast quarter of section fifteen, township one north, range twelve west, in the county of Pulaski, State of Arkansas; and I do by these presents place the said James H. Hazer in my place and stead, with all the rights and privileges that I might or could have, had not these presents been given. In witness whereof, I have hereunto set my hand and seal, this 5th day of June, A. D., 1885.

[Signed] "E. B. YOST."

Liability of the assignor of a bond for title.

It is insisted that by the terms of this assignment, Yost undertook that Edwards would convey title in accordance with the terms of his bond, and bound himself to pay to Hazer all sums expended by him in obtaining title, such as fees paid to attorneys and conveyancers and personal expenses incurred. The assignment contains no express undertaking to that effect; and if one can be gathered from it, it must be by implication arising from the ordinary or legal signification of its provisions, or from the act of assignment in itself.

We do not think that the ordinary import of its terms by any fair construction can be said to imply any such undertaking. To the common understanding it would express the purpose to invest Hazer with the rights of Yost, subject to the conditions under which the latter held them. But, to sustain the contention, reliance is placed upon the legal signification of the words of transfer found in the assignment, which, it is claimed, import a covenant that the assignor is seized of an indefeasible estate in fee simple free from incumbrances. We can not so hold for two reasons: (1) Because the thing "granted, bargained and

sold" is the bond for title and not the land, and if any covenant as to ownership is implied from the words of grant, it relates to the bond only; (2) Because an agreement will not be implied against one manifestly expressed, and the terms of the assignment clearly show that the assignor held under a bond for title, and did not covenant that he held an indefeasible estate of fee simple free from incumbrances. The assignment does not disclose the conditions of the bond, but makes reference to it as the source of the assignor's right, and thereby imparts notice of its conditions; and since Yost put Hazer in his place under it, the latter took the rights subject to the conditions expressed in it.

It is further insisted that assignors of bonds for title, by the act of assignment, undertake with their assignees that conveyances will be made according to the obligations of the bonds assigned. We do not think the authorities cited sustain the contention. They only hold that the assignor of a bond undertakes that he is the absolute and unconditional owner of the bond, and has an indefeasible right to demand what the bond calls for. *Emmerson* v. *Claywell*, 14 B. Mon., 18. Yost owned the bond assigned, and was entitled to demand a deed upon the conditions therein set forth; so there was no breach of the implied undertaking.

Judgment affirmed.

FELKER V. STATE.

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Decided May 16, 1891.

1. *Amendment of record—Absence of defendant.*

The record in a prosecution for a felony must show that the grand jury returned the indictment into court, and an omission in this respect cannot be cured by a *nunc pro tunc* order made in the absence of the defendant.

2. *Assault with intent to kill—Sufficiency of indictment.*

An indictment for assault with intent to kill is sufficient, which, after alleging the assault in usual form, charges that defendant "unlawfully, feloniously, after premeditation, deliberation, and of his malice aforethought, *did attempt to shoot, kill and murder;*" an attempt to kill necessarily implies an intent to kill.

3. *Witness—Impeachment—Offer to make experiment.*

Evidence that an offer to make an experiment out of court to test the truth of his testimony was rejected by a witness is not admissible to discredit him where it does not appear that he had reason to believe that the experiment proposed would furnish a true test.

4. *Evidence—Rebuttal of excluded testimony.*

Where the evidence of the proposed experiment was excluded, the witness should not be permitted to explain that he declined the offer because he thought it was intended to entrap him.

5. *Invading jury's province—Opinion of court.*

In excluding evidence of a proposed test, introduced on behalf of defendant, it was error for the court to remark, in hearing of the jury, that "a man charged with crime has no right to manufacture evidence in his own favor."

6. *Evidence—Other crimes.*

Where an assault is alleged to have been committed at night at the gin-house of the assaulted person, evidence of a previous attempt to burn the gin-house is inadmissible to explain defendant's purpose in going there, in the absence of proof connecting him with such previous attempt.

7. *Instruction—Specific intent to kill.*

It is error to charge that one would be guilty of assault with intent to kill, who, while attempting to commit arson, shoots at another who was endeavoring to arrest him or to protect his own property; there must be the specific intent to kill, which will not be supplied by a general malevolent design nor by a specific design to commit another felony.

8. *Assault with intent to kill—Self-defense.*

It is error to charge that if defendant armed himself with intent to commit arson, and, while endeavoring to execute such purpose, shot at the owner of the building with intent to kill him, he would be guilty of an assault with intent to kill, without regard to the fact that said owner may have shot first and after defendant had turned to flee away. One who has attempted to commit a felony and abandoned it has not forfeited the right to defend himself, during his flight, against impending violence.

9. *Assault with intent to kill—Justification.*

One who is unlawfully shot at will not be justified in shooting his assailant except in necessary self-defense.

10. *Credibility of witnesses.*

It is not error, where the defendant becomes a witness, to charge that, in determining the credibility of witnesses, the jury may consider their manner on the stand, their apparent bias for or against the defendant, and their interest in the result of the prosecution.

APPEAL from *Franklin* Circuit Court, Ozark District. HUGH F. THOMASON, Judge.

J. V. Bourland and *W. L. Terry*, for appellant.

1. It was error to refuse to permit appellant to prove that Dain had rejected the "test" of the sound of the guns. This was a relevant circumstance as affecting both the *animus* and credibility of the prosecuting witness.

2. The court erred in remarking "that a man charged with crime has no right to *manufacture evidence* in his own favor." 51 Ark., 147.

3. It was error to allow the State to cross-examine Dain for the purpose of showing that the proposed "test" was not made in good faith. 43 Ark., 104.

4. Proof of an attempt at arson was not competent. 15 N. H., 174; 55 N. Y., 81, 90; 37 Ark., 265; 39 *id.*, 280; Wh. Cr. Ev., secs. 31, 32 *et seq.*; Steph. Dig. Ev., art. 11, p. 18, and art. 12, p. 22; 1 Allen, 572; 9 Cush, 594; Wh. Cr. Ev., sec. 48, and p. 47; 51 Ark., 513; 3 So. Rep., 618; Wh. Cr. Pl. & Pr., secs. 801–2.

5. The first instruction is erroneous, in that it leaves out the question of *intent*, the very essence of the offense. Wh. Cr. Law, sec. 641; 24 Ark., 348. The second instruction erroneous, vicious and misleading. Sec. 1521, Mansf. Dig.

The third instruction was erroneous. Thomp. on Trials, sec. 2309. The fourth contained long recitals of facts which tended to confuse. 31 Ark., 666; 36 *id.*, 117. It gave undue prominence to isolated parts of the evidence. Thomp. on Trials, sec. 2330; 37 Ark., 333; 30 *id.*, 383. It is misleading, and does not state the law correctly. 24 Ark., 348; Mansf. Dig., sec. 2007; Wh. Cr. L., sec. 648. It is open to other objections—it was argumentative; Thomp. on Tr., sec. 2301—stated facts; *ib.*, secs. 2324, 2295; 37 Ark., 598.

6. The record fails to disclose that the indictment was duly returned into court. This cannot be cured by *nunc pro tunc* order without defendant's presence. 39 Ark., 180; 24 *id.*, 636.

7. The indictment is fatally defective. 24 Ark., 348. No felonious intent is charged. See also 34 Ark., 276.

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

1. There was no error in refusing evidence of the proposed "test." It was merely an attempt to manufacture evidence.

2. The evidence of Dain of the alleged attempt at arson is within the exceptions to the rule, and admissible to show the motives of defendant. 2 Bish. Cr. Pro., sec. 628; 43 Ark., 371; 52 *id.*, 309; 14 *id.*, 560.

3. It is too late after verdict to object that the *nunc pro tunc* order was made in defendant's absence. 12 Ark., 260.

4. *Milan* v. *State*, 24 Ark., 348, states the common law correctly, but its strict rules have been modified by our code. Mansf. Dig., secs. 2106, 2107, 2121; 69 Ill., 526.

HEMINGWAY, J. The appellant was tried and convicted of an assault with intent to murder one B. W. Dain, and prosecutes this appeal to reverse the judgment upon the verdict.

1. It is insisted on behalf of the appellant that it does not appear from the record that the indictment upon which he was tried was returned into court by the grand jury. There was no entry of record showing the return of the in-

1. Amendment of record in defendant's absence.

dictment. It bears the clerk's indorsement that it was "Filed in open court on the 22d of February, 1890." No point was raised as to the manner in which it was found or presented until after the jury returned its verdict, when an effort was made to arrest the judgment. Then there was an effort on the part of the State to supply the omission by a *nunc pro tunc* entry, as of the 22d of February, 1890, reciting the return of the indictment into court by the grand jury. So far as the transcript discloses, the proceeding to correct the record was *ex parte*. It is well settled in this State that the record must show a return of the indictment by the grand jury—that an indorsement by the clerk upon an indictment that it was filed in open court does not satisfy the requirement—and that an omission in that respect cannot be cured by a *nunc pro tunc* order made in the absence of the defendant. *McKenzie* v. *State*, 24 Ark., 636; *Green* v. *State*, 19 Ark., 178; *Hatbrook* v. *State*, 34 Ark., 520; *Holcomb* v. *State*, 31 Ark., 427; *Miller* v. *State*, 40 Ark., 488. Such objections should be raised by motion to set aside the indictment (Mansf. Dig., sec. 2157); but whether a party, who fails to make such motion and proceeds to trial upon an indictment bearing the ordinary badges of regular and authentic origin, can raise the objection after conviction, is a question we need not decide. A just and speedy administration of the law favors the practice by motion to set aside, and whether it be the only method of reaching the omission or not, it should in practice be adopted by those who question the genuineness of indictments.

2. Indictment for assault with intent to kill.

2. But it is insisted that, conceding the indictment to have been properly found and presented, it is fatally defective in its allegations and insufficient to support a judgment. The defect relied upon is in the allegation charging the intent with which the assault was committed. The allegation as to the assault is full enough to satisfy the most exacting requirement, and seems to follow established precedents; instead of following the allegation as to the assault with the usual form of allegation as to the intent, which

would be "with intent, him, the said Dain, then and there feloniously, wilfully and of his malice aforethought to kill and murder," it substitutes, "and him, the said Dain, unlawfully, feloniously, after premeditation, deliberation, and of his malice aforethought, did attempt to shoot, kill and murder." It is argued that the terms employed are not the legal equivalent of those used in defining the offense and found in approved forms, and that the variance is fatal to the indictment. To sustain this contention *Milan* v. *State*, 24 Ark., 346, is relied upon. But a marked and commendable change has taken place, since that case was decided, in the rules governing criminal pleading and practice, and many matters then deemed substantial are now treated as formal. In the case of *Dilling* v. *State*,* determined by this court in an unreported opinion by Judge SANDELS, we declined to follow Milan's case, and sustained an indictment which, after charging an assault to have been committed wilfully, feloniously and of malice aforethought, omitted those descriptive words in charging the intent to commit the higher crime. *State* v. *Lynch*, 26 Pac. Rep., 219. The elements of the crime charged are, (1) the commission of an assault with malice aforethought, and (2) an intent to commit the independent felony. As before stated, there is no objection to the form in which the first element is charged; and this narrows the consideration to the sufficiency as to the charge of intent. The indictment must charge an assault "with intent to kill and murder," either in express terms or in terms that import a legal equivalent. Is this requirement answered by the charge of an assault and attempt to kill and murder? An attempt to do an act necessarily implies an intent to do it, coupled with some other act designed to accomplish the intent. There is no such thing conceivable as an

*NOTE.—Dilling's case, which was decided orally, was a prosecution for an assault with intent to commit rape. The indictment alleged that he "feloniously, wilfully and of his malice aforethought, upon one Hettie Stewart, then and there being, did make an assault with the intent her, the said Hettie Stewart, then and there to rape, against," etc.—REP.

attempt to kill and murder without an intent to do it; so that the allegation, by the necessary signification of its terms, charges the criminal intent in terms as plainly expressing it as those found in the statute. This in reason is all that the defendant could ask; and the statute expressly provides that "the words used in a statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used." Mansf. Dig., sec. 2119. We are satisfied that the variance in this indictment is one of form, wholly without substance, was not misleading, and is therefore no basis for an objection to the indictment. While we would not encourage an ignoring of precedents or a departure from the descriptive words of statutes, we do not think that a tolerance of such practice in instances like this imperils the rights or liberty of any citizen.

3. Impeachment of witness.

3. The appellant's next objections relate to the exclusion of evidence offered on his behalf, to a remark of the judge made in the hearing of the jury when ruling it out, and to the admission of certain evidence on the part of the State relating to the same matter. It is an undisputed fact that, on the occasion of the assault charged, two shots were fired, one by the defendant and the other by Dain. The parties to the difficulty were the only persons who witnessed it, and each states that the other fired first. Neighbors heard the shooting and distinguished the order of the shots by the character of the report, but could not state which party fired the first shot. Before the trial outsiders proposed to Dain that the guns used by the parties on the night of the difficulty be fired in the hearing of the said neighbors, under as nearly the same circumstances as possible, by disinterested and reliable parties, who would observe which gun was fired first, so that the neighbors might determine which gun fired at this time was first discharged during the difficulty; but Dain declined to participate in the experiment. The appellant offered to prove this proposal and its rejection by Dain, but the court ruled the evidence inadmissible. If the experiment proposed had been of a kind that promised to

furnish a true test as to the matter of difference, or if it had appeared that Dain so thought, its rejection by him would have tended to prove that he was the conscious author of a false narrative, and it would for that reason have been admissible to discredit him. But there was nothing to show that Dain believed that the difference could thus be correctly tested, or that he declined the experiment because it threatened to disclose his falsehood. We can not say that the test proposed was one calculated to elucidate the matter, nor that Dain might not well have rejected it as inaccurate and unreliable. He was cognizant of the facts, and might well have declined to place what he knew against the theories that might be developed upon an experiment affected by numberless changing outward conditions. If his refusal was thus prompted, as it might well have been, it indicated no conscious falsehood; and the evidence offered should have been excluded.

4. Rebutting excluded testimony.

But after the testimony offered had been excluded, the court permitted the State to prove that Dain declined the offer because he thought it was intended to entrap him. When the testimony as to the offer and its rejection had been excluded, there was no reason to admit testimony explaining Dain's reason for rejecting it, and it should not have been done.

5. Invading jury's province.

In excluding the evidence, the judge remarked, in the hearing of the jury, that "a man charged with crime has no right to manufacture evidence in his own favor." If this implied that defendant had attempted to manufacture evidence in his own favor, it was clearly improper; and since it might have been thus understood, though otherwise intended, it should not have been made. It can be said, to the honor of the trial judges and juries in this State, that the latter defer greatly to the opinions of the former; and upon matters of law this is proper. But since the defendant is entitled to be tried upon the facts by a jury, uninfluenced by any opinion of the judge, he should never express or intimate his opinion or manifest a feeling as to those matters

committed to the jury. While such was certainly not intended by the judge in this case, his remark may have influenced the minds of jurors accustomed to defer to his learning and judgment.

6. Evidence of other crimes.

4. The court permitted the State to introduce proof, against the objection of the defendant, as to an attempt that was made to burn Dain's gin-house several days before the assault charged. As there was no proof connecting the defendant with that attempt, it had no tendency to prove his purpose in going to the gin on the night of the difficulty. It was not proper to admit it for the purpose of explaining the presence of the prosecuting witness at the gin at an unusual hour of the night, for the fact of his presence was not disputed and the reason for it was immaterial.

5. The court gave in charge to the jury, at the request of the State and against the defendant's objections, the following instructions:

(1.) "The court charges you that if you find from the evidence in this case, beyond a reasonable doubt, that the defendant, W. H. Felker, in the Ozark district of Franklin county, within three years next before the finding of the indictment in this case, unlawfully, feloniously and after premeditation, deliberation, and of his malice aforethought, went to the gin-house of the witness, B. W. Dain, in the night time, intending to burn said gin-house, and that, before going to said gin-house, he prepared himself with a gun or pistol with which to insure the success of his purpose or to defend himself against lawful arrest, and that, while at or near said gin-house, with the aforesaid unlawful and felonious purpose, he, the said defendant, shot at witness Dain, who was attempting to arrest him or to protect his property, he would be guilty, and you should so find.

(2.) "If you find that defendant armed himself with a gun or pistol and went to the gin-house of B. W. Dain, in the night time, intending and attempting to burn said gin-house, and that, while there endeavoring to execute such purpose, he shot at witness Dain with intent to kill him, he would be

guilty of this offense, without regard to the fact that said witness Dain may have shot first at this defendant and after defendant had turned to flee away."

7. There must be specific intent to kill.

The first, standing by itself, is an incorrect declaration of law, in that it does not make the defendant's intent to kill Dain essential to his conviction. If he did not shoot with intent to kill, he was not guilty of the felony charged, although he may have entertained a present design to commit another felony. The circumstances of the defendant's going to the gin with intent to burn it, and arming himself with a pistol to aid him in carrying out his intent, and Dain's attempting to arrest him in order to protect the gin, would have been better omitted. If the shot was fired at Dain with intent to kill him, that was sufficient to warrant the conviction unless it was done in necessary self-defense; and the law governing that aspect of the case was sufficiently set forth in the next instruction. If the shot was not fired with intent to kill, those circumstances do not warrant a conviction. For neither a general malevolent design nor a specific design to commit another felony can supply the specific intent to kill, which is an essential ingredient in the offense charged.

8. When right of self-defense forfeited.

The second seems to state the law correctly, down to the last clause which is neither consistent with the part that precedes it nor a correct statement of the law. If the defendant went to the gin for the purpose of burning it, and attempted to execute his purpose but was discovered before he accomplished it, and fled, abandoning his attempt, he had not forfeited the right to defend himself, during his flight, against impending violence; but could in such case resort to whatever means were necessary to his protection. For this error alone we would be compelled to reverse the judgment; we have adverted to other errors, without indicating what their effect upon the judgment would be, in order that they may be avoided upon a future trial.

6. The defendant asked the court to charge the jury as follows:

9. Justification of assault.

"(1.) You have no authority to make inquiry as to why defendant was at the gin of Dain, whether he had stopped to warm or had entered the premises to set fire to the gin, unless you find that the defendant was actually engaged in the overt unlawful act. So that, whatever purpose you may find defendant had in being at the gin-house, you should acquit the defendant if you find that, upon his entering the premises, B. W. Dain fired upon him, before defendant had fired or attempted to fire upon said Dain. (2.) The owner of a gin is not justified in shooting another who enters his premises, even though the owner suspicions that he enters with intent to commit arson, unless such shooting is necessary to prevent the overt act of setting the property on fire."

The prayer was refused, and it is claimed that there was error in its refusal. We do not think the instructions should have been given. If the defendant went to Dain's gin to burn it, and was discovered and shot at by Dain before he did any unlawful act, he would not be justified in shooting at Dain unless that was necessary to his own protection; he was in an attitude where he should have done everything in his power by retreat, disclaimer of a felonious purpose or otherwise, in order to avoid the necessity for a violent defense. His right to shoot, upon the facts recited, was not necessarily perfect when Dain fired, but depended upon an imperious necessity. We can see no aid that the latter instruction could have rendered the jury in arriving at a verdict. In the connection in which it was offered, it was abstract; and if it had been given, and the jury had found that Dain was not justified in shooting, it was not informed what effect that should have in correctly deciding the case. If it was to be understood that such fact alone established defendant's right to shoot, it was entirely incorrect; and if such fact properly led to any other legal conclusion, that should have been stated. We think it was properly refused as asked.

10. Credibility of witnesses.

7. Although the defendant becomes a witness upon the trial, we think the court may well charge the jury that, in

determining the credibility of the witnesses, they may consider the manner of the witnesses on the stand, their apparent bias for or against the defendant, and their interest in the result of the prosecution.

For the error in giving the second instruction set out on part of the State, the judgment will be reversed, and the cause remanded. If the grand jury in fact returned the indictment into court, that may be shown, and the record corrected by a *nunc pro tunc* entry; but if the indictment was not in fact returned into court by the grand jury, it should be set aside, and the defendant held to await the action of the grand jury. No action can be taken in the matter of amending the record in the absence of the defendant.

Judge MANSFIELD did not participate in the consideration or determination of this cause.

WATSON *v.* MURRAY.

Decided May 16, 1891.

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1. *Advancement—Resulting trust.*

Where, in a purchase of land, a mother paid the consideration and her son took the title, a trust resulted in her favor, unless she intended to make an advancement; if she paid a part only of the consideration, a trust resulted *pro tanto.*

2. *Advancement—Presumption.*

Where the deed to real estate is taken in the name of the purchaser's child, the law presumes that the purchase was an advancement, but the presumption may be rebutted by proof; as in this case by showing that the mother intended that her son should become an equal owner with herself, and that he wrongfully and without her consent took title to himself.

3. *Possession—Notice.*

Where in such case the possession of the premises by the mother, as head of the family, was sufficiently marked and ostensible to put an intending purchaser upon inquiry, one who purchases from her minor son will take the legal title subject to a trust in her favor as to a moiety.

4. *Estoppel—Burden of proof.*

The burden is upon one who relies upon an estoppel to establish the facts relied upon as creating it.

5. *Estoppel by conduct.*

One will not be estopped by a failure to set up a title where no one was deceived by it, or where there was no intention to deceive.

APPEAL from *Pulaski* Chancery Court.

DAVID W. CARROLL, Chancellor.

T. J. Oliphint for appellee.

1. The relation between appellant and Jordan was one of confidence and trust. Pom. Eq. Jur., secs. 959, 1049, 1088; 104 U. S., 54, 70; 39 Ark., 309; 13 Cal., 133.

2. A parent is entitled to the earnings of a minor son, especially while living with her as a member of the family. 3 Hill, 399; 38 Am. Dec., 644; 15 N. H., 486; 2 Mass., 113; 6 Conn., 547; 3 Barb., 115. The money being hers, and being made to believe by Jordan and his friends that to take the deed in Jordan's name did not affect her rights while she lived, she is the owner in fact, and is entitled to have the trust declared, provided Murray is not an innocent purchaser.

3. On the subject of innocent purchaser and notice, see 33 Ark., 465; 41 *id.*, 169; 34 *id.*, 391; 47 *id.*, 540. The law presumes a prudent person before purchasing will take ordinary precautions, and, if the land is occupied, will make inquiry as to their rights. 37 Ill., 214; 109 Ill., 349; 15 *id.*, 540; 18 *id.*, 542; 45 *id.*, 281; 76 *id.*, 260; 87 *id.*, 578; 95 *id.*, 39; Story, Eq. Jur., sec. 400. The possession of a third person is sufficient to put a purchaser upon inquiry. 5 Barb., 548; 13 N. Y., 189; 1 Hare, 43. It is the duty of the purchaser to seek the party in possession and make inquiry; and if he neglects to do so, it will be at the hazard of being held cognizant of all facts which the inquiry would have revealed. 2 Ves. Jr., 437; 2 Sch. & Lef., 583; 2 Ball & B., 416; 2 Swanst. 281; 1 Meriv., 282. Where the location of the land is such as to render personal inquiry practicable, a purchaser failing to make the inquiry is no more entitled to be regarded a

purchaser in good faith, than if he had so inquired and ascertained the real facts. 36 Cal., 272; 12 *id.*, 363; 19 *id.*, 675; 21 *id.*, 609; 26 *id.*, 393; 29 *id.*, 486; 33 *id.*, 693; 7 Watts, 386; 15 N. Y., 355; 4 T. B. Mon., 196; 7 B. Mon., 312; 4 N. H., 404–5; *ib.*, 266. The purchaser is bound to admit every claim which the tenant could enforce against the vendor. 5 Johns. Chy., 28. If appellant had given the lot to Jordan, she could have taken it from him without his consent. 22 Ill., 74; 14 *id.*, 342; 70 *id.*, 415; 83 *id.*, 267; 2 Johns., 53; 3 Am. Dec., 399; 12 *id.*, 188; 2 Wend., 459; 20 Am. Dec., 639; 14 Barb., 244; 25 *id.*, 505.

Eben W. Kimball for appellee.

A trust must be proved so clearly as to leave no doubt of it. 48 Ark., 169; 11 *id.*, 82. To create a trust the money must be paid at the time of the conveyance. 40 Ark., 62. And the trust must arise immediately by virtue of the purchase. 29 Ark., 630. If there was a trust of any kind, it was *secret* and void by the statute of frauds. If appellant contributed anything, which is not clearly proven, it was an advancement. 45 Ark., 481. There was no such possession as to put Murray on notice. 41 Ark., 169; 109 U. S., 504, 512. It was appellant's duty, when Murray made inquiry of her, to have set up her claim, and, not having done so, she is estopped. 33 Ark., 465. At the very most the secret trust could only amount to a life lease.

MANSFIELD, J. By this complaint in equity the plaintiff Phillis Watson sought to obtain a decree divesting the defendant Murray of the title to a city lot and vesting it in herself. The lot was sold and conveyed to Murray by his co-defendant, Jordan. The latter acquired title by a deed executed to him by W. B. Wait and duly recorded before the conveyance to Murray. The grounds on which the relief prayed for is claimed are specifically set forth in the complaint, the allegations of which are to the effect that the purchase money for the property in dispute was paid to Wait by the plaintiff; that the deed was wrongfully taken

in the name of Jordan; that a trust of the legal estate therefore resulted in favor of the plaintiff; and that Murray purchased with notice of her equitable right. The answer of Murray denies all the material allegations of the complaint, and avers that he purchased the lot and paid the defendant Jordan for it the sum of $650, without any knowledge or information that the plaintiff had paid any part of the price at which it was bought from Wait, or that she had or claimed to have any interest in it whatever. The defendant Jordan is a minor, and an answer in proper form was filed for him by a guardian *ad litem*. The chancellor, having found that Murray was a *bona fide* purchaser without notice of any equity held by the plaintiff, dismissed her complaint, and decreed that she should deliver to Murray possession of the lot.

The proofs adduced at the hearing established in substance the following facts: The lot in controversy is situated in the city of Little Rock, where the plaintiff, an uneducated negro, had resided for many years previous to the purchase from Wait. She labored there as a cook and washerwoman, and thus supported herself and her family. The defendant Jordan is her son, and lived with her during those years and up to about the date at which he executed the deed to Murray. He was about 18 years of age when this suit was commenced, and appears to have been an intelligent and industrious boy. As soon as he was old enough to work, he began to earn money as a shoe-black and in other similar occupations. His mother saved his small earnings, together with such part of her own wages as was not required for the payment of house rent and other necessary expenses; and when a fund had thus been accumulated which probably exceeded the sum of $300, it was deposited in bank with an understanding between the mother and son that it should be used in buying for themselves a home. Out of this fund a lot was purchased from one Pearce for the sum of $300. The deed was taken in the name of Jordan; but it does not appear that the plaintiff knew it was to be taken

in his name, or that she was present when it was executed. She however accepted the deed on the representation of Jordan that Pearce and others advised that it be made in his name to prevent other children of the plaintiff, who had not assisted in making the purchase, from sharing in the inheritance of the property at her death. The Pearce lot—as we may call it by way of distinction—was sold soon after its purchase for the sum of $400. Jordan was about 16 years of age when this sale was made, and upon the application of the plaintiff the disability imposed by his minority was so far removed as to enable him to execute a deed to the purchaser. The $400 thus obtained was paid to the plaintiff, but was taken to the bank by Jordan, who appears to have deposited it there in his own name. About a year later the lot in suit was purchased from Wait for the sum of $325. It was paid for out of a common fund, which included the sum received for the Pearce lot, and probably represented additional earnings of the plaintiff and also further sums acquired through the labors of Jordan.

They both appear to have participated in the bargain for the Wait lot, and it was evidently purchased in pursuance of the original plan for buying a home. The purchase money was paid to Wait by Jordan, who again took title in his own name; but he did so without the plaintiff's knowledge or consent. She was not present when the deed was executed, and, on learning that Jordan was made the sole grantee, expressed her dissatisfaction. But he again assured her by stating that he had acted upon the advice of an attorney, and that she would in any event hold the property during her life. A dwelling house was built upon the Wait lot at a cost of about $520, and paid for out of the fund referred to above and other funds earned by the plaintiff and Jordan. As soon as the house was completed, the plaintiff moved into it, and continued to occupy it until the final decree was rendered in this suit. Jordan lived there with her as a member of her family in the same way that he had lived with her in other houses. Murray, who also resided in Little Rock, visited

the premises twice before his purchase. On the occasion of each visit he found the plaintiff there pursuing her accustomed labors, and had a conversation with her. He testifies that in the first conversation he asked her how old Jordan was, and she replied that he was 18. This he states was all that was then said by either party. On the second visit he says that he asked her how the kitchen was finished, and that she then inquired why he was looking at the house; that he answered by asking if she did not know it was for sale; that she replied by saying she did not, and inquired at what price; that he told her the price was $600 or $650, and she said the price was too small, that it was less than the property cost. This, he states, was all of the second conversation, and that a few days after it occurred he had an abstract of the title examined and bought the lot.

The plaintiff testified that, on Murray's first visit to her house, he inquired whether the place was for sale, and she answered that it was not, so far as she knew; that in answer to other questions she told him Jordan was her son and living with her, and that the property belonged to both of them. She also states that on Murray's second visit she told him the property belonged to her, and objected to its sale. Murray further testifies that, in a conversation had with the plaintiff about one month after his purchase, he learned for the first time that she claimed the lot, and that he then stated to her that she had "slept on her rights, as her name was not mentioned in the abstract;" that if it had been, he would have paid her or would not have bought the property at all. A short time after this last conversation he caused to be served upon her a notice to quit the possession of the premises.

The deed to Murray was made about ten months after the plaintiff's actual occupancy of the house began. It was made in consideration of $650 paid to Jordan, and a second order of the circuit court was obtained to enable him to execute it. It does not appear who applied for this order; but it is shown that the plaintiff did not make the applica-

tion, and had no knowledge of it. Jordan left the city a few weeks after the sale, and is proceeded against as a non-resident. His deposition was not taken. The plaintiff testified that, in the course of a conversation had with her a few months before the sale to Murray, Jordan stated that he was not going to sell the lot, but could do so if he wished; and that he then boasted of the advantage he had secured by taking the deed from Wait in his own name.

1. Resulting trust.

I. To establish the truth claimed by the bill, as against the defendant Murray, it was incumbent on the plaintiff to show: (1) That she paid the consideration for which the deed from Wait was executed; (2) that the purchase was not an advancement to Jordan; and (3) that Murray had notice of her equitable estate at the time he bought. It is not however necessary to the declaration of a trust in favor of the plaintiff to show that she paid all the purchase money. If she paid only part of it, and the payment was not made by way of an advancement, a trust resulted *pro tanto*. 1 Perry on Trusts, sec. 126; *Case* v. *Codding*, 38 Cal., 191; *Somers* v. *Overhulser*, 67 *id.*, 237; *Kline* v. *Ragland*, 47 Ark., 111; Bispham, Eq., sec. 81.

On the question first to be decided, it is not important to determine what proportion of the fund used in buying the lots mentioned was contributed by the personal labors or wages of the plaintiff. Jordan was a minor living with his mother, and she was entitled to his earnings. Field's Law of Infants, sec. 67. The whole fund belonged, therefore, originally to her; and there is no evidence that she ever relinquished her right to any part of it, unless she did so for the special purpose of making her son the owner or part owner of these lots. The waiver or relinquishment of a parent's right to the wages of a minor child need not be made expressly. It may be implied. Field's Law of Infants, sec. 68. If the proof shows no such waiver on the part of the plaintiff, then it is clear that she paid the whole amount of the purchase money for both lots. And as both purchases were made from a common fund and with the

On page 505, ninth line from top, for "truth" read *trust*.

same purpose in view, it is plain that whatever trust resulted as to one of the lots resulted equally as to the other. If therefore the Pearce lot was held, as a whole or as to any part of it, in trust for the plaintiff, the money received on its sale was to the same extent a trust fund in Jordan's hands—if indeed it can be said to have passed exclusively into his possession. 1 Perry on Trusts, sec. 126. As a waiver of the plaintiff's right to any part of the funds used in buying the Wait lot would in effect be a purchase to that extent for Jordan's benefit, the question whether there was such waiver will, under the peculiar circumstances of this case, determine whether there was an advancement; but it will not necessarily determine whether the advancement extended to the whole property.

2. When presumption of advancement rebutted.

II. Where the deed to real estate is taken in the name of the purchaser's child, the law presumes that the purchase was an advancement. But this presumption may be rebutted by circumstances sufficient to show that no advancement was intended. *Robinson* v. *Robinson*, 45 Ark., 481; *White* v. *White*, 52 Ark., 188; *Milner* v. *Freeman*, 40 Ark., 62; 1 Perry on Trusts, secs. 145–147. In Perry's work it is said that "Whether a purchase in the name of a wife or child is an advancement or not, is a question of pure intention;" and that "if there is any circumstance accompanying the purchase which explains why it was taken in the wife's or child's name, and shows that it was not intended to be an advancement, but was intended to be a trust for the husband or father, the presumption of an advancement will be rebutted." The same author also says that where a father or husband pays the purchase money, and against his intention a conveyance is obtained in the name of the wife or child by the fraud or wrongful act of either, the presumption of an advancement will be rebutted. Sec. 148. The evidence tends strongly to prove that the plaintiff expected to be present when the conveyance from Wait was executed, and that Jordan in her absence wrongfully took the deed exclusively to himself. She took, it is true,

no action at the time to have the wrong undone, and apparently acquiesced in the form of the conveyance. But she was without information as to the nature of land titles, and there is reason to believe that she had no proper conception of the danger to which her right was thus exposed. Her ignorance in this respect cannot be made a ground for even equitable relief. But it may be allowed to have some weight in arriving at her intention in the transactions we are considering. *Milner* v. *Freeman*, 40 Ark., 62. The lot was purchased with the view of acquiring a home. The sums paid for it and subsequently expended in erecting upon it a dwelling house and other improvements represented no doubt all the plaintiff had been able to save from the earnings of a life-time. She was advanced in years at the time of the purchase, and her circumstances were such as to give her a just appreciation of the value of a home. She had implicit confidence in her son; but it seems extremely improbable that she could have intended that the property should belong exclusively to him. The evidence convinces us that she had no such intention.

But while we are satisfied that an advancement of the entire property was not intended, we think it was the intention of the plaintiff that Jordan should become an equal owner with her. She testifies that they "put their money together," and, as she expresses it, "the contract was made" to buy them a home. From facts established by her own deposition it may fairly and reasonably be inferred that she waived her right to a part of Jordan's earnings sufficient to pay one-half of the price of the Wait lot, and that it was used for that purpose. We therefore conclude that, on the execution of Wait's deed, Jordan became the absolute owner in his own right of an undivided half of the lot, and that a trust resulted in favor of the plaintiff as to the residue.

III. The evidence shows that the plaintiff moved into the house built upon the Wait lot as soon as it was completed. There is not a circumstance to indicate that she or her neighbors regarded her occupancy of the premises as

3. Possession as notice of title.

being by the permission or sufferance of Jordan. She was the head of the family, and no one could reasonably have ascribed the actual possession of the property to her minor son rather than to herself. *Byers* v. *Engles*, 16 Ark., 543. Her possession was as distinct and observable when Murray purchased, as it was when he subsequently served her with the notice to quit. And if it was not in the strictest sense exclusive, we think it was sufficiently marked and ostensible to put Murray upon inquiry and to charge him with notice of her equitable estate. *Wyatt* v. *Elam*, 68 Am. Dec., 518; *Hamilton* v. *Fowlkes*, 16 Ark., 340; *Atkinson* v. *Ward*, 47 Ark., 533. He therefore took the legal title to the property, subject to the existing trust as to one-half of it; and it should be adjudged that he holds it accordingly, unless the plaintiff is estopped to assert her equity. 2 Pomeroy's Eq. Jur., 1048.

4. Burden of proof as to estoppel.

IV. It is argued that, as the plaintiff failed to set up any claim to the property when Murray informed her that it was for sale, she is estopped from claiming it now. The burden of proof was upon Murray to establish the facts relied upon as creating an estoppel. He undertook to prove them by his own deposition; but that is directly and positively contradicted by the testimony of the plaintiff, and finds no corroboration elsewhere in the record. As to this ground of defense, then, it would be sufficient to say that it is not supported by a preponderance of the evidence.

5. Estoppel by conduct.

But, assuming that Murray has correctly stated all that occurred when he visited the premises, it cannot be said that the plaintiff's conduct was such as was likely either to make the impression that she had no interest in the property, or to cause him to desist from further inquiry. Nor can it be said that Murray's statement to the plaintiff was such that a person of her limited information would take it as calling upon her in fairness to assert her right. The testimony shows that the vendee of the Pearce lot required her consent to his purchase, and paid the price to her. It was upon her application that the order was made enabling

Jordan to execute a deed for that lot, and she may reasonably have thought that a like consent and application would be necessary to consummate the sale of property which she occupied as her home. The party setting up an estoppel "must actually be deceived by the conduct of the other party," and the latter "must *intend* that his conduct should be acted upon." Bispham, Eq, sec. 282, p. 349, note 7, and secs. 284, 291. There is no reason to believe that the silence of the plaintiff on the occasion referred to was intended to induce the belief that the lot belonged entirely to her son. Nor does it appear that Murray in making the purchase was in the least degree influenced by her conduct. The abstract of title satisfied him of Jordan's right to convey, and his own testimony shows that he acted and relied solely upon that. Under such circumstances there is no estoppel.

The chancellor erred in dismissing the complaint. The judgment is therefore reversed, and the cause is remanded with instructions to the court below to enter a decree divesting Murray of title to the undivided half of the lot in controversy and vesting it in the plaintiff.

COCKRILL, C. J., did not participate.

FORT SMITH BRIDGE COMPANY *v.* HAWKINS.

Decided May 23, 1891.

1. *Municipal corporation—Taxation.*

   A municipal corporation can levy no taxes, general or special, unless the power to do so be plainly and unmistakably conferred; under the statutes of this State no power is given to cities and towns to levy taxes upon property not situated within their corporate limits. (Mansf. Dig., sec. 896.)

2. *Corporate limits—Navigable river.*

   Where a riparian owner upon a navigable stream, holding under grant from the United States, laid off his land into town lots and blocks, streets and alleys, extending to the river, and filed a map of it in the clerk's office, and the legislature incorporated the town of Van Buren, and declared its limits to be "the same metes and bounds as designated" on said map, the corporate limits extend to high-water mark only, and not to the middle thread of the stream.

APPEAL from *Crawford* Circuit Court in chancery.
HUGH F. THOMASON, Judge.

Clayton, *Brizzolara* and *Forrester* for appellants.

1. The first question involved in this case was decided in 13 S. W. Rep., 796.

2. The boundary line of Crawford county extends to the middle of the main channel of the Arkansas river, but as to the town of Van Buren there is no statute defining its boundaries, which must be determined from the acts of incorporation and the map and plat of said town as recorded. Acts 1850, p. 81, sec. 1; Acts 1842, p. 172; Acts 1844, p. 136; 36 Ark., 166. The general acts of incorporation do not affect the corporate limits or boundaries. Gantt's Dig., ch. 72, sec. 3201; Mansf. Dig., ch. 29, secs. 729, 730; 27 Ark., 419; *ib.*, 467. The making and the recording of the plat was a dedication. 2 Dill. Mun. Corp. (4th ed.), secs. 628, 630, 636. The fact that a town is laid off on the banks of a navigable river is sufficient evidence of its extending to the river. 8 B. Mon. (Ky.), 232 *et seq.* The grant was from the United States, and the survey stops at the edge of the river. The plat defining the limits of a city is construed the same as grants by deed. 8 Frost, 196. The Arkansas river is meandered, and the survey runs only to the river bank. Lester's Land Laws, 714; 1 Woolr., 88. The common law doctrine is not applicable to such streams. Walker Chy. (Mich.), 168. Grants of lands upon navigable rivers from the United States extend only to the margin of the stream. Gould on Waters, secs. 76, 78, and note 5; 54 Am. Rep., 410; 71 Cal., 135; 1 U. S. St. at Large, 468, sec. 9; 2 *id.*, 235, sec. 17; U. S. Rev. St., sec. 2476; 7 Wall. (U. S.), 272; 2 Swan, 1; 75 Ill., 41; 7 Bissell, 201; 4 Iowa, 199; 12 How. (U. S.), 454; 32 Iowa, 106; 26 Kans., 682. And to high water mark only. 13 S. W. Rep., 931, and cases cited.

Jesse Turner, Sr. and *Nimrod Turman* for appellee.

1. The case of 53 Ark., 58, determines that the bridge should have been assessed by the assessor.

2. The Arkansas river is the south boundary of the city (Acts 1842, p. 172). Van Buren is then a riparian proprietor, and holds to the middle of the Arkansas river, and the rule laid down in 53 Ark., 314, should be modified. 24 How., 41; 13 *id.*, 421; 27 S. C., 137; 121 Ill., 238; 3 Kent, Com., *p. 427, 13th ed.; 7 Wall., 272; 3 Wash., R. P., top pp. 353–4–5 and notes; L. C. Am. R. P., pp. 370–1–2, etc., vol. 4; 1 Dill. Mun. Corp., pp. 262–3, note 1 to 4th ed.; 6 Cowen, 518; 39 Miss., 100; 3 Scam., 510; 3 Sm. & M., 336 (Miss.); 3 Kent, *p. 428, note (d). The common law, as laid down by Kent, Washburn and other text writers and as declared in the opinions just cited, has been recognized by a majority of the American States, and is sustained by a decided preponderance of authority. Out of a vast number of decisions we cite the following, by States, viz.:

New Hampshire—See 54 N. H. 548, 28 N. H. 195, 14 N. H. 467, 2 N. H. 369; Connecticut—5 Conn. 388, 9 Conn., 38; Vermont—28 Vt. 257, 262; Maine—31 Me. 9, 50 Me. 479, 3 Greenl. 269, 7 Greenl. 273, 290; Massachusetts —5 Pick. 199, 22 Pick. 333, 9 Cush. 544; New York—83 N. Y. 178, 72 N. Y. 211, 68 N. Y. 246, 24 Wend. 451, 26 Wend. 404, 6 Cow. 518, 9 Paige 54; Ohio—3 Ohio 495, 16 Ohio 540, 36 Ohio 396; Illinois—(applying the common law rule to the Mississippi river)—3 Scam. 520, 5 Gil. 54, 47 Ill., 384, 49 Ill. 172, 51 Ill. 266, 54 Ill. 110, 75 Ill. 41, 82 Ill. 46, 179, 89 Ill. 334, 91 Ill. 515, 95 Ill. 84, 101 Ill. 46, 238, 108 Ill. 646, 123 Ill. 535, 124 Ill. 542; Mississippi—(applying the common law to the Mississippi river)—39 Miss. 100, also 3 S. & M. 366, 29 Miss. 21; Wisconsin—2 Wis. 308, 44 Wis. 295, 46 Wis. 237, 47 Wis. 314, 4 Wis. 486, 2 *id.*384, 4 Wis. 321, 13 Wis. 692, 16 Wis. 665, 17 Wis. 417, 509, 18 Wis. 118, 20 Wis. 425, 30 Wis. 61, 36 Wis. 50, 42 Wis. 203, *ib.* 214, *ib.* 248, *ib.* 233; Michigan—8 Mich. 18, 10 Mich. 125, 1 Mich. 202, 18 Mich. 196, 19 Mich. 325, 26 Mich. 508, 28 Mich. 182, 30 Mich. 308, 31

Mich. 336, 41 Mich. 453, 466; Kentucky—3 Bush 266, 274, 8 Bush 336; New Jersey—1 Halst. 1, 16 Peters 367, 1 Wall. Jr. 275, 14 How. Eq. 1, 8, 631, 32 N. J. 369; Delaware—2 Harr. (Del.) 489, 5 *id.* 325; Maryland—5 H. & J. 196, 1 Bland, Ch. 316, 3 *id.* 453, 1 Gill 430, 22 Md. 530, 537, 42 Md. 348, 2 Md. Ch. 485; Georgia—6 Ga. 130, 141, 18 Ga. 539, 30 Ga. 355, 4 Ga. 241; South Carolina— 4 Rich. 68, 27 S. C. 137. The common law doctrine has been recognized by this court in 25 Ark., 120; 39 *id.*, 403.

BATTLE, J. The object of this action is to enjoin the collection of the taxes which were levied by the city of Van Buren, for the years 1886, 1887 and 1888, upon the bridge of the Fort Smith and Van Buren Bridge Company. The bridge is across the Arkansas river, and one-half of it is in Crawford county, in this State, and is in the main line of the St. Louis and San Francisco Railway Company, and is used by that company in the operation of its trains. It was assessed for taxation for the years 1886, 1887 and 1888, by the state board of railroad commissioners as part of the roadbed of the railway company, and was valued by them for that purpose at $263,000. This valuation was added to and included in the assessment of the railway of the St. Louis and San Francisco Railway Company, and $3930 thereof, that is to say, of the valuation of the bridge, was apportioned and certified for taxation by Van Buren for the years named. The assessor of Crawford county also assessed the one half of the bridge lying in that county, for the same years, at $100,000. The portion of the valuation of the state board of railroad commissioners, which was apportioned to Van Buren, and the valuation of the assessor were entered and extended upon the tax books of Crawford county for each of said years, and a municipal tax of five mills on the dollar levied by the city of Van Buren was assessed and extended against the bridge on such apportionment and the valuation of the assessor on each of said books, and the books, with the taxes so extended, were placed in the hands

of the tax collector of Crawford county, with a warrant to each of them attached authorizing him to collect the same. The taxes assessed against the bridge on the apportionment by the state board were paid. But the railway and bridge companies refused to pay the taxes assessed upon the valuation made by the assessor, and seek by this action tc restrain the collection of the same. They allege that the collection of them should be restrained because they say no part of the bridge is in the city of Van Buren. On the other hand the collector, the defendant in the action, avers that the entire one-half thereof, which is in the county of Crawford, is in that city. The court below held that so much of the bridge as is in the county of Crawford is within the city of Van Buren, and sustained the levy of taxes assessed against the same upon the valuation fixed by the assessor, and held that the taxes assessed and extended on the tax books according to the apportionment made by the state board were illegal, but held that the bridge company was entitled to a credit on the taxes found to be lawfully assessed against the bridge for the amount of the taxes so paid, and decreed accordingly; and plaintiffs appealed.

Since this court held in *Railway* v. *Williams*, 53 Ark., 58, that the bridge in question should be assessed for taxation by the assessors of the counties in which it is situate as the property of the bridge company, and not by the state board as the property of the St. Louis and San Francisco Railway Company, there is but one question in the case, and that is, Is the one-half of the bridge in Crawford county subject to taxation by the city of Van Buren?

1. Taxing power of municipal corporation.

Municipal corporations can levy no taxes, general or special, unless the power to do so be plainly and unmistakably conferred. The power must be given either in express words or by necessary or unmistakable implication. It cannot be deduced by doubtful inferences from other powers, or from any consideration of convenience or advantage. *Vance* v. *Little Rock*, 30 Ark., 439; 2 Dillon

on Municipal Corporations (4th ed.), secs. 763, 764, 786; 1 *ib.*, secs. 89–90.

The statutes of this State limit the right of a municipal corporation to levy taxes to the real and personal property within the limits of such corporation. Mansf. Dig., sec. 896. Was one-half of the bridge in question in the corporate limits of the city of Van Buren?

2. Corporate limits of riparian towns.

Van Buren is an incorporated town or city in Crawford county in this State. The boundary line of Crawford county between it and the county of Sebastian is the middle of the main channel of the Arkansas river. That river is navigable as far up as Van Buren, and beyond. The town is situate on the east bank of the river, on the north fractional half of section twenty-five, in township nine north, and in range thirty-two west. This tract of land originally belonged to Thompson and Drennon. They laid off the town on it, and caused a map of the town so laid off to be made and filed in the office of the county clerk of Crawford county in 1842. The town so laid off extended to the river. Along the bank of the river, the whole length of the town, is a strip of land marked on the map "reserved," which was not divided into lots and blocks, but nevertheless forms a part of the town. This reserve does not belong to the town, but, by an agreement with Thompson and Drennon, the town has been permitted to erect a wharf on it, and to collect wharfage from steamboats lying at such wharf.

The town was incorporated by acts of the General Assembly in 1842 and 1845. The last act declared its corporate limits to be the same metes and bounds as are designated on the plat of the town on record at the time it was enacted. Acts of 1842, pp. 172, 173; Acts of 1844–45, p. 136. The evidence clearly proves that the plat referred to in the last act was the map filed by Thompson and Drennon in 1842. The acts of the General Assembly of April 9, 1869, and of March 9, 1875, regulating the incorporation, organization and government of municipal corporations, made no change in the territorial limits of towns and cities

incorporated at the time of their enactment, but left them as they were. Gantt's Dig., secs. 3201–3202; Mansf. Dig., secs. 729–730.

The bridge of the Fort Smith and Van Buren Bridge Company was erected across the river; and one-half of it is in Crawford and the other half is in Sebastian county. A part of it extends over a portion of the strip of land marked on the map "reserved" and on to the block designated on the map as block 81.

In order to determine how much of the bridge is in Van Buren, it is necessary to ascertain its corporate limits on the Arkansas river. Is it high-water mark on the bank of the river in Crawford county, or is it low-water mark on said bank, or is it the middle or thread of the stream?

As a rule the same construction that is given to grants of land is given to statutes which prescribe the boundaries of incorporated territories. *Cold Spring* v. *Tolland*, 9 Cush., 492; 1 Dillon on Mun. Corporations (4th ed.), sec. 182, note 1, and cases cited. Following this rule courts have differed as to the location of the boundaries of such territories on rivers as they have as to like boundaries of grants of land. In those States where grants of land, bounded on fresh-water rivers, carry the title of the grantee to the soil to the middle of the stream, courts hold that like boundaries of incorporated towns and cities extend to the center of the river; while in other States, where grants of land bounded on navigable rivers, wherein the tide does not ebb and flow, carry the title of the grantee to low-water mark, courts hold that the boundaries of municipal corporations on such rivers extend to low-water mark and no further.

In *Cold Spring* v. *Tolland*, 9 Cush., *supra*, the court, following the rule stated, and saying that a grant of land, bounded on a stream not navigable, carries the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin, and that this is so although the monuments are described as standing on the margin or bank of

the stream, held that a statute which made the west bank of Farmington river, a stream not navigable, a boundary of territory incorporated as the town of Tolland, constituted the center of the stream, and not the edge or margin, the true boundary line.

Announcing the same doctrine and following the same rule, the court, in *State* v. *Canterbury*, 8 Foster, 195, held, that towns bounded by or on the Connecticut or Merrimac rivers, or by lines up or down the rivers, extend to the center of the rivers. In the course of its opinion, the court remarked: "We think there is much force in the suggestion of the counsel for the State, that the grants of towns to the proprietors, which are merely grants of land, would, of course, follow the ordinary rules of construction; and it could hardly be reasonable to apply a different rule, when the same land is incorporated into a town by a description entirely identical."

In *Jones* v. *Soulard*, 24 How., 41, the right to the land in controversy depended on the location of the eastern boundary of St. Louis. It appeared that the town of St. Louis was incorporated in 1809, and that its eastern line as then incorporated was described as follows: "Thence," meaning from Sugar Loaf, "due east to the Mississippi; from thence by the Mississippi to the first place mentioned." The question was, whether the eastern line of the corporation, as thus described, extended to the middle thread of the Mississippi river, or was it limited to the bank of the channel. Holding that grants of land bounded by fresh water rivers confer the proprietorship on the grantee to the center of the stream, notwithstanding the rivers are in fact navigable, the court held that the eastern line of the city was the middle thread of the Mississippi river. *State* ex rel. *Bridge Co.* v. *Columbia*, 27 S. C., 137.

In Pennsylvania it is well settled that, when a navigable river, which is held to be a public highway under the common law of that State, is made the boundary of a grant by the commonwealth, the title passes to low-water mark, but

no further; and that "it is to small streams not navigable that the principle of *usque ad filum aquæ* applies." When the city of Wilkes-Barre was incorporated, the Susquehanna river, a navigable stream, was made its boundary on the northwest. In Gilchrist's Appeal, 109 Penn. St., 600, it appears that the city of Wilkes-Barre attempted to collect taxes on a body of coal land lying beneath the Susquehanna river. It was contended on the part of the city that its corporate limits extended to the middle or thread of the river. But the court, following the rule as settled in that State as to grants of land, held that they did not extend beyond low-water mark, and that the city had no right to impose taxes on the coal land lying outside of its territorial limits. *Johns* v. *Davidson*, 16 Penn. St., 512.

This court has never determined the river boundary of an incorporated town or city. But in *Railway* v. *Ramsey*, 53 Ark., 314, it held that "the owner of land on the margin of a navigable stream in this State, holding under a grant from the United States government, does not take *ad medium filum aquæ*, but to high-water mark." We see no good reason why the same rule should not govern in determining the boundaries of incorporated territories. The incorporation of territory, which has been conveyed to an individual, cannot change its boundary lines when the description of the same in the act of incorporation and the conveyance are identical. Upon principle and authority the same description defines the boundaries alike in both cases.

The rule applies in this case. The land on which Van Buren stands was originally held by Drennon and Thompson under a grant from the United States. They laid it off into town lots and blocks, streets and alleys, to the Arkansas river, and made a map of it as laid off, and filed it in the clerk's office. Before it was incorporated, the high-water mark of the river in Crawford county was the boundary line of the town on the side next to the river. In 1845 the legislature incorporated the town the second time, and declared its corporate limits to be "the same metes and

bounds as designated" on said map. The high-water mark was thereby made and still retained and has remained a boundary line of the incorporated territory.

So much of the bridge, therefore, as extends over the high-water mark in Crawford county is within the corporate limits of Van Buren. This part, with the approaches thereto, should have been separately assessed, as a part of the entire bridge, by the assessor of Crawford county for taxation by the city for the years 1886–7–8. The taxation of more than that for the municipal purposes of the city of Van Buren for the years mentioned was illegal. The city had no power to impose taxes on that part of the bridge which lay outside of its territorial limits.

The decree of the court below is, therefore, reversed, and this cause is remanded with instructions to the court to ascertain the value of so much of the bridge as is within the corporate limits of the city of Van Buren, at the time it was subject to be valued by the assessor for taxation for the years 1886–7–8, and the amount of taxes that would have been due the city had it been assessed at such valuation at said times and the taxes levied by the city for the years named had been assessed against such portion according to such valuation within the times prescribed by law, and to deduct therefrom the taxes paid the city on the part of the valuation of the bridge apportioned to the city by the state board of railroad commissioners; and, upon the payment by the bridge company of the balance remaining unpaid and of all the costs in this action, within a reasonable time to be fixed by the court, to perpetually enjoin and restrain the collection of the municipal taxes that were assessed against the one-half of the bridge on the assessment and valuation made by the assessor of Crawford county as before stated; and, in the event the amount ascertained to be due the city, and said costs, are not paid within such reasonable time, to dismiss the complaint of appellants; and, in the meantime and until such reasonable time shall expire, to make an order temporarily restraining the collection of the municipal

taxes that have been assessed against the one-half of the bridge as before stated; and that, in the event the court shall not be in session in time to restrain the collection, the judge thereof make an order that the temporary restraining order be issued by the clerk upon the terms the statute authorizes the issue of such orders.

The judgment will be entered here in favor of the appellee against appellants for the costs of this appeal.

RUDISILL *v.* CROSS.

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Decided May 23, 1891.

Statute of frauds—Partition fence.

An agreement for the conveyance of an undivided interest in a partition fence must be in writing.

APPEAL from *Clark* Circuit Court.

RUFUS D. HEARN, Judge.

J. H. Crawford for appellant.

There was no consideration for the so-called second contract. Rap. & Law. Law Dic., "Consideration." Appellee was liable, under sec. 3654, Mansf. Dig., without any contract.

Murry & Kinsworthy for appellee.

1. When the fence was built, appellee became the owner of one-half of it, which he sold to appellant for what he owed appellant for building it. This was a good and valuable consideration. Mansf. Dig., sec. 1673; 31 Ark., 631; 27 *id.*, 407; 33 *id.*, 97.

2. Sec. 3654, Mansf. Dig., only means that a party joining shall pay half the expense of keeping up the joint fence. Endl. Int. St., sec. 127.

HUGHES, J. The appellant sued the appellee in the court of a justice of the peace for half the cost of a partition

fence, and recovered judgment for $18.47, from which appellee prosecuted an appeal to the circuit court, where judgment was rendered in his favor, from which the appellant prosecutes this appeal.

The parties agreed to build a partition picket fence between their town lots. Appellant built the entire fence, and appellee refused to pay for half the entire fence, contending that he was to pay for half of that part only of the fence used by him. Appellee had joined his fence to the partition fence. Appellant afterwards proposed to appellee that if he would not pay half the cost of the fence, and would cut loose from it, and not use it at all, and build a fence of his own, he (appellant) would keep the fence built by him as his own; and in that event the appellee need not pay anything for it. Appellee continued to use the partition fence and did not take his fence loose from it, paid nothing towards the cost nor for the use of the partition fence. He says in his testimony that at first he did not accept the proposition of appellant, but that he did afterwards agree to it, and told appellee that he could keep all the fence.

The court instructed the jury that "if the jury find from the evidence that there was a second contract and that Cross released his interest in the fence to Rudisill, this is a sufficient consideration to bind the second contract; and they will find for the defendant."

Agreement to convey interest in partition fence is within statute of frauds.

"The obligation of a landowner to build and maintain a division fence, in whole or in part, for the benefit of adjoining land, is something more, indeed, than an obligation to furnish the materials and labor necessary from time to time for the erection and reparation of the fence; it imposes a burden upon the land itself. A partition fence ordinarily must rest equally upon the land of the respective proprietors. Hence, an agreement of one of those proprietors to maintain such a fence necessarily imparts a dedication of the use of the land required to support half of it. To that extent it is therefore an estate in the land itself. In accordance, then, with the general rule that an easement, being an

interest in realty, cannot be conveyed or reserved by parol, an agreement by an owner of land to maintain a partition fence between such land and that of an adjoining proprietor, can not ordinarily rest in parol, but, to be binding, must be in writing." 7 Am. & Eng. Enc. of Law, 897, note 2, and authorities cited. "An agreement for a division of the line fence, by adjoining owners, in order to be binding on them and their privies, must be in writing." *Knox* v. *Tucker*, 48 Me., 373; *Kellogg* v. *Robinson*, 27 Am. Dec., 550.

We are of the opinion that the partition fence in this case was real estate, and that, under the agreement between the parties and the evidence in the case, one-half of it belonged to appellee, and that he was indebted to the appellant for one-half the cost of erecting the same; that appellee did not convey his interest in any way; that the contract to release his interest in it to the appellant was a parol contract; that appellee under the contract (referred to as the second contract) did not place the appellant in possession of his interest in the partition fence, because he continued to use it, and did not detach his fence from it.

There was therefore no part performance of the parol agreement by appellee to release his interest in the fence that, in a court of equity, would have taken it out of the statute of frauds. If there was a contract resting in parol for the release of the appellee's interest in the fence to appellant, it might have been taken out of the statute of frauds by part performance by appellee by placing appellant in possession of his part of the fence under the contract, and this would have been a good equitable defense which appellee could have made in this action at law. Sub-div. "fourth," sec. 5033, Mansf. Dig.; *Trulock* v. *Taylor*, 26 Ark., 54.

The "second contract" was therefore void under the statute of frauds, being a contract for the release of an interest in real estate not in writing. It formed no consideration for an agreement by appellant to release appellee from his obligation to pay one-half the cost of the entire par-

tition fence, erected by the appellant under an agreement between them that each would make half of the same.

The action was based upon the contract between the parties to build a partition fence, and not upon the statute (Section 3654, Mansfield's Digest).

As this disposes of the real issue in the case, it is unnecessary to discuss other instructions given and refused by the circuit court.

The judgment is reversed, and the cause remanded for a new trial.

VAN ETTEN *v.* COOK.

54 522
74 536

Decided May 23, 1891.

Laborers' lien—Shingles.

Under section 4425 of Mansf. Dig., to enforce a laborers' lien upon the product of labor, one must show that his labor directly contributed to its production: accordingly, the superintendent of a shingle mill who files saws and occasionally does other work at the mill, the night watchman who also cleans the machinery and raises steam in the morning, and another who removes sawdust and splints from the mill, are not entitled to liens upon shingles sawed at the mill; but the engineer, sawyer and all others who directly assisted in sawing the shingles, including one who assorted them, are entitled to the benefit of the lien.

APPEAL from *Conway* Circuit Court in chancery. JORDAN E. CRAVENS, Judge.

Sanders & Watkins, *W. L. Moose* and *Ratcliffe & Fletcher* for appellant.

The laborers' lien law was intended to apply to agricultural laborers. Mansf. Dig., secs. 4425, 4427, 4434. 1 Jones on Liens, sec. 761. With the exception of 50 Ark., 244, when the lien was conceded by counsel, and 51 *id.*, 317, the lien has been applied only in favor of laborers on farms and like work. See also 27 Ark., 564, for definition of a laborer. Bony, the superintendent, was not entitled to a lien. 43 Ark., 168; 81 N. C., 340; 31 Am. Rep., 503. Winfield, the

watchman, and the sawdust and splint remover *produced* nothing by their labor. The act is summary and strictly construed. 27 Ark., 569; 29 *id.*, 601; 43 *id.*, 170.

Carroll Armstrong and *J. H. Harrod* for appellees.

Every one is a producer who engages directly in the work that results in the production. A "little skill" is not fatal to the lien of the laborer. 27 Ark., 564. A laborer in a saw-mill is entitled to the lien. 50 Ark., 244. One who threshes grain does not produce it, but is entitled to a lien. 8 Iowa, 207.

HUGHES, J. The appellant brought an action in replevin to recover a lot of shingles, held by appellees, Cook as constable and Shelby as sheriff, under writs of attachment levied thereon by them to satisfy the liens of laborers for work performed in making the same.

Appellant afterwards filed a complaint in equity to have it determined who had liens and for what amounts, expressing a willingness to pay all valid and just claims that were liens upon the shingles. He asked for an order for a receiver, and a temporary restraining order to prevent the sale of the shingles till the cause could be heard, which were granted. The replevin suit was transferred to the equity docket and consolidated with the other. The laborers all entered their appearance, and the case was tried in chancery on oral evidence not embodied in the transcript. The circuit court found that "H. W. Burns owned and operated a shingle mill near Germantown in Conway county, Arkansas; that the shingles in controversy were made by said shingle mill;" and that the services rendered by the laborers claiming liens were necessary to the successful operation of the mill, and were rendered in the manufacture of the shingles, excepting the services of one Hill Hinson; that the shingles were the property of appellant, subject to the liens as set out in the decree; and that, upon payment of the amounts secured by said liens in twenty days, the shin-

gles should be delivered to appellant; otherwise that they should be sold to pay the amounts secured by the liens.

Appellant prosecuted an appeal. The only question for our consideration is, Had the laborers liens under section 4425, Mansf. Dig., which is as follows: "Laborers who perform work and labor for any person under a written or verbal contract, if unpaid for the same, shall have an absolute lien on the production of their labor for such work and labor?"

Construction of laborers' lien act.

Liens were decreed to exist in favor of the following persons: J. G. Bony, who was "superintendent of the mill, filed the saws and occasionally did other work at the mill," for $73; W. H. Winfield, who watched the mill at night, cleaned the machinery, and raised steam in the morning, for $14.75; L. Charton, who removed the sawdust and splints from the mill, $10.75; Dave Patterson, who removed sawdust and splints, $3.95; Mike O'Laughlin, who removed sawdust and splints, $10.31. In the opinion of the court the shingles were not the product of the labor of any of these parties, wholly or in part, within the meaning of the statute, and no one of them was entitled to a lien upon them under the statute for labor expended in producing them. *Flournoy* v. *Shelton*, 43 Ark., 168.

Liens were declared in favor of A. L. Currant for $78; Frank Currant for $5.40; Jacob Johnson for $27; A. L. Burns for $15.40, and A. W. Nichols for $25.15; the first two were the sawyers at the mill, and the latter three operated drag saws thereat. *Russell* v. *Painter*, 50 Ark., 244. And in favor of T. J. Hughes for $32.40 and W. H. Winfield for $8.62 for running the engine; and in favor of the following persons for the services and amounts respectively opposite their names: W. M. Taylor for $39.95, William Dorf for $20, Henry Johnson for $7.40, for services rendered in piling blocks for the sawyer, which we understand to mean putting the blocks, out of which the shingles were made, in position to be made into shingles; W. M. Ryan for $56.75, for operating "rat catcher," the machine which trimmed the

edges of the shingles; J. H. Finney for $17.35; Chris. Youngblood for $11.95, for splitting bolts, as we understand, to be made into shingles. It appears that the labor of each of the above named parties directly contributed to the production of the shingles. A lien was also declared in favor of Edward Tenes for $29.50 for assorting shingles. This was labor that added to the value of the shingles, and was necessary to put them in marketable shape and condition. All of the parties last named were within the statute, and entitled to liens, for the reasons indicated. The laborers' lien act must be strictly construed. *Dano* v. *Railway Co.*, 27 Ark., 564; *Flournoy* v. *Shelton*, 43 Ark., *supra*.

No lien can exist under this statute for labor performed remotely tending to the production of an article, but, in order to maintain the right to a lien upon the production of labor under the statute, it must be shown that the labor directly contributed to the production of it.

The cause is reversed and remanded, with directions to enter a decree in accordance with this opinion, and that the property be sold, unless the liens are discharged otherwise.

CLARK *v.* GRAMLING.

Decided May 23, 1891.

1. *Demurrer—Waiver.*

   Where an answer requires no reply, plaintiff does not, by going into trial, waive an objection to it which was raised by demurrer.

2. *Parties—Non-joinder.*

   In a suit to collect a note an objection that one of the payees was not joined as a party plaintiff is waived by filing an answer.

3. *Pleading—Sufficiency of answer.*

   In a suit to enforce payment of a note an answer which denies that defendant promised to pay "in manner and form as therein alleged," or which alleges a contemporaneous parol agreement contradicting the note, is demurrable.

4. *Joint administrators—Release.*

A release by one of two joint administrators of a note payable to both of them in their representative capacity is ineffectual to bar a suit to collect a balance due on it.

5. *Promissory note—Defense that one of the payees was a maker.*

That one of two payees of a note was one of the makers of it, is not a defense at law in a suit by the other payee against the other makers to enforce its collection.

APPEAL from *Greene* Circuit Court.

E. F. BROWN, Special Judge.

B. H. Crowley for appellant.

1. Parol contemporaneous evidence is inadmissible to vary the terms of a valid written agreement.. 24 Ark., 210; 13 *id.*, 449; 15 *id.*, 543; 11 Johns., 201; Smith, Cont., 94; 36 Ark., 487; 37 *id.*, 110.

2. The answer setting up a release by H. C. Gramling does not constitute a defense. 33 Ark., 572; 2 Gr. Ev., sec. 28; 2 Story, Cont., 978; 5 East, 230; 4 Gill & J., 305; 3 N. H., 318; 26 Me., 88; 20 Conn., 559.

3. The fact that one of the makers and payees is the same person, does not render the note void. Tied. on Com. Paper, sec. 20. The note is joint and several, and appellee is liable for the whole debt. Mansf. Dig., sec. 4944.

L. L. Mack for appellee.

Going to trial on the issues operates as a waiver of all objections raised by demurrer. 17 Ark., 403; 53 *id.*, 56; *ib.*, 593; Mansf. Dig., secs. 5043–4–5; Bliss on Code Pl., sec. 417; 30 Ark., 312; 39 *id.*, 258. It is equivalent to pleading over, and is an abandonment of the supposed error in overruling the demurrer, and an appeal will not lie without a motion for a new trial. The demurrer being general, if any of the paragraphs set up a good defense, the demurrer was properly overruled. Bliss on Code Pl., sec. 417; 30 Ark., 312.

MANSFIELD, J. Clark, as administrator of the estate of Witcher, brought this action against R. F. Gramling, Henry C. Gramling and others, to recover a balance due upon a

promissory note, executed by the defendants on the 30th day of September, 1876, and payable twelve months after date "to the order of John Clark and Henry C. Gramling, administrators of William A. Witcher, deceased." The complaint states the amount and date of a number of payments which are credited upon the note, and prays judgment for the sum remaining unpaid. A judgment by default was taken against all the defendants except the appellee, R. F. Gramling. An answer was filed by him consisting, as abstracted, of four paragraphs, stating the following as matters of defense: (1.) A denial "that he promised to pay plaintiff the sum mentioned in the complaint in manner and form as therein alleged." (2.) That he executed the note sued on under an agreement between himself and H. C. Gramling, one of the payees, that he was to pay only one-half the sum for which the note was given and that said H. C. Gramling should pay the other half; and that the plaintiff assented to this agreement at the time the note was made. (3.) That he paid half the amount of the note, and, about November, 1880, "was by the said H. C. Gramling, for a valuable consideration, fully released from further liability" thereon. (4.) That Henry C. Gramling, one of the makers of the note, and Henry C. Gramling, one of the payees, "is one and the same person, and that no action at law can be maintained thereon." A demurrer to the answer was overruled, and the plaintiff excepted. The cause was then submitted to a jury for trial on the issues formed by the answer; and, a verdict having been returned for the defendant, judgment was rendered accordingly, and the plaintiff has appealed.

1. When demurrer not waived.

I. Appellee contends that appellant waived the objection raised by his demurrer by going into trial. This position, so far as we are advised, is sustained by no authority. *McIlroy* v. *Buckner*, 35 Ark., 555; *Clark* v. *Hare*, 39 Ark., 258; *McWhorter* v. *Andrews*, 53 Ark., 307. Section 417 of Bliss on Code Pl., cited by counsel, refers only to a waiver by pleading over after demurrer to the complaint. The

rule there stated can have no application where the demurrer is to an answer requiring no reply, and where, as in this case, there is no pleading over. If the facts stated in the answer constituted no defense, the defendant was not entitled to a judgment on the verdict; and the plaintiff did not waive his right to question the sufficiency of the facts on appeal by participating in the trial. Boone, Code Pl., sec. 117; Newman, Pl. & Pr., 518.

2. Non-joinder of parties.

II. The demurrer to the answer reached back to the complaint; and the plaintiff was not therefore prejudiced by the ruling excepted to, if his own pleading should have been adjudged bad. *Wood* v. *Terry*, 30 Ark., 385. But the only objection to the complaint, apparent upon its face, is that it does not join one of the payees of the note as a party plaintiff. This defect was waived by filing the answer. Newman, Pl. & Pr., 58, 106, 214, 215; Boone, Code Pl., secs. 112, 263; Bliss, Code Pl., secs. 411, 417; Mansf. Dig., secs. 5028, 5031; *McCreary* v. *Taylor*, 38 Ark., 393.

3. Sufficiency of answer.

III. There is no contention here that either the first or the second paragraph of the answer states a valid defense. The first does not deny any fact alleged in the complaint; and the second sets up a contemporaneous parol agreement between the parties, contradicting the terms of the written contract on which the suit is founded. These two paragraphs, though numbered separately in the appellee's abstract, were probably intended to be taken as one defense. But whether considered together or separately, they are so obviously insufficient that comment upon them is unnecessary. Boone, Code Pl., sec. 61; *Joyner* v. *Turner*, 19 Ark., 690; *Borden* v. *Peay*, 20 Ark., 293; *Roane* v. *Green*, 24 *id.*, 210.

4. Release of note by joint administrator.

IV. The defendant does not allege, by the third paragraph of his answer, that he has made any payment in addition to the sums credited on the note, nor that the sum demanded has ever been paid. But he avers that he paid one-half of the amount of the note and was, for a valuable consideration, released from further liability by H. C. Gram-

ling, one of the payees. Whether the release was by parol or in writing, or in what the consideration consisted, is not stated. And it would not be an unfair criticism upon the answer to say that this part of it states legal conclusions, and not the facts from which such conclusions are to be deduced. This method of pleading is not authorized by the code of practice, and should be discouraged by the courts as tending to produce uncertain and immaterial issues, and thus to delay and embarrass the administration of justice. Mansf. Dig., sec. 5033; Newman, Pl. & Pr., 544; *McIlroy* v. *Buckner*, 35 Ark., 555; *Keith* v. *Freeman*, 43 Ark., 296. But it will probably be more in harmony with previous decisions of this court to rule that objection to the answer on the ground now suggested should have been made by motion to make it more definite, and not by demurrer. *McDermott* v. *Cable*, 23 Ark., 200; *Ball* v. *Fulton Co.*, 31 *id.*, 379; *McCreary* v. *Taylor*, 38 *id.*, 393. We shall therefore treat the third paragraph as not fatally defective because of the general and uncertain nature of its allegations; and presuming that it intends to plead, not a mere parol agreement for a release, but a release executed in writing, we will inquire whether it sets up a bar to the plaintiff's action. This question must be answered in the negative unless H. C. Gramling had power to execute the release thus pleaded.

The plaintiff and H. C. Gramling were joint administrators of Witcher's estate; and the terms of the note indicate that it was taken by them in a representative capacity. Whether it was made in consideration of a debt accruing to them as representatives of the deceased, or for a debt due to the latter, is not shown. Nor is it shown whether H. C. Gramling ever had possession of the note. In *Smith* v. *Whiting*, 9 Mass., 334, it was held that one of two executors could not assign a negotiable promissory note made to them, as executors, for a debt due to their testator. The court said that each of the promisees had but a moiety of the note, and

could not therefore by his indorsement transfer either the whole or his own moiety.

In the case of *DeHaven* v. *Williams*, 80 Penn. St., 480, co-executors deposited money of their testator with bankers to their joint account. The bankers, having failed, entered into an agreement with their creditors by which all their property was conveyed to a trustee for the creditors, and the bankers were to be released from the debts they owed, upon all the creditors signing the agreement. The agreement was signed by all the creditors, but only one of Williams' executors signed for his estate. And it was held that this did not release the claim of the estate against the bankers. The opinion of the court places this decision upon the ground that the deposit of the money to the joint account of the executors was a precautionary measure for the protection of each executor against the liability which would result from a loss of the funds through the negligence or misconduct of his co-executor. This precaution, the court said, would be futile if the money could be paid out on the check of one of the executors, or one of them could release the banker. Both these decisions are cited with approval in Schouler's treatise on the Law of Executors and Administrators, the author saying that, in order that joint executors may act with becoming prudence, it is well that the funds of the estate should be kept so that both or all the executors shall together exercise control thereof. Sec. 401, notes 5 and 6.

The Court of Appeals of Kentucky, in *Sanders* v. *Blain's Administrators*, 6 J. J. Marshall, 446, held that one of two joint administrators could not make an assignment, effectual at law, of a note payable to them both. In that case the note was payable to E. R., "administrator," and to M. B., "administratrix," of B. But the court said that the note having been given to them as obligees, it could be treated for most purposes as their individual note, and it was therefore considered as if made to them in their own right.

Tiedeman, in his work on Commercial Paper, appears also to approve the rule that, where a note is payable to several persons as the representatives of a decedent, all of them must join in its indorsement. See sec. 148.

These authorities appear to bear directly upon the question we are considering. And in so far as the decisions we have cited were controlled by the rights, duties and liabilities of executors and administrators in the States where the decisions were made, the doctrine on which they proceed is equally applicable to similar questions arising under the laws of this State. Under our administration laws we know that a note, payable as this is, usually represents a sum with which the administrators are jointly charged on their accounts; and that, in nearly every instance, it is the only security for a debt, for the loss or conversion of which the administrators would certainly be severally as well as jointly liable. The rulings referred to are therefore commended to our approval, no less by the policy they subserve, than by the reasoning and authority with which they are supported. Here, as in Kentucky, it has been held that a note payable to "A. B., administrator, etc.," may be treated as a debt due to him in his individual right. *Mohr* v. *Sherman*, 25 Ark., 7. But if this note be thus considered, its indorsement by both the payees would still be necessary to vest title to it in the assignee. Tiedeman on Commercial Paper, sec. 262; *Sanders* v. *Blain's Administrators*, 6 J. J. Marshall, *supra*.

It is clear that H. C. Gramling would have had no authority to assign the note. And the principle upon which that power is denied him is, we think, equally efficient to render him powerless to release one of the makers of the note from his obligation to pay it. We therefore hold that the release pleaded by the appellee was ineffectual to bar the appellant's action.

V. The fact stated in the fourth paragraph of the answer, that H. C. Gramling, one of the makers of the note, is also

5. Defense to note that one of the payees was a maker.

one of the payees thereof, is not sufficient as a defense for the following reasons: (1) The objection to the plaintiff's action based on such alleged fact, if it were available for any purpose, goes merely to his right to sue at law, and to show that his suit should have been in equity. This was only ground for a motion to transfer to the proper docket, and the objection was waived by the failure to make it before the trial. *Organ* v. *Railroad Co.*, 51 Ark., 235. (2) But the fact on which the objection was based did not render the note void, and did not prevent the plaintiff from maintaining an action at law upon it against all the makers except H. C. Gramling. Newman, Pl. & Pr., 111, 112, and decisions there cited. To sue H. C. Gramling with the other makers of the note was therefore only the misjoinder of a party defendant. And the appellee could not take advantage of such misjoinder by demurrer, but could only make it the ground of motion to strike out the name of the party thus improperly joined. Newman, Pl. & Pr., 664-667; *Oliphint* v. *Mansfield*, 36 Ark., 191; *Fry* v. *Street*, 37 Ark., 39.

It follows that, in our opinion, the demurrer to the answer should have been sustained, and that the court erred in overruling it. The judgment is therefore reversed, and the cause remanded.

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

MAY TERM, 1891.

SIKES *v.* MILLER.

Decided May 30, 1891.

1. *Easement—Town plat.*

   The dedication of land for town purposes by recording a plat of the lots and blocks according to streets and alleys imposes no servitude upon the owner of a lot to front a business house, to be erected thereon, according to the lay of the lots on the plat.

2. *Nuisance—Action for damages premature when.*

   An action on behalf of an adjacent landowner will not lie to recover damages for the improper construction of a house not yet erected, where it is not apparent that damage from that source will inevitably ensue; nor for having opened an alley which might but has not become a nuisance.

APPEAL from *Benton* Circuit Court.

JAMES M. PITTMAN, Judge.

B. F. Sikes and others brought a joint suit for damages against W. A. Miller and others. The allegations of the complaint are substantially as follows.

In 1881 the St. Louis and San Francisco Railway Company constructed its railroad over a certain tract of land in Benton county, Arkansas, owned by B. F. Sikes, and estab-

lished a depot thereon. Sikes laid off the town of Rogers on the land, platted it into lots, blocks, streets and alleys, and had the plat recorded. Some of the lots were laid off for dwelling purposes, and some for business purposes, each lot fronting a street and running back to an alley through the center of the block. The east half of block 8 contains six lots fronting 50 feet east on Douglas street and running back west 140 feet to a north and south alley through the center of the block. Sikes sold these six lots between April and October, 1881, and the purchasers erected business houses thereon fronting east on Douglas street. Plaintiffs own all of the six lots except 1 and north half of 4, and have business houses thereon, making a continuous row of business houses on east side of block 8 fronting on Douglas street. They purchased their lots after Sikes had sold lot 1 and north half of lot 4, and after business houses had been erected thereon fronting east, and erected houses on their own lots, with the understanding and belief that all of said lots should be used for business purposes, and that the houses should front east on Douglas street, according to the plat of the town.

Afterwards, about June 1, 1889, defendants became the owners of lot 1 and north half of lot 4, and have torn away the business houses thereon, and have proceeded to erect and are now erecting thereon four large two-story brick business houses fronting north on Walnut street, and running back 70 feet to a five-foot alley, left open by defendants, west from Douglas street to the north and south alley running through the center of the block. The house on the northeast corner of the block presents a brick wall two stories high fronting on Douglas street, and the roofs of the houses slope south to the five-foot alley, thereby running the water off the roof on to the lots of the plaintiffs. By leaving open the five-foot alley it will be a place for refuse matter, dirt and garbage to collect, and by foul odors and filth therein will greatly depreciate the value of the plaintiff's lots.

Block 8 naturally slopes west from Douglas street, and is higher by six or eight feet on said street than at the north and south alley running through the center of the block. The water that flows from the roofs of the houses runs west; but if interrupted, as it will be, by the erection of these houses by defendants, it will be diverted from its natural channel, and thrown on the lots of the plaintiffs.

Plaintiffs and their grantors have, for more than seven years next before June 20, 1889, been in the peaceable and quiet enjoyment of their said lots, and have had business houses thereon for that period fronting east on Douglas street, and for the same time there have been substantial business houses on said lot 1 and north half of lot 4 fronting on said street. The business of the plaintiffs has been made valuable by such continuous frontage, and the interruption of the plan of the block would depreciate the value of their property and business. They gave defendants written notice, before they commenced the erection of their said houses, not to change the frontage; but the defendants refused to pay heed to their objection, and have continued the erection of their houses. By said wrongful acts of defendants, the plaintiffs, it was alleged, were jointly damaged in the sum of $5000.

On motion of defendants, the complaint was amended so as to show that plaintiffs own the lots in severalty and not jointly or in common, Sikes being the owner of south half of lot 4. Defendants then filed a motion to compel the plaintiffs to elect as to which one of them should prosecute the action, on the ground that it appeared from the complaint that they had no common interest in the subject of the action or in obtaining the relief demanded. The motion was sustained, and plaintiffs elected to prosecute the action in behalf of B. F. Sikes. A demurrer to the complaint was sustained. Sikes elected to stand upon his complaint and appealed.

E. P. Watson for appellant.

1. The lots of defendants were impressed with an easement in favor of appellants. A servitude was thereby created—a negative servitude, as no positive contract had been entered into at the time the lots were sold by Sikes. Washb. on Easements, 17, 21, 22, 63. An equitable easement may arise without any contract, and it will take but slight circumstances to prove that one exists. 26 N. Y., 105; 38 *id.*, 165; 7 R. I., 1; 11 Gray (Mass.), 359; 87 N. Y., 400; 128 Mass., 326; L. R., 6 Exch., 252. One who takes land with a servitude upon it takes subject to the same liabilities as the grantor. Washb. on Easements, pp. 6, 225; 32 Iowa, 346; 3 Paige, Ch., 253; 3 Edw. Chy., 103; 5 Sandf. Ch., 590; 6 Allen (Mass.), 341; 97 N. Y., 285; 14 Stew. (N. J.), 606. When a town is laid off and platted, all persons purchasing lots do so with reference to the plan of the town as then existing. 58 Tex., 690. All purchasers purchase with reference to the town plat, and no one has a right to so change it as to injure other purchasers who purchased prior thereto. 12 R. I., 348; 9 Kans., 453; 33 Ga, 601; 18 Iowa, 361.

2. A nuisance was created by the change of the front of appellee's lots and by leaving open an alley through said block and flooding their lots from the roofs of their buildings, etc. The change of the block constituted a nuisance if it thereby injured the other property holders. Wood on Nuisance, pp. 123–128, 111–12 and note; Cooley on Torts, p. 579; Suth. on Dam., vol. 3, pp. 395, 396, 418; 18 Minn., 324; 80 N. Y., 579; 21 Iowa, 160; 34 Conn., 466; 19 Pick., 147; 6 L. R. Eq. Cases, 177; 49 Tex., 347; Cooley on Torts, 565–6; 3 Suth. on Dam., 394–5; Wood on Nuisances, pp. 3, 8, 18, 867. It was not necessary for appellant to wait until damages actually occurred 14 Minn., 43; 3 Suth. Dam., p. 414. Privity of estate or contract not necessary. 130 Mass., 448; 7 R. I., 1.

L. H. McGill for appellees.

1. The action is premature. The nuisance must first be created and the damage suffered. Wood on Nuisance, secs. 103, 104, 835. Nor will an injunction be granted on the ground that a thing may become a nuisance, where it is not of itself a nuisance. 19 Am. & Eng. Enc. of Law, 832–3. It is no ground for action if the natural rainfall flows on lots by reason of their lower elevation. 28 N. W. Rep., 539.

2. The acts complained of do not constitute a nuisance. Wood on Nuisance, secs. 3, 4, 8, 9, 13, 103, 835, 867.

3. A mere dedication of land for a town site does not constitute an easement or servitude in the property of every purchaser of a lot, that the plan or plat of a town shall be adhered to in making improvements. An easement is an interest in land, and lies in grant, express or implied. 6 A. & E. Enc. Law, 139, 143. If appellant is damaged at all it is a clear case of *damnum absque injuria.*

1. Easement under town plat.

PER CURIAM: The appellant suffered no legal injury from the appellee's refusal merely to front his house according to the lay of the lots on the town plat.

2. When action for damages for nuisance is premature.

The house is not yet constructed, and the alley has not become a nuisance. The appellant's action for damages is therefore premature. When actual damage has been done him by the manner in which the house is constructed, or when it becomes apparent that damage from that source will inevitably ensue, the plaintiff can maintain his action on that score. It is not made to appear that that time has arrived. The presumption is that the house will be so constructed as not to injure the adjoining property. *Springfield, etc., Ry. Co.* v. *Rhea*, 44 Ark., 262.

Affirm.

BLAHUT *v.* STATE.

Decided May 30, 1891.

Intoxicating liquor—Sale to minor.

It is no defense to an indictment for selling liquor to a minor without the written consent or order of his parent or guardian that the father was present and orally consented to the sale.

APPEAL from *Garland* Circuit Court.

JAMES B. WOOD, Judge.

Prosecution for selling intoxicating liquor to a minor without the written consent or order of his parent or guardian. It was proved that the sale was made in his father's presence and with his *oral* consent. Defendant was convicted and has appealed.

C. D. Greaves for appellant.

The father *being present* and consenting to the sale, there was no offense within the meaning and intent of sec. 1878, Mansf. Dig. No *written* consent is necessary when the father is present. Whart. Cr. Law, 141.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

When a statute requires a permit in writing, no consent not in writing will suffice. 37 Ark., 395; 4 Iredell, 246; 1 Brev., 551; 2 Halst., 138.

Sale of liquor to minor.

COCKRILL, C. J. In *Hill* v. *State*, 37 Ark., 395, it was ruled that a sale of liquor to a minor, made in pursuance of the parol consent of the parent, which was afterwards reduced to writing, was punishable under the statute which prohibits a sale to a minor unless made upon written consent. The theory of the decision is that, the offense being against the State, the father has no power to condone it, and cannot deprive the sale of its criminal character except by following the statute—that is, by giving his consent in writing prior to the sale. The legislative intent in requiring this prerequisite was, doubtless, to insure deliberation on the part

of the parent, uninfluenced by the desire to shield or the fear to punish the guilty seller, as well as to secure such evidence of the fact of consent as to end dispute upon that subject. But whatever the reason for requiring it may have been, it is certain that the statute demands a written consent, and the courts can require no less. *Tinsley* v. *Craige*, *ante*, p. 346.

It follows that the oral consent of the parent is not a defense to a prosecution for selling liquor to a minor, although the consent is given in the presence of the minor and the seller at the time the sale is made.

Affirm.

CHAMBLISS *v.* REPPY.

Decided May 30, 1891.

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1. *Judgment—Proceeding to vacate—Fraud.*

   A judgment by default, procured through the representation of plaintiff's attorney that there was a return of service of process, when in fact there had been no service and no return of service by the officer, is a judgment obtained through "fraud practiced by the successful party," within the meaning of the fourth subdivision of section 3909 Mansf. Dig., though the the attorney acted under a mistake.

2. *Vacating judgment—Defense.*

   A judgment against a defendant obtained through the fraud of the plaintiff will not be vacated at a subsequent term "until it is adjudged that there is a valid defense to the action in which the judgment was rendered;" if the defense is partial, the judgment should be modified *pro tanto*. (Mansf. Dig., sec. 3912.)

APPEAL from *Nevada* Circuit Court.

C. E. MITCHEL, Judge.

Chambliss recovered judgment by default against Reppy, and procured an execution to be levied upon certain lands. Before sale Reppy filed a petition to recall and quash the execution and restrain the issuance of further executions on the judgment, upon the ground that the judgment was ren-

dered without notice and for a large amount in excess of what he owed Chambliss. The testimony tended to show that there had been no service of process upon Reppy, and no return of service made; that the judgment was obtained upon the representation to the court, made by Chambliss' attorney through mistake, that a proper return, showing service of process, had been made.

The court found that no process had been served upon Reppy, declared the judgment and execution void, and restrained the issuance of further executions thereon. Chambliss has appealed.

J. M. Montgomery for appellant.

1. The petition fails to set up any defense to the action. Mansf. Dig., sec. 3912; 50 Ark., 458. The bare statement that the judgment was in excess of the amount he owed was not a defense. 32 Ark., 97; 37 *id.*, 599. See also 73 Am. Dec., 639.

2. The recitals of the judgment that defendant was served with process before judgment are evidence of that fact. Mansf. Dig., sec. 5202; 25 Ark., 60. Such a record is an absolute verity. Freeman on Judg. (3d ed.), sec. 122; Wade on Notice, sec. 1370. Jurisdictional facts are conclusively presumed, in case of a court of general jurisdiction, unless the record shows the contrary. 79 Am. Dec., 244. To entitle a party to enjoin a judgment, he must show, not only that the judgment was unjust, but that it was not the result of any inattention or negligence on *his* part. 43 Ark., 107; see also 33 Ark., 778.

Smoote, McRae & Arnold for appellee.

1. Although the record recites notice, still if it appears that no notice has been given, and it is alleged and shown that a meritorious defense could have been made, the judgment is void. 27 Ark., 20; 8 S. W. Rep., 401; Mansf. Dig., secs. 5201–2, 2988 to 2990.

2. Appellee did allege and show a meritorious defense. It was alleged that the judgment was largely in excess of

what plaintiff was entitled to recover. This was not denied, and no proof was necessary. Mansf. Dig., sec. 5072. It was not necessary for appellee to tender what was due. Authorities *supra*; Mansf. Dig., sec. 5201.

Montgomery & Moore for appellant.

Sec. 3912, Mansf. Dig., coming after subdivisions 4 and 7, sec. 3909, must govern in this case. The petition set up neither payment, set-off nor counter-claim, and presented no defense. 5 A. & E. Enc. Law, 4962, note 1; 25 Kans., 13; Freeman on Judg., secs. 108, 498; 80 Am. Dec., 336. The amount due should have been paid or tendered. High on Inj., secs. 130, 138; 50 Ark., 458. If appellee is entitled to relief, it should be only on terms. Freeman on Judg., sec. 498; 117 U. S., 675; 50 Ark., 458; Mansf. Dig., sec. 3912; 67 Am. Dec., 456. Thus preserving all liens and securities. *Ib.*

1. Vacating judgment for fraud.

COCKRILL, C. J. This is a proceeding at law, under section 3909 of Mansfield's Digest, to set aside a judgment rendered by the court at a previous term. The contention was that there was no service of process upon the judgment defendant, and no return of service by the sheriff or other officer, but that the judgment had been rendered upon the representation of the plaintiff's attorney that there was a proper return of service. The complaint alleged a partial defense to the cause of action upon which the challenged judgment was based. The court disregarded the latter issue, and, after a trial directed by it upon the first issue only, annulled the judgment of recovery.

If the judgment was in fact obtained by the plaintiff's attorney, upon the representation that there was a return of service of process, when in fact there had been no service and no return of service by the officer, then the judgment was obtained through "fraud practiced by the successful party," within the meaning of the fourth subdivision of section 3909 *supra*, even though the attorney acted under a misapprehension of the true state of facts.

2. Defense to fraudulent judgment.

But section 3912 of Mansfield's Digest, which is a part of the same chapter of the civil code of procedure from which section 3909 is taken, provides that such a judgment shall not be vacated "until it is adjudged that there is a valid defense to the action in which the judgment was rendered." The court erred in disregarding this provision of the statute. *Boyd* v. *Roane*, 49 Ark., 397, 417. For this error the judgment must be reversed, and the cause remanded for a new trial.

When the complaint in this cause was filed, the judge in vacation enjoined the execution of process upon the judgment until the cause could be heard, under the authority of *Shaul* v. *Duprey*, 48 Ark., 331. The temporary restraining order will be continued in force subject to the order of the circuit court.

It is so ordered.

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WALLACE *v.* STATE.

Decided May 30, 1891.

Intoxicating liquor—Sale to minor.

Delivery of liquor to a minor, in pursuance of a sale to an adult, is neither a sale nor a gift to the minor, within the act approved April 6, 1889.

APPEAL from *Crawford* Circuit Court.
HUGH F. THOMASON, Judge.

Tom L. Wallace was convicted under an indictment which charged that he sold and gave liquor to a minor without the written consent of his parent or guardian. It was proved that the minor was sent by his father in company with the defendant to the latter's saloon to get some beer for which the father subsequently paid. An appeal was taken to test the sufficiency of the evidence to sustain a conviction.

The act of 1889 (p. 122) cited provides as follows: "Any person who shall sell or give away, either for himself or

another, or be interested in the sale or giving away of any ardent, vinous, malt, or fermented liquors, or any compound or preparation thereof called tonics, bitters or medicated whisky to any minor, without the written consent or order of the parent or guardian, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than fifty nor more than one hundred dollars."

C. J. Frederick for appellant.

Minors are not excluded from acting as agents for others. Story on Ag. (9th ed.), sec. 7. To deliver to a minor liquor for the use of a parent is not a *sale* to a minor. Bish. St. Cr., sec. 1021; 55 Ala., 16. There is no statute prohibiting a minor from acting as agent. In 52 Ark., 56, the minor did not disclose his agency. This was neither a sale nor a gift to a minor.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

The legislature intended to make unlawful every delivery to a minor of intoxicating liquor not authorized by the statute. 36 N. W. Rep., 234; 37 Me., 517; 97 N. C., 492; 52 Ark., 56. See 12 Bush, 240.

Sale of liquor to minor.

COCKRILL, C. J. In the case of *Siceluff* v. *State*, 52 Ark., 56, a conviction for selling liquor to a minor without the written consent of his parent or guardian was sustained, although the proof showed that the minor acted as agent of his parent in making the purchase. But in that case the seller was not apprised of the agency, and he dealt with the minor as though he were the vendee. In legal contemplation the relation of vendor and vendee existed between them, as was explained in that case. There was, therefore, a sale to the minor, and, as there was no pretense of written consent by the parent, the offense was complete.

The question in this case is, Was the statute violated by simply delivering liquor to a minor who was known to be doing an errand for another?

The prohibition of the statute is against the sale or giving away of liquor to a minor (Acts of 1889, p. 122); and unless the act complained of amounts to a sale or giving away of liquor to the minor, it is not a violation of the law.

"To deliver liquor to a minor for the use of the parent is not to sell it to the minor," says Mr. Bishop. Stat. Crimes, sec. 1021. The quotation is the statement of an obvious rule of law, when the liquor is delivered for the known purpose of the parent's or another's use; for then no relation of vendor and vendee can be said to exist between the minor and the liquor seller. And to deliver liquor to one merely to be carried by him to another is not to "give away" liquor to the one who bears it. We cannot construe the term "give away" in a penal statute to mean something different from its ordinary legal and commonly accepted import. *Ward* v. *State*, 45 Ark., 351; *Gillan* v. *State*, 47 *id.*, 555. However defective the law may be thought to be, it is not the province of the courts to extend it so as to cover cases not within its terms, as would be done if we should construe the term "give away" to cover the case stated. But the case stated is only that of the minor who receives liquor from the seller for the known use of another. The statute does not prohibit the minor from becoming the agent of the purchaser or donee of liquor, but only from becoming the purchaser or donee.

Such is the construction placed upon similar statutes in Massachusetts and Connecticut, the statute in the latter State using the word "furnish" where ours employs "give away." *Commonwealth* v. *Lattinville*, 120 Mass., 385; *Goddard* v. *Burnham*, 124 Mass., 578; *O'Connell* v. *O'Leary*, 145 Mass., 311; *State* v. *McMahon*, 53 Conn., 407.

No subterfuge, under the guise of an agency, could avail one who sells or gives liquor to a minor; and it is even held that the honest belief of the seller that the minor was acting as agent for another, when in fact he was purchasing for himself, would not excuse him; upon the theory that the law

binds the seller to know the facts before he ventures upon a sale. *Commonwealth* v. *Finnegan*, 124 Mass., 324; *State* v. *Bruder*, 35 Mo. App., 475.

The case of the *People* v. *Garrett*, 36 N. W. Rep. (Mich.), 234, relied upon by the Attorney General as sustaining a construction that a delivery of liquor to a minor for any purpose is within the prohibition of the statute, is based upon a statute which defined the offense to be, "to sell, furnish to or give" liquor to a minor. The terms of the statute are broader than those under consideration, and the case is not therefore authority in point. The case of *Commonwealth* v. *Davis*, 12 Bush, 240, is more nearly in point—the language of the statute, "sell, loan or give" liquor to a minor, being construed to cover every case where liquor was delivered to a minor. The defendant in that case might have been convicted of selling liquor to a minor, under the decision in *Foster* v. *State*, 45 Ark., 328; for he aided the seller in making the sale to the minor, and thereby became a principal in the offense. But we cannot accept the construction placed upon the statute in that case as controlling authority.

The court's charge to the jury was erroneons, aud the judgment will be reversed, and the cause remanded for a new trial.

It is so ordered.

STATE *v.* RAILROAD COMPANY.

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Decided May 30, 1891.

1. *Indictment—Exception in statute.*

It is unnecessary in an indictment for a statutory offense to negative an exception contained in a subsequent section of the statute.

2. *Railway—Failure to signal at crossing—Negative pregnant.*

An indictment is defective which alleges a neglect on the part of a railway company "to ring the bell and sound the whistle" at the crossing of a public road, as required by section 5478 of Mansfield's Digest; the indictment should have alleged a neglect to perform either act, and not a neglect to perform both acts.

3. *Query.*

Does the statutory remedy by suit (Mansf. Dig., sec. 5482) exclude the recovery of this penalty by indictment?

APPEAL from *Sharp* Circuit Court.

JAMES W. BUTLER, Judge.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellant.

Section 5478, Mansfield's Digest, is taken from section 34, act July 23, 1868, section 38 of which provides the manner of enforcing the penalty. The remedy provided is cumulative and not exclusive. 12 Conn., 526; 19 Tex., 158; Arch. Cr. Pl. & Pr., 1, 2; 1 Russ., Cr. (3 Eng. ed.), 50; Bish. Wr. Laws, sec. 251; 1 Whar. Cr. L., sec. 26, note 2; Endl. Int. St., sec. 467; 4 T. R., 202; 15 L. J. N. S. Q. B., 227; 12 Conn., 526; 19 Tex., 158; 43 Fed. Rep., 374; Cr. Code, sec. 6; Bish. Wr. Laws, sec. 253. The words "may be sued for" do not limit the action to a civil suit. See definition of "to sue," Webster. Bouvier, vol. 2, p. 558; 2 Pet., 449; 3 Bac. Abr., pp. 542, 554; 11 Fed. Rep., 248.

2. But one offense is charged.

3. There is no exception to section 5478. But if there was, it was not necessary to negative it in the indictment, as the exception is not incorporated in the definition of the offense. Wh. Cr. Pl. & Pr., sec. 238; 1 Bish. Cr. Pr., sec. 632; 25 Pac. Rep., 71.

Wallace Pratt and *Olden & Orr* (of Missouri) for appellee.

1. The mode of procedure prescribed by section 5482 is exclusive. Sec. 2129, ch. 42, Mansf. Dig. The converse is true. 29 Ark., 173; 15 Oh. St., 114; 13 Barb., 209; 3 Comst., 9; 28 Penn. St., 9; 35 *id.*, 263; 44 *id.*, 332; 1 Hill (S. C.), 53; Sedgw. on St. & Const. Law, 94; 8 Otto (U. S.), 555; 91 U. S., 29; 39 Mich., 141; 67 Barb., 350. *Expressio unius est exclusio alterius.* 2 Bish. St. Cr., sec. 249; 1 Mich., 193; 2 Dev. & Bat., 31; 13 Barb., 209; 2 Ind., 588; 4 Mo., 609; 1 Ld. Raym., 672; 3 Comst., 9; 2 Keyes, 245; 3 N. Y., 9; 73 Ala., 390; Sedgw. St. & Const. Law, 343; Suth., St. & Const., sec. 699; Bish. St. Cr., sec. 250; Wh. Cr. Law, sec. 25.

2. The indictment is bad for uncertainty. The duty is *in the alternative*, and doing *either* is a compliance with the law. The indictment charges a failure merely to do *both*. Bish. Cr. Pro. (2 ed.), sec. 591; 15 Mo., 515; 4 Parker, C. C., 26; 2 N. H., 550; Cheves, 77; Bish. St. Cr., sec. 1043; 53 Ark., 334.

MANSFIELD, J. The grand jury of Sharp county indicted the Kansas City, Springfield and Memphis Railroad Company for a neglect to comply with the provisions of section 34 of the act entitled "an act to provide for a general system of railroad incorporation," approved July 23, 1868; Mansf. Dig., secs. 5472–5487. The section referred to is as follows: "A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of two hundred dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to the county; and the corporation shall also be liable for all damages which shall be sustained by any person by reason of such

neglect." Mansf. Dig., sec. 5478. Section 35 of the same act makes it the duty of railroad corporations to place warning boards wherever their roads cross public highways and streets, but provides that the section shall not apply to streets in cities and villages unless the corporation be required to put up such boards by the officer having charge of such streets.

The indictment charges that the defendant "did unlawfully fail and neglect to ring the bell and sound the whistle on a certain engine and locomotive within eighty rods of the crossing of the railroad track of said railroad company and the Ash Flat and Ravenden Junction public road, then and there situate in road district No. 4, there situate, and unlawfully failed to keep said bell ringing and whistle sounding until said engine and locomotive then and there crossed said public road; the said engine and locomotive then and there being run by said railroad company on the track of said railroad company, against the peace," etc.

The defendant demurred to the indictment on the following grounds: (1.) That it does not state facts constituting a public offense. (2.) That it charges more than one offense; and (3.) That it fails to negative the exception contained in section 35 of the act creating the offense. The demurrer was sustained, and the State appealed.

The indictment does not attempt to state any matters which, however well pleaded, could constitute more than one offense; and we perceive no ground on which the second objection of the demurrer can be sustained.

1. Indictment need not negative exception when.

The third objection is equally untenable. The exception contained in section 35 of the act of 1868 (Mansf. Dig., sec. 5479) applies only to the duty imposed upon railroad corporations by that section. But if the exception were applicable to the requirements of section 34, it is embraced in a section of the act subsequent to that creating the offense charged, and it would not therefore have been necessary that the indictment should state that the defend-

ant did not come within the exception. *Brittin* v. *State*, 10 Ark., 299; 1 Bishop, Cr. Pro., 632.

2. Negative pregnant.

But the first objection stated in the demurrer questions the sufficiency of the indictment on more substantial grounds. The code of criminal practice has relieved prosecuting officers of the necessity they were frequently under at common law of observing in the language of indictments a precision that was purely technical and formal. But the code has not dispensed with such certainty of allegation as is necessary to show on the face of an indictment, not only that a public offense is charged to have been committed, but what the particular act or omission was which it is assumed constituted the alleged offense. As was said by the court in *Taylor* v. *Commonwealth*, 1 Duv., 160, the facts constituting the offense must be stated; and it is not sufficient that they may be inferred from other facts found in the indictment. 1 Bishop, Cr. Pro., secs. 325, 326, 507, 509, 513, 514, 517, 519; *Thompson* v. *State*, 26 Ark., 323; *Edwards* v. *State*, 27 *id.*, 493; *Johnson* v. *State*, 36 *id.*, 242; *State* v. *Keith*, 37 *id.*, 96; *Younger* v. *State*, *ib.*, 116; Mansf. Dig., 2105–2106, 2121.

The offense charged here is the failure to perform a duty which under the law may be discharged by doing either of two specific acts. The non-performance of either of the acts is therefore an affirmative element of the offense, and without its averment the indictment is not valid. The railway company satisfies the law by using either a bell or a whistle at the places and in the manner required. To aver then that the company neglected "to ring the bell" would not state a violation of the statute, since it may have been obeyed by sounding the whistle. But an averment that the company "neglected to ring the bell or to sound the whistle" would sufficiently state a neglect to perform the statutory duty by either method. And so an allegation that the defendant "neglected to sound the whistle and also neglected to ring the bell" would be equivalent to saying that neither

act was done. But the averment in the indictment is that the defendant "did unlawfully fail and neglect to ring the bell and sound the whistle," and that it "unlawfully failed to keep said bell ringing and whistle sounding," etc. Now the ringing of the bell and the sounding of the whistle are not here referred to as separate and distinct acts; but in each clause of the indictment they are stated as if they constituted one continuous act which in its entirety was necessary to complete the duty required by the statute. The import of the language thus employed is to impute to the defendant a non-feasance arising, not from a failure to do either of the acts, but from a neglect to perform both of them at the same time. And to say, in the form of expression used by the pleader, that the defendant failed to perform the *two* acts does not exclude the idea that he may have performed one of them. The indictment is therefore bad for uncertainty, and the demurrer was properly sustained.

3. Does the statutory remedy by suit exclude a recovery by indictment?

Section 38 of the act on which this prosecution is founded provides that all penalties imposed by the act may be sued for by the prosecuting attorney, and in the name of the people of the State of Arkansas, in any court of this State having competent jurisdiction. Mansf. Dig., sec. 5482. And it has been argued by appellee's counsel that the statutory method of enforcing the penalty is exclusive, and that a proceeding by indictment is unwarranted. This is a question as to which the authorities are conflicting; and, as a ruling upon it is not necessary to a decision of this cause, we have thought it not improper to reserve an opinion on the point until it is presented by an indictment not otherwise defective.

Judgment affirmed.

In re BARSTOW.

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Decided June 6, 1891.

1. *Appeal—Extending time for filing transcript.*

After eleven months' delay by an appellant in filing a copy of the record, time for filing it will not be further extended where the only excuse shown for the delay is a press of business in the circuit clerk's office; the appeal could have been expedited by application to this court for mandamus or other appropriate remedy to spur the dilatory clerk.

2. *Practice—Second appeal.*

Where a judgment appealed from was not superseded, a second appeal may be obtained from the clerk of this court; under such circumstances time for perfecting the first appeal will be denied unless it appears that resort to a second appeal will impair some right that might be preserved by perfecting the first.

MOTION to extend the time for filing a copy of the record.

Barstow prayed an appeal in the circuit court of Jefferson county from a judgment of $30,000 rendered against him in favor of the Pine Bluff, Monroe and New Orleans Railroad Company and others, and, not having perfected it by filing a copy of the record in this court within ninety days thereafter, made application for an extension of time. Section 1271 of Mansfield's Digest authorizes the court to grant an extension of time for filing a copy of the record "for cause shown." The only excuse shown for the default is a certificate of the clerk of the circuit court to the effect that he could not prepare the transcript, "owing to the press of business in his office and the unusually large volume of matter which goes to make up the transcript." According to the clerk's statement the appeal had been granted nearly sixty days when the first demand for the copy was made by the appellant. The clerk then promised to prepare it within thirty days. Since the demand was made nine months have elapsed, and, so far as the showing made goes, the press of the clerk's business has not permitted him to start upon the work of making the copy.

John McClure and *M. A. Austin* for petitioner.

1. When time for filing transcript will not be extended.

COCKRILL, C. J. The right of a litigant to perfect his appeal and have his cause finally determined in this court cannot be made to depend upon the caprice or convenience of a circuit clerk; nor can we permit the jurisdiction of this court to be defeated or the dispatch of business to be retarded by his failure to provide a sufficient clerical force to perform the duties of his office. A press of business in his office is therefore no excuse for a failure to furnish a litigant a transcript for an appeal within a reasonable time after demand. *Sturgess* v. *Harrold*, 18 How., U. S., 40. Mandamus from this court in aid of its appellate jurisdiction is an appropriate remedy to spur the negligent clerk to the prompt performance of his duty to prepare a transcript of the record in order that the cause may be reviewed here. *U. S.* v. *Gomez*, 3 Wall., 752, 766. When a command to return a transcript of the record, issued by the clerk of this court, whether by mandamus, writ of error, or other legal method, is contumaciously disobeyed by a clerk of a lower court, his disobedience may be punished as a contempt of this court, and thus another remedy for perfecting the appeal is provided.

The appellant, who alleges the clerk's negligence for a period of eleven months as an excuse for failing to file his transcript here under the grant of appeal by the lower court, could have expedited his appeal by a proper application to this court at any time within that period. He does not appear to have considered that the exigencies of his case demanded prompter action; he has not shown diligence in asserting his rights, and therefore makes no satisfactory showing for an extension of time, under section 1271 of Mansfield's Digest.

2. Practice as to second appeal.

Another sufficient reason for denying the extension of time for perfecting the appeal, in pursuance of the order granting it in the lower court, is that the judgment has never been superseded. The party desiring a review of the proceedings under such circumstances may obtain it by praying an appeal or a writ of error from the clerk of this court.

Either will be granted at his election as of course, with this exception only, viz., the writ of error, according to the ancient practice, is not applicable to a proceeding in equity. A petition to the court is unnecessary, and therefore out of place, when a complete remedy can be had of the clerk for the asking.

It is true that the clerk of the court in which the judgment was rendered certifies that the party desiring the appeal caused a *supersedeas* bond to be filed with him, but it is shown that the bond was filed more than thirty days after the appeal was granted, in which case the statute provides that no writ of *supersedeas* can be issued except by the clerk of this court after the appeal is perfected. Mansf. Dig., secs. 1296-7. There is no showing that the circuit clerk undertook to issue a *supersedeas*. There is therefore no impediment in the way of a second appeal. *Rice* v. *Reed*, 29 Ark., 320; *Turner* v. *Tapscott*, *ib.*, 318. Nor is there a showing that a resort to the second appeal would impair any right that might be preserved by perfecting the first. There is no necessity therefore for application to the court for relief.

The appeal granted by the circuit court has lost its efficacy, and Barstow cannot give this court jurisdiction by filing the transcript here in pursuance of it, without leave given upon cause shown. *Edmonson* v. *Bloomshire*; 7 Wall., 306. As that leave is denied, he must obtain relief from the clerk of this court. If thereafter any obstacle is presented in the way of getting a transcript of the record, his remedy is pointed out above.

Motion denied.

HEMINGWAY, J., was disqualified, and did not participate in this decision.

FORDYCE v. HARDIN.

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Decided June 6, 1891.

1. *New trial—Filing motion after three days.*

When the circuit court received and considered a motion for a new trial more than three days after the verdict was rendered, it will be presumed, from the silence of the record, that the delay was unavoidable.

2. *Evidence of value—Tax assessment.*

Where, in an action to recover damages for killing stock, the plaintiff has testified that the animal was worth seventy-five dollars, it is error to refuse to permit the defendant to introduce in evidence to contradict him the assessment list of his property, recently signed and verified by him, in which he returned the animal for taxation as worth five dollars.

3. *Error*—Remittitur.

Where, in such case, the defendant's evidence showed that the animal was worth twenty-five dollars, the error in rejecting the testimony offered will be cured by remitting the amount recovered in excess of that sum.

APPEAL from *Miller* Circuit Court.

C. E. MITCHEL, Judge.

Suit against S. W. Fordyce and A. H. Swanson, receivers of the St. Louis, Arkansas and Texas Railway Company. The complaint alleged that defendants' trainmen negligently ran a train over and killed a heifer belonging to plaintiff, valued at seventy-five dollars. The answer denied that the heifer was worth more than ten dollars.

Plaintiff testified that the heifer was worth seventy-five dollars. On cross-examination he testified that he "only owned two head of cattle, the one sued for being one of them; that he had assessed them for taxation for the year 1889." The witness was then shown an assessment list, made under oath for the year 1889, made July 19, 1889, which he stated was the one made and verified by him of his personal property for taxation, and that the heifer sued for is one of the two cattle mentioned in said assessment list and valued as therein stated, viz., five dollars. The defendants then offered to read in evidence to the jury said assessment list, to show that the plaintiff has made

contradictory statements as to the value of said heifer, and also as evidence tending to show the value of the same. The plaintiff objected to its introduction, the court sustained the objection, and refused to permit the same to be read to the jury, and defendants excepted. The defendants introduced evidence showing that the heifer was worth only twenty-five dollars.

The jury returned a verdict in favor of plaintiff for fifty dollars, and the court rendered judgment for that amount on December 20, 1889. On December 30, 1889, a motion for a new trial was filed, "which motion," the record shows, "was submitted to the court and by the court overruled and denied; and to which ruling and judgment of the court in overruling and denying said motion, the defendants at the time excepted." Defendants have appealed.

Montgomery & Moore and *Sam H. West* for appellants.

1. The court erred in excluding the assessment list. 42 Ark., 527; Mansf. Dig., 5676, 5616, 2902; 1 Gr. Ev. (Redf. ed.), sec. 362; 46 Ark., 87; 137 U. S., 507; 52 *id.*, 303.

W. H. Arnold for appellee.

1. The motion for a new trial was not filed within three days. Mansf. Dig., sec. 5153; 49 Ark., 75.

2. It was not a reversible error to exclude the assessment list. It was offered for *two* purposes: to show the value of the heifer and to impeach plaintiff. It was objected to by plaintiff as inadmissible for these *two* purposes, and a *general* exception only saved. This general exception availed nothing unless it was admissible for the two purposes. Thompson on Tr., secs. 696, 3397, 2806; 89 Ind., 270; 39 Ark., 17; 50 Ark., 348. It was not admissible to prove value. 42 Ark., 527; 44 *id.*, 263.

1. Presumption as to filing motion for new trial.

HEMINGWAY, J. All matters relied upon for a reversal relate to the court's refusal to grant the motion for a new trial. But the appellant is met upon the threshold of the cause with the contention that, as his motion for a new trial was not filed within three days after the verdict was ren-

dered, and the delay does not appear from the record to have been unavoidable, the court was justified in overruling the motion, regardless of the matters presented by it.

The court permitted the motion to be filed, and considered it. As the record is silent as to the considerations that controlled the court in permitting the motion to be filed and remain of record, it must be presumed that they were legally sufficient to justify such action, and that it was made to appear that the delay was unavoidable. We do not think a different rule is announced in *Nichols* v. *Shearon*, 49 Ark., 75. There the motion was filed in apt time, and, upon an understanding between the parties had in court, it was withdrawn; afterwards, and more than three days after the verdict had been rendered, the same motion was refiled. The court said it might have been properly overruled because of the delay in filing it; but it was apparent that the delay was not unavoidable from the fact that it had been originally filed in apt time. So we think the points raised by the motion are presented for our consideration.

We think the evidence legally sufficient to sustain the verdict, and our inquiry in that matter goes no further.

2. Tax assessment as evidence of value.

The only exception that it seems necessary for us to consider relates to the court's action in excluding from the evidence the appellee's assessment list, recently signed and verified by him, in which he returned for taxation "two head of neat cattle" of the aggregate value of ten dollars. As the appellee had testified that the heifer killed was one of the neat cattle assessed, and had fixed in his testimony a much higher value upon her than that fixed in the assessment list upon both animals, and as the value of the heifer was a fact controverted upon the trial, we think the list was proper evidence to contradict the appellee, and that the court erred in excluding it. *Texas R. Co.* v. *Donnelly*, 46 Ark., 87; *Chicago R. Co.* v. *Artery*, 137 U. S., 507.

3. *Remittitur.*

But the defendant's evidence showed that the animal was worth twenty-five dollars, and upon it a verdict for that amount should have been rendered if the appellee's testi-

mony had been entirely discredited. A *remittitur* of the amount recovered in excess of twenty-five dollars will therefore cure the error indicated; and for that sum the judgment will be affirmed if the appellee elects to remit the excess. Otherwise the judgment will be reversed, and the cause remanded.

KINCHELOE *v.* MERRIMAN.

Decided June 6, 1891.

Divorce—Wife's suit money—Husband's liability.

An attorney cannot recover, in an action at law against a husband, for services rendered his wife in a contemplated suit for divorce upon the ground of the husband's cruelty, since the prosecution of a suit for divorce is not necessary to her protection as a wife.

APPEAL from *Faulkner* Circuit Court.

JOSEPH W. MARTIN, Judge.

J. H. Harrod for appellant.

A husband is not liable to an attorney employed by the wife to obtain a divorce for his fee, even where he obtains the divorce. 32 Ala., 227; 18 Conn., 417; 40 Conn., 596; 79 Ill., 254; 2 Ind., 630; 18 B. Mon., 514; 8 Cush. (Mass.), 404; 42 N. H., 478; Wright (Ohio), 120; 3 Head (Tenn.), 527; 15 Vt., 607; 3 Iowa, 97; Bish. Mar. & Div., 5th ed., vol. 2, sec. 391; Mansf. Dig., sec. 2563; 30 Ark., 73.

Sam Frauenthal and *E. M. Merriman* for appellee.

1. A husband is liable to an attorney for his fee, who is employed by his wife to institute proceedings for a divorce, where the grounds were cruel and inhuman treatment, rendering her condition intolerable, and where it was absolutely necessary for her protection and safety that she have legal advice. Citing 24 Ark., 522; 30 Ark., 73; Mansf. Dig. sec. 2563; 2 Bish. M. & Div. (6th Ed.), sec. 387; *ib.*, sec. 390; *ib.*, sec. 388; 34 Eng. L. & Eq., 214 (217); 50 Ga., 94, 66; 30 Ga., 81; 23 Kans., 340.

2. It was *necessary* for the wife's protection and safety that she have counsel; a *necessary* for which the husband is bound. 1 Bish. M. & D., sec. 554 (6th ed.); 42 N. H., 78 (480); 39 *id.*, 123.

Liability of husband for wife's suit money in divorce proceeding.

HUGHES, J. The appellee sued the appellant for an attorney's fee for services rendered the wife of appellant in counseling and advising her in reference to a suit which the wife contemplated bringing against the appellant for dissolution of the bonds of matrimony upon the ground of cruel and barbarous treatment of the wife by her husband. Appellee alleged in his complaint that it was absolutely necessary for the wife's protection and safety that she should have legal advice. The contemplated suit for divorce was compromised, and not instituted. A demurrer to the complaint was overruled, and judgment was rendered for appellee from which the appellant prosecuted this appeal. Was the appellant liable?

Under our statute the allowance of alimony and suit money, pending a suit for divorce, is in the sound discretion of the court, and, before the court will make the allowance, the wife must show merits. Sec. 2563, Mansf. Dig.; *Hecht* v. *Hecht*, 28 Ark., 93; *Countz* v. *Countz*, 30 Ark., 73. There is no other provision in our statute in reference to suit money in divorce cases. If the allowance is discretionary only with the court *pendente lite*, can it be said that the wife has absolute right to counsel fees in a divorce suit?

In 2d Bishop on Marriage and Divorce, section 388, it is said that "the English doctrine is, that a legal person who, in good faith and on probable cause, carries on or defends a wife's divorce suit with her husband can recover at law of the latter the proper compensation for his service and expenses therein; to the extent to which he does not obtain it, by order of the court, in the suit itself."

Lord Campbell held, in *Brown* v. *Ackroyd*, 5 Ellis & Bl., 819, 827, 829, that a wife has authority to pledge her husband's credit for the costs of a divorce suit, where there are

reasonable as well as where there are absolute grounds for instituting the suit. Under such circumstances the suit would be necessary and fit for the wife's protection, and she would be authorized to employ a proctor, and her husband would be liable for his fees. And it was said in that case by Crompton, J., that "where there is reasonable apprehension of violence, a divorce may be the most effectual protection, and it may be a necessary, within the rule which authorizes a wife, who has left her husband from reasonable apprehension of cruelty, to pledge his credit for what is necessary to her."

This doctrine was confirmed in the court of common pleas, and held to apply, though the petition for divorce was not proceeded with and counsel omitted to pursue the practice of the court for obtaining costs, Erle, C. J., saying: "No doubt such costs come under the description of a 'necessary.' The wife pledges her husband's credit at the beginning of the suit; and I see nothing in the practice of the divorce court to take away the wife's common law right." *Rice* v. *Shepherd*, 12 C. B. (N. S.), 332.

In the courts in this country there is a diversity of judicial determination upon this question. In 2d Bishop on Marriage and Divorce, section 391, it is said that "the proposition that neither the obtaining of a divorce nor the resisting one has any relation to her protection *as wife*, is, as applied to the marriage dissolution, not altogether without reason. And there is a great deal of American authority to this; namely, that the wife's legal agent cannot recover compensation of the husband for his services in suits for divorce from the bonds of matrimony, whether she is plaintiff or defendant." *Wing* v. *Hurlburt*, 15 Vt., 607; *Dorsey* v. *Goodenow*, Wright, 120; *Shelton* v. *Pendleton*, 18 Conn., 417; *Coffin* v. *Dunham*, 8 Cush., 404; *McCullough* v. *Robinson*, 2 Ind., 630; *Williams* v. *Monroe*, 18 B. Monroe, 514; *Johnson* v. *Williams*, 3 Greene (Ia.), 97; *Dow* v. *Eyster*, 79 Ill., 254; *Cooke* v. *Newell*, 40 Conn., 596; *Morrison* v. *Holt*, 42 N. H., 478; *Ray* v. *Adden*, 50 N. H., 82.

We cannot well understand how a suit for divorce could be necessary, or actually afford protection to the wife against personal abuse upon the part of the husband. A proceeding against him to compel him to keep the peace might be necessary, and might have the desired effect; and for services rendered for the wife in such a proceeding the husband would be liable, on the ground that the wife has the right to pledge her husband's credit to procure services which are necessary to her protection and safety.

In the cases of *Glenn* v. *Hill*, 50 Ga., 94; *Sprayberry* v. *Merk*, 30 Ga., 81; *Gossett* v. *Patten*, 23 Kan., 340, and some others, the husband was held liable for the wife's counsel fees in an independent action at law, and, in some of the cases, even though the suit for divorce was discontinued or not brought. But the preponderance of authority in the American States is that, for services rendered a wife in a suit for divorce, an attorney cannot recover in an action at law against the husband, for the reason that prosecuting or defending a suit for divorce has no relation to her protection as wife.

The court erred in overruling the demurrer to the complaint. The judgment is reversed with directions to sustain the demurrer to the complaint.

BURGETT *v.* ALLEN.

Decided June 6, 1891.

1. *Misjoinder of causes—Election.*

Where a complaint seeks to unite with a cause of action against a defendant causes against other defendants with which he has no possible legal connection, the court, on his motion, should compel plaintiff to elect which cause or causes she will prosecute; and if she refuses to make a definite and certain election, the complaint as to such defendant should be dismissed.

2. *Misjoinder—Dismissal of action.*

The court on its own motion may, in the interest of orderly procedure and to prevent the confusion of issues, dismiss without prejudice a complaint which improperly joins several causes of action against different defendants.

APPEAL from *Crittenden* Circuit Court in chancery.

J. E. RIDDICK, Judge.

Isaac W. Burgett died intestate in 1872, possessed of a large estate, consisting of over 7000 acres of land, some of which was cultivated, and personal property appraised at over $2000. He left a widow and an infant child, the plaintiff Pearl Burgett. In 1873 his widow married Jesse Grider, who was thereafter appointed administrator of the estate and guardian of plaintiff. Upon the death of Jesse Grider and wife in 1877, W. H. Grider was appointed administrator *de bonis non* of the Burgett estate, guardian of plaintiff and administrator of the estate of his uncle, Jesse Grider. In 1884 he resigned as administrator *de bonis non* of the Burgett estate, and J. T. Barton was appointed in his stead.

Upon attaining her majority plaintiff brought this suit, alleging in substance that Jesse and W. H. Grider had appropriated to their own uses rents and personal property belonging to the Burgett estate; that Jesse Grider died without ever having made any settlement, either as guardian or as administrator; that W. H. Grider had neglected to make any settlement for Jesse Grider, and that he was largely indebted in his own behalf to the Burgett estate and to herself; that, since his appointment as administrator of the Burgett estate, Barton had made no effort to collect claims due the estate; that a large quantity of the lands of the estate had been permitted to forfeit for taxes; that some of the lands had been fraudulently sold by W. H. Grider to E. M. Apperson & Co.

The complaint sought to unite as parties defendant the principals and sureties in seven different guardian's and administrator's bonds, as follows:

(1) Mrs. E. Wilson, as surety on the bond of Jesse Grider, as administrator of the estate of Isaac W. Burgett. (2) J. M. Harkleroad, as surety on the bond of Jesse Grider, as guardian of the plaintiff. (3) Wm. W. Vance, Jr., as surety on a second bond executed by Jesse Grider, as guardian of plaintiff. (4) Thos. H. Allen, Thos. H. Allen, Jr., Richard H. Allen, Harry Allen, O. P. Lyles, as sureties, and W. H. Grider, as principal, on the bond of said Grider, as administrator of the estate of Jesse Grider, deceased. (5) The same parties as principal and sureties on the bond of W. H. Grider as guardian of plaintiff. (6) Same parties as principal and surety on the bond of W. H. Grider, as administrator *de bonis non* of the estate of Isaac W. Burgett, deceased. (7) E. M. Apperson and J. H. Murry as sureties and J. T. Barton as principal, on the bond of said Barton, as administrator *de bonis non* of the estate of Isaac W. Burgett, deceased.

Besides the above parties, there are included in the action as defendants E. F. Adams and J. M. Greer, who, together with O. P. Lyles, are alleged to have received illegal and unauthorized payments from the several administrators of fees as attorneys of the several estates, which it is sought to recover; and C. F. Berlin and eleven others, who are charged with having separately and severally acquired, through tax sales and otherwise, various tracts of land, which are described and alleged to have belonged to Isaac W. Burgett, deceased. The complaint alleged "that the several matters stated all involve *the estate* and its proceeds, and are so interdependent, complicated and uncertain that she is advised equity alone can furnish adequate relief, and a multiplicity of suits be avoided."

Plaintiff prayed that all the parties named be made defendants and be brought in by summons or warning order, and, if need be, by attachment, and required to answer; that all proper references be ordered and accounts taken, and the amounts due by the several parties named be ascertained, and for decree against them as their liabilities might appear,

and for all relief, general or special, to which she might appear entitled.

All of the defendants were brought in by personal service or warning order. The Allens demurred to the complaint (1) for misjoinder of parties defendant, (2) for misjoinder of causes of action, and (3) for multifariousness in joining both improper parties and causes.

The decree of the court recites as follows: "The demurrer of said defendants (the Allens) to the complaint having been argued and submitted, and the court treating the demurrer as a motion to strike for misjoinder of parties and causes of action, and being of opinion that there is a misjoinder of causes of action, as well as parties defendant, in that the plaintiff hath united the action against the defendants, W. H. Grider as principal, T. H. Allen, W. Harris and O. P. Lyles, as sureties on the bond of said Grider, as administrator of the estate of Isaac W. Burgett, deceased, and as guardian of plaintiff, with the other causes of action set out in the complaint (the said defendants waiving the misjoinder of action on the aforesaid bonds as administrator and guardian); it is ordered, adjudged and decreed that said motion to strike for misjoinder be sustained, and that plaintiff be permitted to elect which of said causes of action and the defendants thereto she will pursue in this action. * * * The plaintiff, by counsel, then presented her election, which is embodied as part of the decree, earnestly excepting to the court's order requiring an election, but in obedience to it, and not of choice, she elects to prosecute the suit against all who joined in the demurrer, and if allowed to retain any other, she designates W. H. Grider. She protests, by advice of counsel, that she may of right retain all the defendants named, and that the right of exception is personal to them respectively, and as none others have excepted, she refers to the court to determine who shall be dismissed.

"The court thereupon finds that the parties named are parties to the several causes which are improperly joined, and be-

ing unable to determine what causes the plaintiff elects to follow, it is ordered that she make it more definite and certain by stating specifically what causes of action she elects to follow, which her counsel declines to do, and thereupon the court decrees that the suit be dismissed, to which she excepts and prays an appeal, which is granted."

W. G. Weatherford for appellant.

1. It is clear that plaintiff has *a present right* of recovery. 36 Ark., 402; 20 *id.*, 536; Story, Eq. Jur., secs. 187–8; 33 Ark., 730; 40 *id.*, 393; 48 Ark., 544; 50 *id.*, 224; 25 *id.*, 108; 50 *id.*, 102; 51 *id.*, 75. Was there then a misjoinder of parties or subject-matter?

2. The complaint is not open to the charge of multifariousness, nor is there a misjoinder that can be taken advantage of by demurrer. See 11 Ark., 726; 20 *id.*, 32; 48 *id.*, 435; 49 *id.*, 315; 31 *id.*, 616; 33 *id.*, 576; 2 How., 619; 5 Lea (Tenn.), 444; 4 *id.*, 472; Mansf. Dig., sec. 4940; 32 Ark., 495; 34 *id.*, 598. Under the rule in 11 Ark., 726, the most the court could have required would have been *to dismiss the complaint as to the demurrants*, and to leave it to stand as to the others.

George H. Sanders and *J. M. Moore* for appellees.

This action was based on *seven* different guardian's and administrator's bonds; besides this, attorneys and tax purchasers are made defendants, charged with receiving illegal fees and purchasing lands at tax and other sales. The complaint was certainly open to the charge of multifariousness and misjoinder. 49 Ark. 312; 48 *id.*, 426; 25 *id.*, 108; 50 Ark., 106; 52 *id.*, 501. An administrator *de bonis non* can not sue his predecessor on his bond for waste, conversion or mismanagement. 34 Ark., 150; 36 *id.*, 316. No final settlement or order for distribution is alleged, and until this is done, no suit lies on the bond of an administrator or guardian. 14 Ark., 170; 24 *id.*, 550; 21 *id.*, 450; *ib.*, 408; 25 *id.*, 108. See also 48 Ark., 547; 34 *id.*, 71.

PER CURIAM. The complaint undertook to join with suits against the appellees causes of action against other defendants which had no possible legal connection with them. There was no error therefore in requiring the plaintiff to elect which of her causes she would prosecute. It was her duty to the court to file a plain and definite statement of what cause or causes she elected to prosecute. She did not do that, but filed a contradictory and ambiguous statement of what she elected to do; and when the court required her to make her election definite and certain, she refused to do so. It could not have been error therefore to dismiss the complaint as to the Allens.

1. Misjoinder of causes—Election.

But, after doing that, causes of action would have remained which had no legal connection. Though the court had authority to proceed to try them in the absence of objection by some defendant, it had a discretion also, in the interest of orderly proceeding and to prevent the confusion of issues, to compel the plaintiff to elect to prosecute only such causes as might properly be joined, and, if the plaintiff refused to make such election, to dismiss the complaint. It was not an abuse of discretion to do so in this case.

2. Dismissal of action.

The order of dismissal was without prejudice to any cause of action attempted to be stated in the complaint, and leaves the plaintiff free to prosecute any of them she desires by a new action.

It must therefore be affirmed.

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SCRUGGS *v.* SCOTTISH MORTGAGE CO.

Decided June 13, 1891.

1. *Usury—Sub-agent's commission.*

A loan of money at the highest lawful rate of interest is not rendered usurious by reason of the exaction of a commission by a sub-agent employed by the lender's agent without the lender's authority, express or implied.

2. *Corrupt intent necessary in usury.*

To constitute usury there must be an agreement to pay for the use of money more than lawful interest; accordingly a note bearing interest at the highest legal rate for the entire year 1884 will not be invalidated by the fact that the money was not loaned until June, if it was the agreement of the parties that, when the loan was closed, the note should be reduced by a credit which would bring it within the limits of lawful interest.

3. *Sub-agent's commission—Case stated.*

A loan company agreed to make a loan at 10 per cent.; notes and a mortgage were to be given to it for the principal and 8 per cent. interest, and other notes and a mortgage for the other 2 per cent. to be given to its agent S; without the company's authority S appointed a sub-agent who, while assuming to act for the lender, exacted for himself a commission for his services. In a suit to foreclose both mortgages, *held*, that there was but one loan made, and neither mortgage was usurious, since the commission was not paid to an agent of the lender; that the amount of the commission paid, being an unlawful exaction and without consideration, should be credited on the debt due S.

4. *Foreign corporation—Doing business in the State.*

A foreign corporation, in lending money on land in this State, is not doing business in the State, within the meaning of section 11 of article 12 of the constitution of 1874, if the agreement for the loan was made in another State, and the notes and securities delivered and the money paid there.

APPEAL from *Lee* Circuit Court in chancery.

MATTHEW T. SANDERS, Judge.

James P. Brown for appellants.

1. The proof shows that Granger was the general agent of Smith & Co. in procuring loans, and that such general agency affects the mortgage company because Smith & Co. are confessedly the general agents of the mortgage com-

pany. 33 Ark., 251; 25 Am. Rep., 487; 29 *id.*, 69; 32 Fed. Rep., 113; 23 *id.*, 636; 1 N. W. Rep., 197; 9 *id.*, 650; 10 *id.*, 916; 15 *id.*, 214; 16 *id.*, 841; 29 *id.*, 154; 21 *id.*, 698; 18 *id.*, 76; Tyler on Usury, 274–363; 51 Ark., 534; *ib.*, 546.

2. The mortgages are void on their face by reason of the usurious interest agreed to be paid on the first interest note. If they were void for usury, a subsequent indorsement does not validate the securities. 35 Ark., 217; Byles on Bills (7th ed.), note 1, p. 314.

3. The mortgage company was a foreign corporation, and had not complied with our laws. Art. 12, sec. 11, Const. 1874. Hence it was entitled to no affirmative relief. 8 Wall., 168; 13 Pet., 519; 10 Wall., 410; 104 U. S., 11; 113 U. S., 727; 7 So. Rep., 200; *ib.*, 201. The mortgage was void as the company had not complied with our laws. 4 Col., 369; 20 Ind., 520; 55 Ill., 85; 10 Allen, 232; 1 Allen, 441; 80 Penn. St., 15; 3 Sawy., 218. The act of 1887, p. 234, could not validate contracts prohibited by the constitution.

John M. Judah and *Eben W. Kimball* for appellees.

1. The evidence fails to show that Granger was the agent of the mortgage company or of Smith & Co. He was an independent broker and acted as the agent of the borrower, and no commissions or fees charged by him could make the loan usurious. 66 Miss., 365; 7 S. E. Rep. 265.

2. The mortgages were not usurious. There was no agreement for more than 10 per cent. interest; the notes were not delivered until June 17, and they were properly credited so as to leave them representing interest only from that day.

3. The mortgages were not void, under art. 12, sec. 11, because:

a. The transaction was a Mississippi transaction—the business was not done in Arkansas. 43 Ark., 353; 46 *id.*, 50; 7 Biss., 315, 372; 41 Fed. Rep., 653.

b. The section does not make the contracts void, as does art. 19, sec. 13; 132 U. S., 282; 98 U. S., 621–627; 35 La. An., 1184; 83 Ala., 315.

c. The act of 1887 (Acts 1887, p. 234), cured the defect, and it is constitutional. 44 Ark., 365; 27 Ark., 26; 93 Ill., 483; 108 U. S., 488; 63 Miss., 641.

d. *One* transaction does not fall within the prohibition. 113 U. S., 727.

HEMINGWAY, J. This is a suit brought by the appellant Scruggs to cancel his certain notes and mortgages, and to enjoin a sale of his land about to be made under the powers in said mortgages; one of the mortgages was executed by him to the Scottish-American Mortgage Company to secure a loan from it, and the other to Francis Smith & Co. to secure an indebtedness to them. The claim for relief was rested upon a charge of usury in the debts secured. The mortgagees answered separately, denying the charge of usury, and by cross-complaints sought the foreclosure of their several mortgages. At the final hearing, the original bill was dismissed, and a decree of foreclosure rendered upon the cross-bills.

The mortgage company was organized under the laws of Great Britain, for the purpose of lending money in the United States upon the security of real estate, having its principal office in Edinburg. In 1884 Francis Smith & Co., a firm of brokers in Vicksburg, were its agents to lend money on land in this State. They were not authorized to appoint sub-agents, and were instructed to lend money at the rate of 10 per cent. The plan upon which they did business was to take a mortgage to their principal for the amount of the loan and interest at 8 per cent., evidenced by several notes payable annually on the first day of January of each year, during the term of the loan; and to take another mortgage to themselves for 2 per cent. per annum on the loan, it being evidenced by several notes payable as the interest notes in the former mortgage. The interest notes

first to mature were written for the amount of a full year's interest, with the purpose of crediting upon them, before their acceptance, the interest accrued up to the date of acceptance. Such was the course pursued in this case. The mortgage to Smith & Co. was designed by the lender as a means of compensating its agent out of the interest contracted for. The origin of this particular transaction was as follows: Scruggs applied to Merwin & Daggett, brokers of Marianna, for a loan of money; they had previously arranged with Granger, a broker in Memphis, to receive applications for loans, and present the same to Francis Smith & Co. An application for a loan was prepared by them and signed and sworn to by Scruggs, in substantially the same form and upon the same general plan as the one described in *Banks* v. *Flint*, *ante*, p. 40. Merwin & Daggett presented the application to Granger at Memphis, and he forwarded it to Smith & Co. at Vicksburg, with his statement that he had examined the land and "recommended" (but did not solicit) that a loan of $800 be made upon terms indicated by him. They indorsed their approval upon the application, and thereupon Granger prepared the notes and mortgages and transmitted them to Merwin & Daggett. They were executed in due form, and returned to Granger with a power of attorney from Scruggs, authorizing Granger to receive and receipt for the loan. The power solemnly recites that Granger is the agent of the borrower and not of the lender, and is verified by affidavit; it contains no express reference to the capacity in which Granger acted in recommending to Smith & Co. the action they should take. Granger sent the securities and power of attorney to Smith & Co. at Vicksburg, and they returned him the amount of the loan. He retained $60 for his commissions and other sums for matters not explained, and forwarded the balance to Merwin & Daggett. The mortgage provided that it should be governed by the laws of Arkansas. The mortgage company made no loan on land in Arkansas until 1884, and made few, if any, prior to the one under consideration.

It does not appear that Granger had previously participated in loans made by it. Francis Smith & Co. were engaged in a general brokerage business in Vicksburg, and loaned money for different persons and companies. Up to the time of taking the proof they had made nineteen loans in Lee county in which Granger assisted, four for the mortgage company and fifteen for other parties. The proof is that when Granger made his arrangement with Merwin & Daggett, he represented himself as acting for Smith & Co., that he employed a land examiner who reported directly to Smith & Co., and that a member of the latter firm several times asserted that he was their agent. The application for a loan was addressed to no one, but recited a desire to borrow money, and empowered Granger, as the applicant's agent, to negotiate for it. That he conducted any negotiations does not appear, except as it may be inferred from his recommendation to the lender's agent. That he was mistaken as to the party whom he represented, and that he was in fact the agent of Smith & Co., may be accepted as a fact in the case. That he retained from the money lent $60 as his commission, is conceded. If this act can be charged to the lender, it is plain that the transaction was usurious, and that the notes and mortgages are void. The question is, Was the lender chargeable with it?

1. Sub-agents' commission.

The evidence is direct and unshaken that the company did not authorize the employment of sub-agents, and that it had no knowledge of such employment. The agency was not of such a character as that its execution demanded the service of sub-agents, for it appears from the proof that it has been more recently executed without any; the agent therefore had no implied authority to constitute sub-agents. Mechem on Agency, secs. 194–7. Upon the proof we can only hold that he was not the agent of the company, and that his charge of a commission was his individual act, and not the act of the company. What he charged was therefore not a part of the lender's charge, nor to be computed in calculating the amount paid for the use of money. *Call*

v. *Palmer*, 116 U. S., 98; *Baldwin* v. *Doying*, 114 N. Y., 452; *Brigham* v. *Myers*, 51 Ia., 397; Mechem on Agency, sec. 745; Story on Agency, sec. 170.

2. Corrupt intent necessary in usury.

It is contended that usury is shown upon the face of the notes and mortgages in this, that the borrower gave his note for interest at 10 per cent. for the entire year 1884, when he did not receive the money until June. To constitute usury, there must be an agreement to pay for the use of money more than 10 per cent. interest, and usury cannot be imputed to a lawful contract where, by inadvertence or mistake, it was drafted to call for excessive interest.

The borrower in this case, applied for a loan at 10 per cent., and his application was accepted upon those terms. There was no other understanding or agreement between the parties, and, as regards the matter now considered, neither party ever intended anything except that 10 per cent. interest and no more should be paid. The interest notes first to mature were drawn for the amount of a full year's interest, but this was in accordance with a plan followed by Francis Smith & Co., which contemplated a reduction of such notes, before closing the transaction, by a credit upon them which would bring them within the limits of lawful interest. Although the notes had been signed by the borrower, their execution had not been completed by delivery and acceptance, when the interest earned up to the date of delivery was credited upon them, thus making them stand for the interest for the remainder of the year. The plaintiffs cannot complain for usury, because there was no agreement for the payment of unlawful interest, and he cannot complain that the notes were changed by the credit, because he ratified it by paying the notes that bore the indorsement.

3. Case stated.

But it is further contended that, even if the company can assert its claim, Smith & Co. cannot, because they knew of the payment of commissions to Granger, and as to them the contract was usurious and the securities void. There was but one loan made, and it at 10 per cent. interest. Notes

and a mortgage were given to the company for the principal and 8 per cent. interest thereon, and other notes and a mortgage for the other 2 per cent. were given to Francis Smith & Co. No more interest was charged; for, as we have seen, a commission paid to one not acting as the agent of the lender, by authority express or implied, is not a part of the interest. If excessive interest had been charged, the transaction would be void as a whole, all securities growing out of it would be void, and ignorance of the holder could save no security. *German Bank* v. *DeShon*, 41 Ark., 331. But, if excessive interest was not charged, was there any usury in the transaction to blight the obligations, even as against one who knew that excessive commissions had been paid to another than the lender or his authorized agent?

In determining whether commissions paid to an intermediary will avoid a contract for usury, the lender's knowledge thereof is material, not because ignorance will protect him against usury, but because his knowledge and acquiescence will imply authority for an exaction not expressly authorized, and make that the act of the lender which otherwise would be the act of the person who was agent only to make lawful loans. But, waiving this matter, the commission was paid to Granger while assuming to act for the lender, and when Scruggs believed that he had authority in the premises. By color of such authority he exacted unlawfully, and Scruggs paid without consideration, $60 for commissions. That he was authorized to represent Francis Smith & Co., we are satisfied. He was Smith's agent, just as Ocobock in the Banks case (*ante* p. 40) was the agent of the Corbin Bank. The only difference is that in this case the lender did not authorize the sub-agency, either expressly or by knowledge of and acquiescence in it, while in that case he did. We therefore treat the payment of a commission to Granger as if made to Smith & Co., and in that view inquire if Smith & Co. can recover. Our conclusion is that they cannot, as the payment of commission was unlawfully exacted and made without consideration; the amount of it should, when

Smith & Co. invoke equitable relief, be credited on the debt due them. As that satisfies their debt, they are entitled to no relief.

4. Foreign corporation doing business in the State.

It is also urged that the company cannot recover because it did business in Arkansas without having an agent in the State with a known place of business upon whom process could be served. Const. 1874, art. 12, sec. 11. We do not think it appears from the testimony that the company did business in the State at the time of making the loan. The agreement for the loan was made in Mississippi, and the notes and securities delivered and the money paid there.

The decree, in so far as it concerns the Scottish-American Mortgage Company, will be affirmed; in so far as it dismissed the bill against Francis Smith & Co., and grants the prayer of their cross-bill, it will be reversed, and a decree rendered here dismissing the cross-bill and granting the prayer of the original bill.

MAY *v.* FLINT.

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Decided June 13, 1891.

Usury—Broker's commission.

A commission paid by a borrower to his broker for effecting a loan will not affect its validity. *Baird* v. *Millwood*, 51 Ark., 548, followed.

APPEAL from *Johnson* Circuit Court in chancery.
GEORGE S. CUNNINGHAM, Judge.

Suit to cancel an alleged usurious mortgage of land and a trustee's deed executed thereunder. Thomason executed the mortgage to Charles L. Flint, as trustee for the New England Mortgage Security Company. Upon Flint's resignation J. H. Basham was substituted as trustee. At a sale under the power in the mortgage Sherwood became purchaser of the land. May, a judgment creditor of Thomason, brought this suit. The facts are stated in the opinion. There

was a decree for the defendants, from which plaintiff appealed.

Sol F. Clark for appellant.

1. This case comes squarely within the case *ante* p. 40, and 41 Ark., 331.

2. The record fails to show that Basham, the substitute trustee, had any power to sell, or by what authority he was substituted.

J. M. Rose for appellee.

1. The proof fails to show that the Corbin Banking Company was the agent of the mortgage company, and differs from the case *ante* p. 40. But that case is contrary to all the decisions except the Nebraska cases. Since the decision in the Banks case, Alabama has sustained our position. 8 So. Rep., 388.

Usury — Broker's commission.

HEMINGWAY, J. The appellant relies upon a plea of usury to defeat a mortgage. It is not claimed that the lender directly received or contracted to receive excessive interest; but a commission was received by an intermediary, and this, it is contended, made the loan usurious. The question then is, Was the commission paid a part of the interest? To affect a loan with usury on account of a commission paid to an intermediary, it must appear that he was the agent of the lender and took the commission under authority express or implied from his principal. There is no proof of an express delegation of authority in this case; and if the appellant's contention can be sustained, it must be upon an implied authorization. The direct proof in the case is that the intermediary was not the agent of the lender, that he was a broker engaged in procuring loans for borrowers who sought his services, and that in procuring loans, as in this case, he acted as the agent of the borrower. Such is the direct testimony of the lender as well as of the broker. Is it overcome by the circumstances in proof? The appellant contends that it is, and relies upon our finding in *Banks* v. *Flint*, *ante*, p. 40. In that case we disregarded the

positive statements of some witnesses as to the broker's relations toward the parties, because we found such statements to be in irreconcilable conflict with other conceded facts. From the circumstances we found that the broker had solicited business and performed services for the lender; that this had been done in a similar manner for a number of years, to the extent of almost all the lender's business; and that it was clearly implied from the circumstances that this was done in pursuance of an agreement or understanding with the lender. Upon this we held that an agency existed.

Such an understanding is not implied from the proof in this case. For there is no proof that the relations between the broker and lender were intimate; and, for aught that appears, this was the first transaction between them, and it was brought about by the broker at the solicitation of the borrower. As such is the state of case, we think the court's finding followed the proof, and that this case is controlled by *Baird* v. *Millwood*, 51 Ark., 548.

The appellant contends that the court should have canceled the deed from the substituted trustee, in execution of the power in the mortgage, because it was not shown that the substitution was made according to the terms of the mortgage. The complaint attacked the deed only on account of usury in the mortgage, and the proof was directed and limited to that charge; this did not call in question the validity of the substitution.

We find no error in the judgment, and it is affirmed.

CARTER *v.* UNION PRINTING COMPANY.

Decided June 13, 1891.

Corporation—Release of subscription.

A voluntary release of a stock subscription by an insolvent company is a fraud upon its creditors, whether their claims arose before or after the stock was issued.

APPEAL from *Pulaski* Chancery Court.

DAVID W. CARROLL, Chancellor.

Morris M. Cohn for appellant.

1. The judgment against the company is binding on the stockholders. Morawetz on Priv. Corp. (1st ed.), sec. 619; Thomp. Liability Stock., sec. 329.

2. The wrecking of the company by McMurtry and his associates, while they were directors and officers, made them iable in damages to its creditors. Mansf. Dig., sec. 984; 42 N. W. Rep., 926; 20 Fed. Rep., 181; 13 Pac. Rep., 161; 7 Atl. Rep., 514.

3. Capital *paid in* means *cash*, under secs. 968–971, Mansf. Dig.; 91 U. S., 60; 17 Ohio St., 187; 1 McCrary, 92; 69 Pa. St., 334; 44 Barb., 625.

4. But if the stock could be paid for in property, it should have been shown to be actually worth the amount subscribed. Const., art. 12, sec. 8; Morawetz (ed. 1882), sec. 374; note to 31 Fed. Rep., 676; Green's Brice's Ultra Vires (Am. ed. 1880), 142; 20 N. W. Rep., 764–7; 59 Md., 599, 604; 69 Pa. St., 334; Bates, Lim. Part., secs. 47, 48, 54; 47 N. Y., 225.

5. The arrangement between the corporation and the stockholders could not relieve McMurtry from paying his stock, at the expense of the creditors. And this does not depend upon insolvency. 91 U. S., 56; *ib.*, 47; *ib.*, 69; 103 *id.*, 508; Taylor, Corp., sec. 545; Angell & A., Corp., secs. 600, 603; Boone, Corp., sec. 112; Mor. on Corp., secs. 109, 112, 781, 824; 1 McCrary, 96; 59 Md., 599; 47 N. Y., 225, 232; Wait, Fr. Conv., sec. 369.

6. The company could not cancel unpaid stock, or buy it in after insolvency at the expense of creditors. Mansf. Dig., sec. 981; Wait, Insolv. Corp., sec. 582; Morawetz (1st ed.), sec. 589; Boone, Corp., sec. 141; Thompson, Liability of Stock., sec. 205; 91 U. S., 56, 60, 61; 103 U. S., 498; 54 Md., 429; 35 N. J. Eq., 501; 20 Md., 764; 57 Miss., 602.

7. Insolvency and fraudulent conveyance may be proved by circumstances. 95 U. S., 6; *ib.*, 22; 50 *id.*, 314; *ib.*, 42; Pom. Eq. Jur., vol. 2, sec. 973, p. 511; The doctrine as to increase of stock is the same. *Ib.;* Morawetz on Corp., sec. 831; 37 Md., 522.

8. One stockholder may be sued. 22 How., 380; 101 U. S., 205; 114 Pa. St., 153; 12 Or., 322; Thompson on Liability of Stock., secs. 354–5–7.

House & Cantrell and *Sanders & Watkins* for appellee.

1. A corporation has the power to purchase its stock where there is no fraud. In this case the stock was not merged or reduced. Cook on Stock, etc., sec. 311; 11 Wall., 96; 2 Morawetz, Corp., sec. 841; Thompson on Liability of Stock., sec. 134; 6 Cent. L. J., 109; 114 Mass., 37.

2. The unpaid subscription of a stockholder, when his stock is subscribed and issued after the debt is contracted, is not a trust fund for the benefit of such creditor, because he does not contract upon the faith and credit of such stock. 2 Morawetz, Corp., secs. 832, 833; 44 N. W. Rep., 198; 42 Minn., 327; 119 U. S., 343.

3. Stock can be paid for in property such as is necessary to carry out the object and purpose of the corporation. Cook on Stock, etc., sec. 13; 27 Penn. St., 416; 6 Cent. L. J., 109; Mansf. Dig., sec. 973.

4. Insolvency is not alleged nor proven.

HEMINGWAY, J. In February, 1886, the Union Printing Company was organized as a corporation with a paid capital stock of $10,000. In June following its stock was increased to $30,000. Munro and Van Valen subscribed for $15,000 of the new stock and McMurtry for the remainder,

they having given to him $3500 of their own to induce him to take his. He paid on the stock for which he subscribed $3530, and bound himself to pay the balance, $1470, on call. He became the president of the company, and continued as such until the 2d of September following, when his resignation was tendered and accepted. On the same day the following proceedings are shown by the minutes of the directors' meeting, to-wit:

"CALLED MEETING OF THE BOARD OF DIRECTORS.

"LITTLE ROCK, ARK., September 2, 1886.

"At a meeting of the board of directors of the Union Printing Company, called by direction of the president and held at its place of business, on the 21st day of September, 1886, the following named directors were present: J. Erb, F. L. Munro and J. M. Wade.

"President A. McMurtry being absent, the vice-president took the chair, and called the meeting to order. The reading of the minutes of the previous meeting was dispensed with. The following was read, and, upon motion of Mr. J. Erb, was unanimously adopted:

"WHEREAS, There has heretofore been issued to A. McMurtry certain stock in this corporation amounting to $8500, upon which the sum of $5000 purports to have been paid thereon, but in fact there has been but the sum of $3530 paid thereon, and leaving the sum of $1470 due and unpaid, and which was to be paid at the time of issue; and,

"WHEREAS, The said McMurtry now fails and refuses to make such payment, but has offered and agreed to accept the sum $3530 as purchase of said stock; and,

"WHEREAS, This corporation is in need of immediate funds, and can resell the said stock so as to realize the sum of $1470;

"*Now, therefore,* The said offer of said McMurtry is hereby accepted, and the president of the corporation is authorized and empowered to buy said stock and have the same transferred to the corporation, * * * not for the pur-

pose of retiring the same, but for the purpose of reissue and resale for the benefit of the concern. And the said president is hereby authorized and fully empowered to enter into, on the part of the company, such contract and negotiations, and to make such securities, by mortgage of property of the concern, as will secure to the said McMurtry the purchase price of said stock and will perfect the purchase of said stock, and to do and perform all such matters and things as in his judgment may be necessary to carry out the purpose of this resolution.

"WHEREAS, This corporation is in need of money to meet certain liabilities due therefrom; now, therefore, be it

"*Resolved*, That the president of this corporation be and he is hereby authorized and fully empowered to borrow of any one who is willing to lend the same the sum of $1470, and to execute to such lender the obligation of this company, and to procure any and all securities, personal or otherwise, or to make a mortgage upon the property of this company, in such way and manner as may to him, the said president, seem right and proper, to secure the said loan."

In pursuance of these resolutions the company borrowed $1470 from R. C. Lynch, a brother-in-law of McMurtry, and executed to Lynch and McMurtry's representatives, he having died, a mortgage on all its property to secure the sum so borrowed, as well as the amount agreed to be paid to McMurtry.

About the time when the company was organized, the plaintiff entered into a contract with it whereby it became bound to pay him for service to be rendered. He subsequently brought suit for a breach of that contract, and on the 28th of November, 1888, recovered judgment in the sum of $1344.20. Execution was issued on the judgment and returned *nulla bona*, whereupon this suit was brought for the purpose—among others—of requiring McMurty's representatives to pay to plaintiff a sufficient part of the amount unpaid on his stock to satisfy the judgment.

It appears that on the original stock of $10,000 no cash was paid. The incorporators owned a lot of printing presses and material, and this was contributed in payment for the original stock. The property contributed had been purchased for $3000, of which a balance of $2000 was unpaid and secured by mortgage on the property. Before this suit was brought a suit had been instituted wherein a decree was rendered for the sale of the company's property under the two mortgages above referred to; a sale was had and a sum realized insufficient to pay the first mortgage. Upon the hearing in this case the chancellor dismissed the bill, and the plaintiff has appealed.

When corporation cannot release stock subscription.

In design and effect, the transaction between McMurtry and the company amounted to an agreement for a cancellation of his stock subscription by returning to him what he had paid in and releasing him from liability for unpaid installments. We proceed to inquire whether the company had the right, as against its creditors, to release him from his liability. If it had not this right, the plaintiff is entitled to recover the amount of such liability; and as counsel stated in the argument that it was sufficient to satisfy his claim, we may waive other questions discussed. The creditors of a corporation have a right to look to its property for the payment of their claims, and to object to any disposition of it in fraud of their rights; and this right extends as well to claims due it as to its property in possession. Upon this question the Supreme Court of the United States has used the following language: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the pay-

ment of their claims, except as against holders who have taken *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." *Sanger* v. *Upton*, 91 U. S., 56, 60, 61.

That the rule announced is correct, is not controverted; but counsel argue that it does not apply to this case. The reason assigned for their contention is that plaintiff's debt was contracted before the stock was increased, and they argue, as a correct legal proposition, that the unpaid subscription of a stockholder is not held as a fund for the benefit of those creditors whose claims arose prior to the issuance of the stock and without reference to or reliance upon it. They cite several cases in support of the rule contended for, but we do not think they go to the extent claimed. In those cases the corporations had parted with the stock upon terms that gave them no claim against the subscribers, and it was held that if a corporation issue new shares of stock after the claim of a creditor arose, he, not having dealt with the company on the faith of any capital represented by such shares, can not insist on the contribution, by the holders, of a greater amount of capital than the corporation itself could claim from them. *First National Bank* v. *Gustin, etc. Co.*, 42 Minn., 327. But they further hold that if a stockholder were indebted to a corporation for unpaid installments of stock, this claim would be an asset of the company which, in case the company became insolvent, any creditor might resort to for the purpose of satisfying his demand. *Ib.; Coit* v. *Gold Amalgamating*

Co., 119 U. S., 343. The distinction is illustrated in the case of *New Albany* v. *Burke*, 11 Wall., 96–106, where the court sustained a release of a claim for subscription, and Judge Strong, in delivering the opinion, said: "No doubt the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, as is also all its other property; and had the railroad company released without equivalent consideration, or given it away, its action would have been fraudulent and might have been set aside by a court of equity." So we think the plaintiff may attack the release, if it was fraudulent; and that conclusion brings us to the next inquiry.

Was the company in such a condition financially as would entitle it to make a voluntary release of this claim as against its creditors? If so, it could have made any other voluntary disposition of an equal amount of its property. As we view the evidence, it was not in a position to bestow bounty upon anyone. It began business without a surplus, and had continued it without accumulation. For its original stock of $10,000 it took a lot of mortgaged second-hand printing presses and machinery at three times its former cost, charged with a lien for two-thirds thereof. Upon an increase of its stock, a subscriber who paid in property of questionable value gave $3500 of his stock to induce McMurtry to subscribe for $5000 of the stock, and pay $3530 in cash on his subscription. The minutes of the directors' meeting show that the company was in such financial straits that it was willing to release a claim for $1470 and mortgage its property for $3530 in order to acquire $8500 of its stock, and by sale of it realize $1470. These circumstances clearly foreshadow the ultimate sale of its effects for a sum less than the paramount lien. If not absolutely insolvent, it was seriously embarrassed; and any gift of its property was prejudicial to its creditors. It is earnestly insisted that we should not determine this cause upon the ground of the company's insolvency when the release was made, because there was no allegation of such

insolvency in the complaint. The complaint alleged that there was an unpaid balance upon McMurtry's subscription, and this was denied by the defendant. The proof clearly shows that there was an unpaid balance unless it was released by the transaction of September 2, and upon it the defendant must rely. To overcome the force of the defense, the plaintiff was at liberty to make any proof which tended to show that the release was invalid, among others that it was executed in fraud of the company's creditors; and of this fact we think the proof is conclusive.

But it is contended that the transaction was not prejudicial to the company's creditors, because, while it gave up a claim against McMurtry, it obtained an equivalent sum of money from Lynch. The reason assigned does not, it seems to us, justify the conclusion. In the first place the loan from Lynch was an independent transaction with a different person, and has no bearing upon the arrangement with McMurtry; but in the next place, if the money had been advanced by McMurtry, it could not change the result, for it was advanced and received as a loan, and not in payment of a liability. The company's note, secured by mortgage upon its property, was given for it, and a decree of foreclosure subsequently rendered upon it in a suit to which McMurtry's representatives were parties. Having been treated as a loan, and charged upon the company's property, first by mortgage and afterwards by decree, it is now too late to contend that it was a satisfaction of McMurtry's liability.

That the result will entail a hardship upon McMurtry's estate is probable; but that is not a consideration in determining the questions presented. The result flows, by the provisions of law, from his relations with the company, and courts could not, if they would, change or restrain the effect of such provisions, designed as a protection to those dealing with corporations.

The judgment will be reversed, and a judgment rendered here for the amount of plaintiff's debt, with interest and the cost of the action at law, provided it does not exceed the

sum of $1470 with interest thereon at 6 per cent. after the bringing of this suit; in such event the recovery will be limited to the amount last stated.

THOMAS v. STATE.

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Decided June 13, 1891.

Perjury—Indictment—Negative pregnant.

An indictment for perjury which charges that defendant made affidavit to having furnished a certain article for the county, and alleges that he did not make and furnish it, is insufficient; the averment that he did not "make and furnish" is by implication an admission that he did "furnish."

ERROR to *Randolph* Circuit Court.

JAMES W. BUTLER, Judge.

P. H. Crenshaw for appellant.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

1. The common law recitals and details are not now required in indictments for perjury. 24 Ark., 594. The indictment contains the requisites laid down in the rule in the above case, the false swearing, the intent, the authority of the officer, the materiality and the facts showing the falsification. It put defendant on notice of what crime he was charged, stating with certainty time, place and circumstances.

MANSFIELD, J. The only question presented by this record is, whether the indictment on which the appellant was convicted of perjury is sufficient. After the usual formal commencement the indictment alleges: That the defendant made out and presented to the county court of Randolph county an account against that county for a coffin "furnished as alleged" by the defendant for the burial of the body of Elijah Johnson, a pauper; that, in proof of said account, the defendant "did swear, verify and make oath" before the county clerk, who it is alleged had "lawful au-

thority to administer said oath, and to swear the said R. F. Thomas to the truth and justness of said account." The matter sworn to and its falsification are then stated as follows: "He, the said R. F. Thomas, then and there and therein did feloniously, wilfully, knowingly and corruptly swear and make oath and affidavit as aforesaid that said account was just and true, and that the item of said coffin furnished as alleged in said account was just and true, while in fact and in truth the said R. F. Thomas did not make, furnish and supply said coffin for the burial of the body of the said Elijah Johnson, deceased, and that said oath and affidavit was then and there material to the issue and to the item for said coffin, as charged in said account, and that the said oath and affidavit was then and there feloniously, wilfully, corruptly and knowingly false. Against the peace, etc." The court overruled a demurrer to the indictment, and after verdict against the defendant denied his motion in arrest of judgment.

The wilful and corrupt swearing falsely to any affidavit authorized by law to be taken before any officer, it is declared by a statute of this State, shall be deemed perjury. (Mansf. Dig., sec. 1704.) The same statute provides that, in indictments for perjury, it shall be sufficient to set forth the substance of the offense charged, and by what court or before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with proper averments falsifying the matter wherein the perjury is charged. (*Ib.*, sec. 1705.) Under this statute it is not necessary to state the form of the oath under which it is alleged the offense was committed. But where the prosecution is based upon section 1704, *supra*, it is essential to allege that the "affidavit, deposition or probate" was such as the law authorizes. In this case it is alleged that the oath was made to verify and prove a claim made out against the county. The statute (Mansf. Dig., sec. 1412) requires such an oath to be by affidavit—that is, to be made in writing. In the first sentence of the indictment it is averred

that the defendant, in proof of the account presented to the county court, "did swear, verify and make oath before one W. T. Bispham, clerk," etc.; and in the next succeeding sentence it is stated that the defendant made "oath and affidavit as aforesaid that said account was just," etc. The indirect method by which it is thus averred that the oath taken before the clerk was to an affidavit, is, to say the least, objectionable. And upon the authorities it may well be questioned whether the indictment is not insufficient because of its failure to state that the affidavit was in writing. See 2 Bishop, Cr. Pro., sec. 912, note 6; *Copeland* v. *State*, 23 Miss., 257; *People* v. *Robertson*, 3 Wheeler, Cr. Cas., 180; 2 Wharton, Prec., 590–591. But, passing the question here suggested, a more serious objection to the indictment arises out of the manner in which it assigns perjury upon the matter sworn to.

Sufficiency of indictment for perjury.

An assignment of perjury must specifically, directly and without uncertainty of meaning designate the particulars wherein the matter sworn to was false. And it is not sufficient merely to say that the oath or affidavit was false. 2 Bishop, Cr. Pro., sec. 918. That the statute referred to above (sec. 1705) has not changed or relaxed this rule, will appear from the decisions of this court in the cases of *State* v. *Green*, 24 Ark., 591, and *Thomas* v. *State*, 51 Ark., 138.

The only item of the account specified in the indictment as the matter to which the affidavit of the defendant related was for a coffin "furnished." And the matter thus sworn to, as it is here stated, was "that the item of said coffin furnished, as alleged in said account, was just and true." The pleader undertakes to negative this by stating that the defendant "did not make, furnish and supply said coffin." The terms "furnish and supply" are evidently used in the same sense, and the latter may therefore be treated as surplusage. But the term "make" has a meaning widely different. And the fact that the coffin was not made by the defendant, is perfectly consistent with the statement contained in his affidavit that he furnished it. That the article

was furnished, is the only fact to be negatived; and if this were properly done, the indictment would not be vitiated by the denial of a matter not charged to have been sworn to. But when it alleged that the defendant "did not make, furnish and supply," this is equivalent to saying that he did not make and furnish. And this form of denial, according to a rule of construction which has often been applied to pleadings in civil proceedings, is by implication an admission that the coffin was furnished. *Schaetzel* v. *Insurance Co.*, 22 Wis., 412; *Baker* v. *Bailey*, 16 Barb., 54; *Feely* v. *Shirley*, 43 Cal., 369; *Larney* v. *Mooney*, 50 Cal., 610. In other words the indictment may be fairly taken to allege only that the defendant did not furnish a coffin made by himself. But there is no allegation that he had sworn that he made it, and whether he did so or not was therefore a matter wholly immaterial. It may be said that the indictment should be read as if it stated that the defendant "did not make or furnish" the coffin mentioned in his affidavit. In some written instruments "and" has been held to mean "or" where, as it is expressed, "reason and the intent of the parties require it." 1 Burrill's Law Dic., 98. But we know of no authority for resorting to such liberality of construction in aid of the defective allegations of a criminal pleading. *State* v. *Railroad Co.*, *ante*, p. 546; *Thomas* v. *State*, 51 Ark., *supra*. We think the indictment against the appellant was not sufficient. The judgment is therefore reversed, and the cause remanded with instructions to the court below to sustain the demurrer.

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BOLLING v. STATE.

Decided June 20, 1891.

1. *Felony trial—Presence of defendant.*

The recognizance of witnesses in a felony case may be taken in the defendant's absence.

2. *Homicide—Evidence.*

Upon a trial for murder, in which the defense of insanity is made, evidence is admissible that defendant, a few weeks before the killing, bought a gun and practiced shooting it; also that, more than two years before the killing, he wrote to deceased's daughter, asking to escort her to an entertainment, and that she declined—it being further shown that recently before as well as after the killing defendant had referred to the incident with apparent ill-feeling.

3. *Insanity—Right to open and close.*

In a prosecution for murder the defendant cannot, by a plea which admits the killing but alleges insanity as a defense, shift the burden of proof so as to entitle him to the right to open and close the argument.

4. *Insanity—Evidence—Opinion.*

Upon the defense of insanity to a prosecution for murder, evidence is admissible in defendant's favor as to his subsequent conduct or language when so connected with evidence of previous mental weakness as to establish its existence at the time of the murder, or when indicating unsoundness of so permanent a nature as to have required a longer period than the interval for its development; based upon such testimony, the witness may give his opinion with reference to sanity generally or to any monomania to which the evidence points.

5. *Moral insanity—Irresistible impulse.*

It is no defense to a crime committed by a sane person that it was done under the influence of an irresistible impulse.

6. *Rule as to insane delusion.*

The existence of an insane delusion is a defense in a criminal case only when the imaginary state of facts, if real, would justify or excuse the crime.

7. *Burden of proof.*

The rule in *Casat* v. *State*, 40 Ark., 523, that the burden is upon the defendant to prove insanity by a preponderance of the evidence, is adhered to.

APPEAL from *Logan* Circuit Court.
HUGH F. THOMASON, Judge.

Oscar L. Miles for appellant.

1. It was error to refuse defendant the right to open and close. There was only one issue for the jury, the *insanity* of defendant. The *burden* was on him to establish it, and hence he was entitled to open and close.

2. Defendant was not present when certain *substantive* steps were taken. Mansf. Dig., secs. 2098, 2213; Max. Cr. Pr., 561; 24 Ark., 627; *ib.*, 629; 44 *id.*, 331; 45 *id.*, 165; 50 *id.*, 492.

3. The court erred in admitting the irrelevant testimony of Hedges and others. Whart. Cr. Ev., sec. 29; *ib.*, 23 *et seq.;* 92 U. S., 284.

See also 51 Ark., 157; 43 *id.*, 294.

4. It was error to exclude the questions (1 and 2) asked the witness A. Hedges. The "child test," the "wild beast test," the test of "knowledge of right and wrong generally," have been put away, and the courts now hold that if accused did "not know right from wrong with respect to the particular act he was committing," he is no more responsible than if he had not done the deed. 10 Cl. & Fin., 200; 7 Metc., 500; 50 Ark., 517; 12 Mo., 223.

5. The charge was objectionable because no definition of murder in the second degree was given, and none as to reasonable doubt; nothing as to *partial* insanity or *insane delusions*. The sixth was good as far as it went, but was incomplete. 50 Ark., 517. The seventh was argumentative and erroneous because it undertook to tell the jury when defendant's plea of insanity had failed—a matter to be determined by them. 49 Ark., 148, 440. Its latter clause is not the law. In support of prayer first of defendant, see Sackett's Inst. to Juries, 699; and as to the second, third, fourth, see respectively *ib.*, 698–9, and 50 Ark., 511. The ruling of this court in Casat's case, reaffirmed in Coats' case, is opposed to the reasoning in 31 Ill., 385, which is to our mind unanswerable. As to the seventh, eighth, ninth, tenth, eleventh and twelfth, see Elwell's Insanity, 390; 10 Ohio St., 598; 10 Fed. Rep., 161; 63 Ala., 307.

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

1. The burden was not shifted from the State by defendant's plea of insanity. It was at last only a plea of not guilty. Mansf. Dig., sec. 2172; Bish., Cr. Pro., sec. 699.

2. It is too late after verdict to complain that he was not present when the grand jury was empaneled or the indictment quashed. 12 Ark., 630; 50 *id.*, 497. The other objections were not substantive steps. 45 Ark., 165; *State* v. *Elkins*, 63 Mo.

3. The evidence objected to tended to show a grievance against Parks, dating from the refusal of Parks' daughter to accompany defendant to the show. The evidence tends to sustain a "pertinent hypothesis."

4. Opinions of non-expert witnesses are admissible only when *all the facts* upon which the opinion is based are detailed before the jury. Bish., Cr. Pro., 3d ed., sec. 679; 5 Blackf. (Ind.), 217; 4 Conn., 203; 56 N. H., 227.

5. The instructions as to insane delusions are taken from 40 Ark., 511, and 50 *id.*, 511. The sixth instruction asked by defendant was ruled against in 40 Ark., 511. The eighth *is not the law. Any delusion* does not justify a homicide. If defendant was sane as to this crime, but insane upon other questions, the insanity will not excuse. Whart., Cr. Law., sec. 41.

HEMINGWAY, J. The appellant, John D. Bolling, was indicted, tried and convicted for murder in the first degree, in the killing of Capt. W. J. Parks, and prosecutes this appeal from a judgment sentencing him to death. Upon his arraignment he filed a written plea, in which he admitted the killing, but denied that he was guilty, because, as he alleged, he was insane and thereby incapable of acting with malice, premeditation or deliberation.

The killing was done on the afternoon of the 3d of November, 1888, on a platform in front of the defendant's storehouse, upon a public street in the village of Charleston, in the open view of the people in the village, and was witnessed

by a number of them. The defendant sat in his door with his gun in his hand. The deceased approached, stepped upon the platform in front of the door, and, when within ten feet of the defendant, the latter rose, presented his gun and fired, inflicting a wound from which death instantly ensued. It appears that the defendant could not have seen the deceased until about the time he stepped upon the platform, and that nothing was said by either party before the killing. There had never been any difficulty between the parties, and no one knew of any ill-will on the part of the deceased toward the defendant. Nothing unusual was noticed in the conduct of the defendant that day, and persons who were with him a few moments before the killing say he appeared, talked and acted as was usual with him. After the shot was fired he walked across the street, a distance of about sixty feet from the body of Parks, and seemed to be working with the hammer of his gun as if to reload it. Persons who came to the body called upon him to return and surrender, whereupon he went back and gave up his gun. He then drew a pistol, declaring that he could still defend himself. He was ordered to give it up and surrender, which he declared himself willing to do upon a guaranty of protection. This was offered, and he was taken in custody. He protested against being hurried off, and asked a neighbor to lock his store. A guard escorted him directly to a neighboring store, and during the evening to Fort Smith for safe keeping. Before he was placed in custody he several times demanded protection as a condition of his submission, and spoke of an apprehension that he would be murdered.

The killing was on Saturday, and there was some crowd in the village; after the occurrence there was much excitement. The defendant was calm and composed, manifesting neither excitement nor apprehension, except as they might be implied from his demand to be protected.

On his way to Fort Smith he was cheerful and free from excitement, affording amusement and entertainment for the guard that attended him. He asked where he hit the de-

ceased, and when informed laughed and said it was a good shot. He manifested no sorrow for his act, but said that his conscience was clear, and he regretted that he had not done it three or four years sooner. He seems to have answered without hesitation or reserve all questions asked him at that time as to the reason for his act. The reasons assigned were not in each instance the same, though with each he either mentioned or intimated acts done or threatened by Parks.

The following may be stated as some of the different reasons assigned to different persons. Before he was placed under arrest and when called to surrender, he said all he wanted was protection; that he had been run over for three or four years by Capt. Parks and his sons Jim and Henry packing pistols in their boot-legs to kill him, and he would stand it no longer; that they had been standing around on the streets with pistols in their bootlegs to shoot and kill him, and he had determined to have peace or the gallows; that they had meddled with his private business and domestic affairs, and he would have killed Parks three or four years sooner if it had not been for his family. A few moments after the killing another witness asked him why he did it, and he replied: "I have stood all I could—I could not stand any more."

As he was conducted from the place of killing, he passed Jim Parks, and said to him: "I hated to have to do it, but he has been warned of it time and again."

On his way to Fort Smith he told A. Hedges, a witness, that the trouble between him and Parks had been brewing for three or four years, and he was only sorry he had not killed him long ago; that he had gone to church three times to kill him, and went the night before, fully determined to do it, but that he thought best not to do it. He said to the same witness, after reaching the jail yard and while waiting for the jailer, "that Parks was trying to marry his mother against her will; that the church had combined to force her to marry Parks; that he had reasoned with Parks, and downed him on religion, and he would rise and come

again; and he downed him on the scriptures, and he would rise and come again; and at last he denied revelations, and that settled it." In the jail next morning he was asked why he killed Parks, and replied: "To keep Parks from marrying his mother." He was asked if Parks had ever asked her to marry him, and replied: "You don't understand the case—the church was forcing her to marry him against her will." At the same time he said that Parks had been carrying a pistol for some time to kill him, and that Henry Parks had passed his store a day or two before with a six-shooter in his hand to kill him, and would have killed him, but he ran or darted into the store. He was then asked if he had anything against Jim Parks, and said, "No; only Jim asked him once if he did not want to travel."

To another witness he made about the same statement as to the one last referred to, and said further that he carried his pistol to church the night before intending to kill Parks, but thought it might not be sufficient; and further that Parks objected to his going to see his daughter; and if he was not welcome to visit her, Parks was not welcome to visit his mother. When speaking of Parks' purpose to marry his mother and the church's aiding him in the matter, he said "that John Armistead, Dr. Barnes and brother Joe Burt, if he was living, could tell all about it." The parties named, except Joe Burt, were produced as witnesses, and stated that they had never heard of the matter.

J. P. Falconer, who was of the guard that conducted him to Fort Smith, asked him in the jail yard that night, why he did it, and if he was sorry? He said, "he was not sorry, except that he had not done it twelve months ago; that nobody knew what he had stood and gone through; that they had been dogging him for the last four years; that he thought the thing was settled, but no longer than yesterday it came up again; that Parks had been trying to injure him in his business affairs and in the church, and he had been in dread of his life for four years; that, no longer than the day before, Parks passed his door with a pistol in his bootleg,

and would have killed him if he had not run in the house." He then repeated the statement, heretofore set out, of Parks' purpose to marry his mother, of the church's aiding him in it, and of his arguing the matter with Parks; and in proof of his statement referred him to the parties named to the other witnesses. He was asked how he knew the church had taken hold of the matter, and he answered that "they had told it to him in their prayers."

Another witness some time afterwards asked him why he did it, and he said, "that was for him to know; that the thing had been going on for four years, and he could stand it no longer."

To another witness some time after, and to his mother before, the killing, he said that he was the only thing in the way of Parks' forcing her to marry, and that Parks and his sons were trying to kill him so as to get him out of the way; he told this witness that Parks went to church and to his place of business and made mouths at him and danced around him; that on the day of the killing Parks came upon the platform, and commenced making mouths at him and dancing before him, and the "Lord said kill him, and he obeyed."

After the defendant's arrest and while he was in the jail, he evinced the usual concern about his business affairs, and gave directions as to their management. He was about 35 of age, a widower, and a merchant by occupation. He was a peaceable man, and no witness knew of his ever having any trouble except once over a game of marbles. His father was the victim of delusions with reference to a lady whom he had once loved, and, although he had married another, he often imagined that she was present, and that he saw her. Those delusions so affected him, that he left his house and family, and was found a physical wreck, subject to the same delusions. His grandfather is described as a subject of insane fancies which prompted the most loathsome and unnatural practices, and to remonstrances against

them he replied by quotations from scripture without aptness or relevancy.

About three or four years before the killing the defendant conceived the idea that the deceased was trying to force defendant's mother to marry him. He approached her on the subject, and she assured him that there was nothing in it, but he replied that she did not understand the matter as well as he did. He frequently after that time talked to her about it, and on the morning before the killing he requested that she would not take Parks' hand in a church meeting, and that night he told her that he could not stand to go to church again where he would see Parks. A lady acquaintance once spoke to his mother in his presence about the deceased, and he visited the lady next morning and told her that if it were repeated there would be bloodshed. No witness knew of any inclination on part of the deceased to marry his mother, and she testified that he had never requested it directly or indirectly, nor at any time engaged in conversation with her.

About two weeks before the killing the defendant went into a neighboring store asking to borrow a pistol, and indicating ill-feeling toward Parks. About the same time he bought a gun, saying that he wanted to be able to hit a stump or a tree, and it appears that he practiced shooting until the homicide occurred.

After the killing, a small paper writing, headed "The Reason," was found in a file of his papers, and is as follows: "The cause of my uneasiness is the old man and Jim Parks have threatened my life and for no cause, only to injure me." This was dated October 21, 1888 and was signed "J. D. Bolling." Two pages of his mercantile account book were pasted together, and, when loosed, they disclosed the following entries, to-wit: "If I am murdered, you may know that old man Parks did it or had it done, for he has contemplated it" (dated July 20, 1888, signed J. D. B.), and "The dogs determined to have my blood" (dated September 14, 1888, signed J. D. Bolling).

Two years or more before the killing he asked to accompany a daughter of the deceased to an entertainment, but she declined his escort. Remarks made by him recently before the killing indicated that he entertained an unpleasant recollection of this occurrence, and possibly ill-feeling towards the deceased on account of it. Since it occurred he had married, and his wife with an infant had died. On the occasion of their death, he was observed to act strangely, and to evince an unnatural indifference to his bereavement. He slept through the travail of his wife, and laughed in the presence of his dead child; and, to enforce the observance of certain details with reference to its burial, asserted that it was his property to be disposed of at his will. Some other circumstances were proved as tending to show a general disordered condition of his mind, but we have stated enough of the proof to give an outline of the defense, and thereby afford an understanding of the questions raised by this appeal.

Many exceptions were taken and properly saved during the trial, and we proceed to consider such of them as we have thought demanded our consideration.

1. Witnesses may be recognized in defendant's absence.

1. The venue was changed from the Franklin to the Logan circuit court; after the order had been made, the court had the witnesses called and recognized to appear as witnesses in the Logan circuit court; the defendant was not present, and it is urged that the recognizance could not be taken in his absence. We do not think that this was a substantive step in the case which could not be taken in his absence.

2. Evidence.

2. Evidence was admitted, against the defendant's objection, that he bought a gun a few weeks before the killing, practiced shooting it, and had it repaired. If these circumstances took place in preparing for the homicide, they were admissible and proper to be considered in determining the *animus* with which the act was done. They were sufficiently proximate to the act to warrant their admission; and whether they were really a part of the preparation, and if

so, what weight they should have in determining the *animus* of the defendant, were questions for the jury. Besides, as they were acts of the defendant done at a time near the homicide, they were proper to be considered in determining the condition of his mind at that time.

3. The State proved, against the objection of the defendant, that in February, 1886, the defendant wrote a note to a daughter of the deceased, asking to escort her to an entertainment, and that she replied: "His company was not accepted." It is contended that this circumstance had no tendency to elucidate the issues joined, and that its admission was error. There was other proof that, recently before as well as after the killing, the defendant spoke of the fact that he was not welcome as a visitor of Parks' daughter, with some apparent feeling. Thus connected, we are of the opinion that it was proper to admit the proof.

3. Right to open and close.

4. The defendant, upon his written plea admitting the killing charged but denying his guilt because he was insane and incapable of acting with malice, deliberation or premeditation, asked to open and close the case. This request was refused, and he excepted. The statute provides that there shall be but three kinds of pleas to an indictment, to-wit: guilty, not guilty and former conviction or acquittal of the offense charged. Mansf. Dig., sec. 2172. In this case the defendant pleaded not guilty, and with his plea set out the reason relied upon to sustain it. Everything except the denial of his guilt was surplusage, and the issue was the same as if he had pleaded not guilty in the ordinary manner. Having pleaded not guilty, he cast upon the State the burden of proving his guilt as laid, and this entitled it to open and close. If the defendant's contention be sound, other defendants might admit homicides charged against them and deny guilt upon the ground that they acted in self-defense or in the prevention of a felony or in any other manner which would excuse them, and thereupon claim the same right. The defense in this case is one often made, and we have been cited to no case to sustain the defendant's posi-

tion. So far as we are advised, the State's right to open and conclude has been uniformly recognized, while the defendant's right has been expressly denied in cases adjudged by the Supreme Courts of Ohio and Iowa. *Loeffner* v. *State*, 10 Ohio St., 598; *State* v. *Felter*, 32 Iowa, 49.

4. When witness may give opinion as to insanity.

5. After the witness Hedges had detailed what the defendant said and did, and described his appearance and manner from the time of his arrest until he was left in Fort Smith, the defense asked him two questions which were objected to by the State and excluded by the court. The questions were as follows:

(1.) "Did you, while in company with the defendant from the time you arrested him until you turned him over to the jailer in Fort Smith, see anything in his conduct, appearance, manner or conversation that indicated to your mind that he appreciated the character of his act in killing Capt. Parks; and if you did, what was it that you saw or heard?"

(2.) "From what you saw of defendant in the street at the time you arrested him, his conversation in the street, at Falconer's store, on the road to Fort Smith, in the jail yard and in the jail, and from what you observed of his appearance, his coolness and his general manner, what is your opinion as to his being controlled by or suffering under an insane delusion in regard to Capt. Parks' marrying his mother against her will, the church assisting to bring about this marriage, and the desire on the part of Capt. Parks to put the defendant out of the way so as to obtain his mother?"

We are of the opinion that there was no error in excluding the first question. It called for an inference from what he (witness) had failed to see, and not for an opinion based upon what he had seen and detailed. Although the witness may have observed nothing which indicated that the defendant appreciated the character of his act and might have so answered, that could not have proved that defendant did not appreciate it. His failure to observe it might have arisen

from his inattention or from the studied concealment of the defendant. It is not strange that a prisoner, though guilty, should suppress the evidences of his conscious guilt, nor can his failure to manifest them be made proof of his innocence. If the response elicited had been negative, it would have established nothing; and if it had been positive, that evidences of appreciation were observed, that could not have aided the defendant.

We are of opinion that the second question called for competent evidence, and that the witness should have been permitted to answer it. The reason of its exclusion does not appear from the record. It could not have been either because the witness was asked to state his opinion, or because he was asked to state one as of a time after the killing, or because he was asked to state one based upon the manner, acts and conduct of the defendant. For the court admitted in evidence opinions of non-experts upon the question of sanity, and proof of the acts, conduct, manner and declarations of the defendant after the killing. The ruling that the question could not be answered must have been placed on the ground that it sought an opinion as to the sanity of the defendant upon a particular subject, and not generally. As a rule, the conduct as well as the language of a defendant after the commission of a crime, not forming a part of the *res gestæ*, is inadmissible in his favor; but when insanity is set up, the rule is sometimes different. They are then admissible whenever they are so connected with or correspond to evidence of disordered or weakened mental condition preceding the time of the offense, as to strengthen the inference of continuance and carry it by the time to which the inquiry relates, and thus establish its existence at that time; or whenever they are of such a character as of themselves to indicate unsoundness to such a degree or of so permanent a nature as to have required a longer period than the interval for its production or development. *Com.* v. *Pomeroy*, 117 Mass., 143. As such acts, conduct and declarations were admissible, was it competent for the

witness, after stating them, to state his opinion based upon them as to the sanity of the defendant? The affirmative was expressly ruled in *Kelly's Heirs* v. *McGuire*, 15 Ark., 601, and has been since then the settled rule of this court. If the witness could state an opinion as to sanity in the abstract, we see no reason why his attention should not be directed to the particular subject to which the acts and conduct testified to by him relate, and his opinion as to the sanity of the defendant as regards it elicited. We think it might be done, for if an opinion assists in reaching a correct conclusion, one with reference to the monomania to which the evidence points would furnish more assistance than one that was general.

5. When irresistible impulse no defense.

6. The defendant presented thirteen instructions, and asked that they be severally given to the jury; the court refused to give any of them, and it is now insisted that each of them should have been given. In a number of them a rule was announced that although the defendant knew what he was doing and that it was wrong, still if he did not have power of will to abstain from the act, he would not be responsible. As we view the evidence, there was nothing upon which to base an instruction as to the law governing the defendant's responsibility if acting under the control of an irresistible impulse; and for this reason no instruction should have been given relating thereto. Moreover, the instructions asked made no distinction between insanity and mere passion or revenge, but declared that an irresistible impulse, from whatever source arising, would absolve the defendant from responsibility for acts done under its sway. Such is not the law; but when an act is done under the influence of anger or resentment, it matters not how violent they may have become nor that they may have acquired absolute dominion over the actor, he is responsible to the law if his act be otherwise criminal; and for this reason, as well as the other, the instructions into which that rule entered were properly refused.

6. Rule as to insane delusion.

7. In several of the instructions the rule was announced that if the defendant was possessed of a delusion that Parks was trying to marry his mother and the killing was caused by this delusion, he would not be responsible. The rule, as stated in McNaghten's case (10 Cl. & F., 200) and generally approved, is that, if the defendant labors under a partial delusion only, and is in other respects sane, he must be considered in the same situation as to responsibility as if the fact with respect to which the delusion exists were real. So if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment; but if his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment. If Parks had been in fact trying to marry the defendant's mother against her inclination, it would not have warranted the defendant in taking his life; and, applying the rule above stated, such a delusion would not excuse him.

8. The thirteenth instruction asked by the defendant was a correct declaration of the law upon this subject; but while it told the jury that a delusion would only absolve from guilt when the facts if real would excuse it, it failed to tell the jury what facts would excuse a homicide, and left that matter to be determined by the jury without aid or guidance from the court. In that respect it was incomplete, and improperly cast upon the jury the determination of a matter of law. The omission should have been supplied and the instruction given, as it presented the law applicable to the defendant's theory of the case. We do not mean to say that the failure to supply the omission and give the instruction was a reversible error on part of the court, but that to have done so would have been proper, since it presented the law applicable to a theory of the case which the jury were bound to consider in reaching a verdict and which had not been treated in the instructions given.

7. Burden of proof as to insanity.

9. It was decided in *Casat* v. *State*, 40 Ark., 523, that the burden was upon the defendant to prove insanity by a preponderance of the evidence. We adhere to that ruling, and approve the court's refusal to charge, as asked by the defendant, that the burden was upon the State to prove his sanity.

10. Other instructions refused were either abstract or argumentative, and there was no error in their refusal.

11. The court gave but two instructions which related to the law of insanity, and they treated it entirely in the abstract. The first declares that it is incumbent on the defendant to prove by a fair preponderance of the evidence that, at the time of the killing, he was laboring under such a defect of reason arising from a disease of the mind as not to know the nature and quality of the act he was committing; or if he did know it, that he did not know he was doing wrong. This embodies the rule as stated in McNaghten's case and in Casat's case, and meets our entire approval.

12. The last instruction bearing upon that subject contains two clauses; in the first it seems to announce the rule as above stated, but in the second a different one. It there says: "Insanity will only excuse the commission of a criminal act, when it is made to appear affirmatively, by evidence fairly preponderating, that the person committing it was at the time insane to such an extent as not to know right from wrong." By this test, if the defendant knew or could distinguish right from wrong in the general affairs of life, he would be guilty, although, upon the one matter pertinent to his case, his knowledge and power of distinguishing right from wrong were wholly deficient. It can make no difference that the other instruction correctly states the rule; for the two are contradictory and irreconcilable, and we have no means of determining which the jury accepted as its guide. It may be that the defendant knew it was wrong to steal, rob, lie or murder; still, if his mind was diseased, and by reason thereof he had a fixed belief that the deceased had injured or was attempting to

injure him, and that it was his duty to kill him, or that it would be no wrong against the laws of God and nature to do it, he would be absolved from guilt; but although the jury may have found the facts as stated, it could not have acquitted the defendant if it observed the rule stated. That the jury accepted it as the test by which to determine this cause, seems probable when we have considered the court's ruling upon the admission of evidence; for while it permitted witnesses to state their opinions as to whether the defendant was sane or insane generally, it excluded all opinions as to the condition of his mind upon the subject of his relations with Parks. That ruling, in connection with the charge given, may have led the jury to believe that if the defendant was sane generally, he could be held responsible, although he was absolutely insane upon that subject. In this we think there was prejudicial error.

Without going further into the instructions given or refused, we will announce the principles which we think should govern in the trial of this case; and by them the correctness of the charge may be tested. If the defendant labored under a delusion as to the acts and purposes of Parks, and by reason thereof really believed that it was not wrong under the laws of God and nature to kill him, he would not be responsible; but although he had a delusion, still if his reason was not dethroned and he knew that it was wrong to kill Parks, he would be responsible, unless the delusion was that Parks was in the act of attempting to kill him, and that it was necessary for him to kill Parks to prevent his own death or serious bodily harm. The delusion that Parks was attempting to marry his mother, or had tried to injure him in the church or in his business, would not excuse the killing; for such facts, if real, would furnish no excuse; to acquit the defendant on account of such delusion, there must also appear an absence of the knowledge of right and wrong in relation to the facts assumed.

For the errors indicated, the judgment will be reversed, and the cause remanded.

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ROBERTSON v. STATE.

Decided June 20, 1891.

1. *Indictment—Variance.*

On an assignment of perjury committed in the circuit court in testifying as to what was defendant's evidence before the grand jury, a variance between indictment and proof as to the form of the oath administered to him before the grand jury is immaterial.

2. *Perjury—Materiality of testimony.*

Where a witness has given testimony material to the issue, and in answer to the question whether he had not sworn differently before the grand jury denies having done so, the answer affects his credibility as a witness, and a charge of perjury may be founded upon it.

APPEAL from *Johnson* Circuit Court.

J. G. WALLACE, Judge.

A. S. McKennon for appellant.

1. The testimony of appellant, if wilfully and corruptly false, was not material to the issue; it did not tend to prove the guilt or innocence of Davis.

2. Instruction 5 was error, and was not cured by any other instruction given.

3. There was no evidence to sustain the verdict.

4. There was a fatal variance between the indictment and proof. 2 Archb. Cr. Pl. & Pr., 1723, and note.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

1. Perjury may consist in false and corrupt testimony relating, not only to the main fact in issue, but also to material circumstances tending to prove the issue. 53 Ark., 395; 1 Murphy, 124; 1 Carr. & M., 655; 3 Arch., Cr. Pl. & Pr., 597–8.

2. The foreman of the grand jury had power to administer the oath in the form in which it was administered, and there was no substantial variance between the oath alleged and that proved. 27 N. H., 373; 1 F. & F., 356. The fifth instruction was perhaps error, but was cured by the first.

HUGHES, J. The appellant was convicted of perjury in the Johnson circuit court, filed a motion in arrest of judgment and a motion for a new trial which were overruled, to which he excepted and appealed.

The indictment charges in substance that, on the trial of Blair Davis in said Johnson circuit court, upon a charge of seduction of Nannie Walton, it was a material question whether the said Z. L. Robertson did, at the May term, 1889, of the circuit court of Johnson county, testify and give evidence before the grand jury that Blair Davis had told him, the said Z. L. Robertson, that he, the said Blair Davis, was engaged to be married to Nannie Walton, and that this conversation occurred in the fall of 1888; and that the said Z. L. Robertson (the appellant), having been called as a witness upon the trial aforesaid before the circuit court, falsely, maliciously, knowingly, wilfully, corruptly and feloniously did depose, swear and give evidence to the jurors "that he, the said Z. L. Robertson, did not testify before the grand jury of the Johnson county circuit court, at its May term, 1889, that Blair Davis told him, the said Z. L. Robertson, that he, Blair Davis, was engaged to be married to Nannie Walton, and that this conversation occurred in the fall of 1888; whereas, in truth and in fact, the said Z. L. Robertson did testify before the grand jury aforesaid, at the May term of the circuit court aforesaid, that Blair Davis did tell him, the said Z. L. Robertson, that he, Blair Davis, was engaged to be married to Nannie Walton, and that this conversation occurred in the fall of 1888."

This is the gist of the charge.

Instruction numbered five was given by the court and excepted to by the appellant, and is as follows: "If the jury believe that the defendant deposed before the grand jury as testified to by the foreman and clerk of said grand jury, and that the defendant, with full understanding and conception of his evidence, there signed the minutes of his evidence before said grand jury, which minutes have been here read to the jury in behalf of the State, and that the

same was material to the finding of the indictment by the grand jury against Davis, you should find the defendant guilty."

It cannot be supposed that by this instruction the circuit court meant to convey to the jury the impression that the appellant was on trial for perjury committed in swearing falsely before the grand jury, for he had told them in the first instruction that it was not charged that the appellant committed perjury when before the grand jury. The instruction seems to be incomplete, and its meaning is not certain. We think it was calculated to confuse, if not mislead, the jury, and that it is erroneous, and ought not to have been given.

1. Variance between indictment and proof.

It is urged by the appellant that there is a fatal variance between the indictment and the proof in this, that the indictment charges that the appellant was sworn by the foreman of the grand jury that "the evidence he should there give should be the truth, the whole truth, and nothing but the truth," and that the testimony proves that the oath administered was, "You do solemnly swear that you will true answers make to all questions that may be put to you by or under the direction of this grand jury." This is wholly immaterial in this case, as the assignment of perjury is, not false swearing before the grand jury, but false swearing on a trial in the circuit court; and therefore whether the appellant was sworn or not sworn before the grand jury, can have no bearing upon this case. In an indictment for perjury "the simple allegation that the defendant was 'duly sworn,' not describing the attendant ceremonies, has been well adjudged sufficient, or the mere substance of the oath may be given." 2 Bishop, Cr. Pro., sec. 912.

2. Materiality of testimony in perjury.

In considering the motion in arrest of judgment, if we assume that the appellant testified upon the trial of Blair Davis, in the circuit court, for seduction, that "Davis had not, in the fall of 1888, told him that he was engaged to be married to Nannie Walton" (whom he was charged to have seduced), and that, upon being asked if he did not so swear

before the grand jury, he answered "No," the question to be determined is, Was this a material contradiction? "Where a witness has given testimony material to the issue, and in answer to a question as to whether he had not previously made a statement different from the testimony then given, he denies having done so, the answer affects his credibility as a witness, and a charge of perjury may be founded upon it." *People* v. *Barry*, 63 Cal., 62, and cases cited. "It is not necessary that the false statements should tend directly to prove the issue in order to sustain an indictment. *If the matter falsely sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main fact, it is perjury.* And it is equally perjury if the false testimony tends to *discredit* the witness." *Ib.; Wood* v. *People*, 59 N. Y., 123; *Marvin* v. *State*, 53 Ark., 395.

The second ground in the motion for a new trial is that the verdict of the jury is not supported by the evidence.

We have searched the bill of exceptions in vain to find any evidence that the appellant testified on the trial of Blair Davis for the seduction of Nannie Walton, in the Johnson county circuit court, that the said Blair Davis did not tell him, the appellant, that he, Blair Davis, was engaged to be married to the said Nannie Walton, and that the statement was made by the said Blair Davis to him, the said Z. L. Robertson (the appellant), in the fall of 1888. There is a total failure of evidence to support the charge.

Coleman Cox and T. W. Rodgers, members of the petit jury that tried the case of the State of Arkansas against Blair Davis for seduction of Nannie Walton, testified in the case at bar on the part of the State, and their evidence is, that the appellant was a witness in the case against Blair Davis, and swore that his testimony before the grand jury was written down, but was not read over to him, and that he did not testify before said grand jury that Blair Davis told him that he was engaged to Nannie Walton, etc. This is as strong as any evidence in the case, and it will be seen that it relates alone to what the defendant said he swore before the

grand jury, and fails utterly to show that the appellant swore on the trial of Blair Davis that Davis did not tell him that he, Davis, was engaged to Nannie Walton, etc.

For the errors indicated the judgment is reversed, and the cause is remanded for a new trial.

STATE *v.* RAILWAY COMPANY.

Decided June 30, 1891.

Highway—Obstruction by railway—Limitation.

In a suit to recover from a railway company the statutory penalty for failure to construct a suitable crossing of its track at a public highway, possession of the right of way for seven years is not a bar where it is such only as is ordinarily taken by railways for the purpose of enabling them to construct their tracks and operate their trains thereon.

APPEAL from *Craighead* Circuit Court, Jonesboro District.

JAMES E. RIDDICK, Judge.

Action by the prosecuting attorney in the name of the State for the use of Craighead county against the Kansas City, Fort Scott and Memphis Railway Company to recover the statutory penalty and damages for failure to construct a suitable crossing of a public highway. The facts are stated in the opinion.

J. D. Block and *J. C. Hawthorne* for appellant.

1. There was no adverse holding by the appellee. The railroad did not claim to own the land, or attempt to prevent the public from passing. The possession of the cut, and using it as railroads usually do, do not establish a *quo animo*. 34 Iowa, 150.

2. There is no showing of an abandonment. 47 Ark., 431. A mere non-user is not sufficient, unless accompanied by acts showing an intention of abandonment. 4 C. E. Green (N. J.), 142; 5 N. E. Rep., 306, and note.

3. The act (Acts 1887, p. 99, sec. 1) is retroactive, and applies to railroads constructed prior to its passage. 23 Am. & E. R. Cases; 32 *id.*, 271; 24 N. Y., 345. The statute did not commence to run until the passage of the act and the service of the notice. Wood on Lim., 254. See further 25 Barb., 138; 52 N. Y., 510; 23 O. S., 510; 1 A. & E. R. Cases, 20.

Wallace Pratt and *Olden & Orr* for appellee.

The appellant is barred by the seven years' statute. 47 Ark., 431; 50 *id.*, 53; 47 *id.*, 66; 16 Wend., 535; 3 Mass., 275; 11 Mass., 396; 51 Ark., 271, 255.

HUGHES, J. This action was brought by the appellant to recover of the appellee damages for obstructing a public highway in Craighead county, by the making of a cut in the county road in August, 1882, by the railway, about fifty feet in width and about twenty feet deep, where the railway crossed said public highway. The railway track was laid in March, 1883, and the public could not pass over the road where it crossed the railway after the cut was made, but passed around it and crossed the railway track about 200 yards from it. The county road was not vacated, nor was another opened by order of the county court, but the overseer of the road continued to work it on both sides of and up to the railway cut. On the 16th of July, 1889, the overseer of the county road notified the railway company in writing, through the section foreman in charge of the railway at that point, to construct, within sixty days from that date, a bridge across said railway, or to construct and maintain a crossing over the same, at the point where the public road crossed it, of the character required by law, which said company neglected and refused to do. The railway company answered the complaint, and relied upon the seven years' statute of limitation.

This suit was brought on the 14th day of November, 1889, more than seven years after the cut was made by the rail-

way company, under the act of the legislature passed in 1887 (Acts of 1887, p. 99, sec. 1), which provides:

"That wherever any railroad corporation has constructed or shall hereafter construct a railroad across any public road or highway of this State, now established or hereafter to be established, such railroad corporation shall be required to so construct such railroad crossing, or so alter the road-bed of such public road or highway, that the approaches to the railroad bed, on either side, shall be made and kept at no greater elevation or depression than one perpendicular foot for every five feet of horizontal distance, such elevation or depression being caused by reason of the construction of said railroad; *Provided*, That wherever there may be a cut of sufficient depth in the road bed of any railroad at the crossing of any public road or highway, such railroad may be crossed by a good and safe bridge, to be maintained in good repair by the railroad company or corporation owning or operating such railroad."

The jury found for the railway company; a motion for a new trial was overruled, and the cause was brought to this court by appeal. Was the action barred by the seven years' statute of limitation?

When limitation does not run in favor of railroad obstructing highway.

There is no evidence in the case to show that the railway company had any other possession of the public highway than such as is ordinarily taken by railways for the purpose of enabling them to construct their tracks and operate their trains thereon. It does not appear that the possession by the railway company was taken or maintained in hostility to the rights of the public, or with the intention of excluding the public from the use of the highway over the cut made by the company. The railway company does not claim ownership of the soil at that point. The public was prevented from using the highway at that point only by the physical obstruction caused by the cut, which was made by the railway company, not as a *tort feasor*, but in the exercise of a lawful right and for a lawful purpose. Whether possession is adverse depends upon the intention with which it is held.

To be adverse it must be hostile. *Pulaski Co.* v. *State*, 42 Ark., 118; *Jackson* v. *Porter*, Paine, C. C. U. S., 457. The evidence in this case fails to show adverse possession of the highway by the railroad company. The evidence does not support the verdict. The action was not barred.

It is not necessary to discuss the instructions given and refused by the circuit court. For the want of evidence to support the verdict of the jury the judgment is reversed and the cause remanded.

WALLIS *v.* STATE.

Decided June 27, 1891.

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1. *Grand jury—Presumption.*

Where the record discloses that a grand jury of sixteen persons named was duly empaneled, it will be presumed, in the absence of a contrary showing, that other persons who were summoned but did not serve as grand jurors were excused for cause.

2. *Embezzlement—Bailee.*

The statute defining the crime of embezzlement by "any carrier or other bailee" (Mansf. Dig., sec. 1640) is not confined to bailees of the generic class "carriers," but embraces all bailees.

3. *Bailment—Attorney.*

An attorney who has collected funds belonging to a client is a bailee and not a debtor of such client.

4. *Attorney—Embezzlement of school funds.*

An attorney employed under the act of March 31, 1885, to collect demands due to the school fund is guilty of embezzlement if he converts to his own use money so collected, notwithstanding the act provides that he may retain as a fee for collection 10 per cent. of the gross amount collected.

5. *Embezzlement—Demand.*

To constitute the crime of embezzlement, under this statute, it is unnecessary to prove a demand.

6. *Venue.*

The locality of the crime of embezzlement is sufficiently proved by evidence that the defendant resided and collected the money in the county of the venue, and that when last seen it was in his custody in that county.

7. *Embezzlement—Description of money.*

On an indictment which charges the conversion of a sum of money comprising greenbacks, gold and silver certificates and national bank notes, proof that the money converted was of one or other of the four kinds of bills described, without further description, will support a verdict of guilty.

APPEAL from *Sebastian* Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

W. W. Wallis, an attorney, was indicted in Scott county for embezzlement of $1567.56 collected by him by virtue of his employment by the Attorney General, under the act approved March 31, 1885, to collect claims and notes due the school fund. Upon his application a change of venue was taken to the circuit court of Sebastian county for the Fort Smith district. In the latter court a motion was made to quash the indictment because the record of the former court showed that Thomas Parker had been selected by the jury commissioners as a grand juror and summoned by the sheriff, but did not appear to have been excused, though the record showed that a grand jury of sixteen persons named, not including Parker, was duly empaneled. The motion was denied. A demurrer to the indictment, the grounds of which are stated in the opinion, was overruled. Defendant was convicted and has appealed.

John S. Little and *Rogers & Read* for appellant.

1. The indictment should have been quashed for error in empaneling the grand jury. Mansf. Dig., sec. 3991-2. The record does not show that Thomas Parker was either empaneled or excused. 21 Ark., 128.

2. An attorney is not a bailee, within the provisions of sec. 1640, Mansf. Dig., which only applies to carriers and bailees of that class. Endl. Int. St., sec. 405, pp. 558, 568; Bish. St. Cr., sec. 245; 2 S. W. Rep., 223; 49 Mo., 559; 43 Texas, 404.

3. Under the terms of the contract appellant became a *joint owner* of the money collected to the extent of his commissions, and could not be guilty of embezzlement.

Whart. Cr. Law, sec. 1054, 9th ed.; Acts 1885, p. 167, sec. 12; 22 Minn., 41; 11 Metc. (Mass.), 64; 30 Kan., 534.

4. Under his employment, when the funds were collected, the legal title vested in him, and he became debtor for the amount collected less his commissions. 2 Met. (Mass.), 343; 12 Cush., 112; 9 Met. (Mass.), 499; 125 Mass., 15; 32 Mich., 131; 56 Ind., 346; 53 Ind., 331; 3 How. (U. S.), 578; 1 Denio, 233; 7 Hill, 384.

5. A demand was necessary. 2 Ark., 402; 3 *id.*, 82.

6. There is an utter failure of proof as to the character and kind of money; nor is it shown that it was converted in Scott county.

J. B. McDonough, Prosecuting Attorney, with whom is *W. E. Atkinson*, Attorney General, for appellee.

1. The record shows that Thomas Parker was excused. But if the record was silent, the presumption is that he was excused. 16 Ark., 43; 8 *id.*, 374.

2. An attorney is a bailee, within the statute. 3 Ark. 82; *People* v. *Converse*, 42 N. W. Rep.; 51 Ark., 119; 82 Pa. St., 483; Rapalje & Law., Dict.; Bouvier, Dict; 3 H. & C., 921; 3 E. & E., 501; 30 L. J., 99; 3 B. & Ad., 216; 1 C. C. (L. R.), 27; 1 Q. B. Div., 12; Endlich, Int. Stat.,, sec. 410; 3 McCord (S. C.), 306; 2 Strob. (S. C.), 474; 9 Tex., 521; 26 Oh. St., 196; Bish. Cr. Law, sec. 246; 118 Mass., 350; Endlich, Int. Stat., sec. 411; 9 C. P. (L. R.), 339; 8 Q. B. Div., 275; 51 L. J. M. C., 53; L. R., 9 Q. B., 440; 33 La. An., 253; Bish. St. Cr., sec. 246; 19 Me., 394; 44 Mo., 458; 69 Cal., 226; 8 Cox, C. C., 436; 8 Cal., 42; 19 Cal., 600; 71 *id.*, 390; 33 La. An., 1161; 2 New Mex., 250; 21 Kan., 730 (534); 25 Pac. Rep., 616; 22 Kan., 170.

3. Appellant was not a tenant in common of the money collected. 15 N. E. Rep., 481–3; 45 Ohio St., 535; 26 N. E. Rep., 858; 48 N. W. Rep., 292; 24 Pac. Rep., 183; 74 Mich., 478.

4. The collection of the money, and the fact that he had the right to retain his commissions, do not make him a

mere debtor to the State, nor discharge him from his duty as a bailee to remit the balance. 35 Ohio St., 70; 1 Leigh & C., 85; 36 Mich., 306; Russ. & R. C. C., 139; Car. & M., 525; 16 Russ. & R. C. C., 139; Russ. & R. C. C., 463; 3 Starkie, 63; 80 Mo., 358; 22 Kan., 200; 25 Minn., 490; 8 C. & P., 742.

4. No demand was necessary. 111 Ind., 289; 22 Kan., 211; 10 Gray, 173.

5. The proof was sufficient that the conversion took place in Scott county. 25 Pac. Rep., 130; 83 Ga., 171; Desty on Cr. Law, sec. 146*c*; 98 Am. Dec., 132-3-4.

1. Presumption as to formation of grand jury.

HEMINGWAY, J. I. When it appears by the record that a grand jury made up of sixteen persons named was duly empaneled, it will be presumed, in the absence of a contrary showing, that persons not named in the panel but who were selected by the jury commissioners and summoned by the sheriff to serve as grand jurors were excused from such service by the court; and it will be further presumed, unless the contrary appears, that the court excused such persons for good and sufficient reasons. We conclude that the motion to set aside the indictment was properly overruled.

II. The controlling question in the case arises upon the construction of section 1640, Mansf. Dig., which defines the crime of embezzlement by carriers and other bailees.

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

Does the statute cover the case of an attorney employed by the Attorney General of the State, under the provisions

of the act of March 31, 1885, to collect demands due to the school fund arising from the sale of sixteenth section lands? This act provides that attorneys employed under its provisions may retain as fees for collection 10 per cent. of the gross amount collected by them, and that "the remainder of said gross amount, after deducting their fees as above provided for, shall be by said attorneys transmitted without delay to the Treasurer of State." Acts 1885, p. 167, sec. 12.

It is contended that although the defendant may have converted moneys collected by him as an attorney employed under the provisions of this act, he is not indictable under the statute defining embezzlement. Three grounds are alleged in support of this contention, as follows: 1st. That the statute applies only to carriers and bailees of the same generic kind as carriers; 2nd. That upon the collection of the money it became the property of the defendant, and he became the debtor of the school fund—in other words, that the relation of creditor and debtor, and not that of bailor and bailee, arose; 3d. That if the entire amount collected did not become the property of the defendant, he became the owner of an undivided one-tenth part thereof, and in respect thereto could not commit the crime of embezzlement. We will proceed to consider the sufficiency of the grounds relied upon in the order above stated.

2. Embezzlement by bailee

(1). It is insisted that the rule *ejusdem generis* restricts the meaning of the term "other bailee" to the generic class "carrier." The rule invoked is by no means of universal application, and its use is to carry out, not to defeat, the legislative intent. Where an act attempts to enumerate the several species of a generic class, and follows the enumeration by a general term more comprehensive than the class, the act will be restrained in its operation because it is discerned that the legislature so intended; but where the detailed enumeration embraces all the things capable of being classed as of their kind, and general words are added, they must be applied to things of a different kind from those enumerated. For the rule does not require the entire rejec-

tion of general words, and is to be used in harmony with the elemental canon of construction, that no word is to be treated as unmeaning if a construction can be found that will preserve it and make it effectual. End. Int. Stat., secs. 23, 410–14. If the legislature, in the statute under consideration, had undertaken to detail the different kinds of carriers, and had followed the enumeration with the general words "and other bailees," its purpose might reasonably be implied to include such bailees only as belonged to the class carriers, and had been omitted in the enumeration; but having employed the generic term "carriers" and thus included all carriers of every kind, it must have intended, in adding the broader term, to embrace within the act something more than carriers. Otherwise the addition was without purpose, and the term added without meaning. The statute under consideration is a part of the revised statutes of 1838, and is a substantial transcript of a Missouri statute which was construed by the Supreme Court of that State before its adoption in this State. The same rule was invoked there as here to restrain the operation of the general words; but the court said: "In our opinion, the legislature intended to make it larceny in all bailees to embezzle and convert goods," etc. *Norton* v. *State*, 4 Mo., 461. The Court of Appeals of that State, an intermediate tribunal but one of great learning, subsequently approved this construction of the act. *State* v. *Broderick*, 7 Mo. App., 19. In a later case the Supreme Court of that State expressed a different view of the statute, but this was done without any discussion of the question or even a reference to the earlier decisions. *State* v. *Grisham*, 90 Mo., 163. If it is to be presumed that the law-makers here, in adopting the act of a sister State, intended to adopt the construction put upon it by the highest courts of that State, the presumption would extend only to the construction given prior to its adoption here. End. Int. Stat., sec. 371. Looking to its construction there preceding its adoption here, we find the rule *ejusdem generis* not applied, because it would destroy parts of the act. In Dot-

son's case, decided in this court, the rule was not invoked, but the act was construed and a broader meaning given it than the rule would admit of. *Dotson* v. *State*, 51 Ark., 119. Upon consideration we are constrained to adopt the construction first put upon the act in Missouri. That does not extend the natural import of the terms employed, or enlarge the scope of the act by construction; but accords to these terms their ordinary signification, and declines to restrict their operation.

3. An attorney is a bailee when.

(2). Having determined that the act applies to other bailees as well as to carriers, we are next called to decide whether the defendant, by reason of collecting money due the school fund, occupied toward the school fund the relation of debtor or that of bailee. As before stated; the act under which he was employed provides that the attorney may deduct 10 per cent. of the gross amount collected for his fees, and that he shall without delay transmit the remainder to the State Treasurer. The natural signification of this provision is that he may take a part of the collection in satisfaction of his fees, and that he shall deliver the remaining part to the Treasurer. There is no implication in the act that he shall receive and appropriate the money, and upon subsequent settlement pay the amount found due; the express provision excludes such implication. The act permits him to segregate a part from the whole and appropriate it; upon segregation the part becomes his, while the remainder belongs to the school fund. The express permission to appropriate a part is an implied prohibition against appropriating the remainder. If by the act it all became his, why provide that he could deduct and appropriate a part? The act, in requiring that he transmit the remainder after deducting his commission, leaves no room for construction; it in express terms imposes the duty of delivering such remainder; and as such was his duty, he was a bailee, as defined in *Dotson* v. *State*, 51 Ark., *supra*, and not a debtor. If he had made a general assignment while it was in his custody, can it be contended that it would have passed to his assignee? Or

if his creditors had proceeded against him for a discovery of his assets, can it be that he would have been required to discover and surrender it in satisfaction of their demands? Now he either held it for himself or for his client; if for himself, it was subject to all the incidents and burdens of private property; if for his client, it was for the purpose of delivery only. That was his only duty in reference to it, for he was not authorized to lend, invest or otherwise dispose of it. Attorneys are usually selected with reference to their ability and fidelity; but if moneys collected by them are liable for their individual demands, their solvency becomes quite as important a consideration as their skill and integrity. But we do not think the defendant's creditors could have asserted the right to apply the funds collected by him to their demands. Although in his custody, it was held by him as the property of the school fund; and so long as he held it, the owner could have asserted its ownership and the right of possession as an incident thereof.

But it may be said that he could lawfully have converted the money into exchange for the purpose of transmission, and that, as this is true, it was not his duty to transmit the specific money. If the premise be conceded, the conclusion does not follow. It would only follow that there could be a substantive performance of the duty by means of a substituted delivery where a specific delivery was impracticable. Until the money was converted into exchange for transmission, he would hold it under the duty arising by his employment; and after such conversion, if authorized, the same duty would arise as to the exchange. The right of property in the money, or substitute for it, would be in the school fund. Authority to change its form for purposes of transmission would not authorize its conversion to his own use or for any other purpose. There is nothing in the act which implies an intent to credit him, and he could not, without the consent of his client, create the relation of creditor and debtor. That is a relation which should arise only by consent of both parties. Bankers and perhaps

persons engaged in other pursuits conduct their business with money deposited, and the right to use such deposits is implied from the character of their pursuits. In such cases the right of use carries the right of property, and the relation of debtor and creditor springs from the deposit. But a deposit of money creates the relation of debtor and creditor, and passes the right of property in the money only when it is made with the understanding, express or implied, that a right of use goes with the deposit. Such is not the case with money collected by an attorney at law; it is not part of his business to use the money of his client; he collects it for the sole purpose of transmission.

This court has twice decided that an attorney, as to money collected, was the agent of his client. *Palmer* v. *Ashley*, 3 Ark., 75; *Cummins* v. *McLain*, 2 Ark., 413. If he is the agent, he is not a debtor. He cannot at the same time occupy both relations with reference to the same collection. And as it is settled that he is an agent, the scope and purpose of his agency are easily determined. His only duty is to hold the money until he can make a delivery of it. The client can demand delivery at any time after the collection; and as such is his right, the duty of the attorney to make delivery follows.

The relation of an attorney to his client is the same whether he collects money or receives other property in the course of his employment. If he should receive for his client securities, jewels or other chattels, would it be contended that the property in them passed to him, and that he became bound to pay his client their value? He has the same rights and the same duties with reference to them as with reference to money; and if money becomes his by collection, they become his if received into his possession. True, if before a felonious conversion he pay over an equal amount of other money, there is no violation of the criminal law because there is no felonious intent, and there is no civil liability because there is no damage. But the fact that an attorney may thus avoid criminal and civil responsi-

bility, does not change his attitude towards his client. It is held by some courts, for whose opinions we entertain the highest regard, that an attorney cannot commit embezzlement as to moneys collected by him; and the reason assigned is that he is but the debtor to his client. *Commonwealth v. Libbey*, 11 Met., 64. As the reason embodies a principle in conflict with the decisions of this court above cited, the conclusion can have no controlling influence with us.

4. Embezzlement by a collecting attorney.

(3). We do not think the defendant had an undivided interest in the collection. The collection belonged to the school fund, and he had a claim against it for his fees. The act under which he was employed made the amount of the collection the basis for fixing the amount of his fees, but did not transfer to him a property interest therein, nor convert an agency into a tenancy in common. He had the right to segregate one-tenth part from the whole of the collection and to appropriate that part, but until such segregation the whole belonged to the school fund. *People* v. *Converse*, 74 Mich., 478; *State* v. *Shadd*, 80 Mo., 358; *Territory* v. *Meyer*, 24 Pac. Rep., 183; *Rex* v. *Hartley*, R. & R., 139.

It follows from the views expressed that an attorney employed to collect demands due to the school fund is a bailee within the meaning of the act.

5. Necessity of demand.

III. It is further insisted that the defendant is entitled to a new trial because there is no proof that a demand had been made upon him for the money. It is necessary to allege and prove a demand only where the statute makes it an element of the crime. As the statute under consideration does not make a demand such an element, no demand was necessary. The crime charged was not a failure to pay over the money on demand, but simply a felonious conversion. If the defendant had thus converted the money, his crime was complete, and his response to a demand could not have absolved him; if he had not thus converted it, he was not guilty.

IV. It is further insisted that there is no proof that the money was embezzled in Scott county. The defendant resided in that county and collected the money there. The last time it was seen, it was in his custody in that county. As venue may be proved by circumstances, we think the jury were warranted in finding that the conversion occurred in that county. 6. Venue.

V. The indictment charges the conversion of a sum of money comprising greenbacks, gold certificates, silver certificates and national bank notes. It was proved that the defendant collected a large sum, that it was in paper money, and that it was of one or other of the four kinds of bills described in the indictment. If it was either or all, it came within the charge, and we think the proof on that point sufficient. 7. Description of money taken.

VI. It could serve no purpose to set out the proof. We think it supports the verdict rendered. We find no error in the record, and the judgment will be affirmed.

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REED v. STATE.

Decided June 27, 1891.

1. *Larceny—Instruction—Weight of evidence.*

An instruction that "the presumption that the possessor of recently stolen property is the thief is not a presumption of law, and a weak one of fact; it is not at all conclusive, and of itself is not sufficient for conviction," invades the province of the jury.

2. *Circumstantial evidence—Reasonable doubt.*

Upon indictment for larceny, proof of which rests upon circumstantial evidence, a refusal to instruct the jury that "it is incumbent on the State to submit proof, not only consistent with defendant's guilt, but inconsistent with any other rational conclusion" is no ground of exception if the jury are instructed that defendant's guilt must be "established by the evidence to the satisfaction of the jury beyond a reasonable doubt."

3. *Evidence—Other crimes.*

While evidence of other crimes is inadmissible if disconnected with the crime charged, it will be competent if it identifies the defendant as the party who committed the crime. (Cf. *Felker* v. *State*, *ante* p. 489.)

APPEAL from *Sebastian* Circuit Court, Greenwood District.

EDGAR E. BRYANT, Judge.

Evans & Hiner for appellant.

1. It was error to admit testimony of other larcenies. 1 Gr. Ev., secs. 50, 52; 39 Ark., 280; 37 *id.*, 265; 22 Cal., 477; 11 S. W. Rep., 832; *ib.*, 927; 42 N. W. Rep., 1134; 6 So. Rep., 237; 35 N. W. Rep., 405; 41 *id.*, 136.

2. The instructions refused by the court were copied from *Boykin v. State*, 34 Ark., and Gr. Ev., and were not covered by any part of the charge.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

1. Evidence of defendant's possession of stolen goods, other than those mentioned in the indictment, was admissible, not to show that defendant would be likely to commit the crime alleged, but to rebut the theory of the defense. 48 Ia., 678; 26 Tex., 209; 30 Miss., 653. It had a tendency to connect the defendant with the larceny, and thus identify him as the one who committed the larceny.

HUGHES, J. The appellant was convicted of larceny upon an indictment charging him with the stealing of a saddle, a blanket, a bridle and a slicker from George Harper. He filed a motion for a new trial which was overruled, to which he excepted, and appealed to this court.

On Sunday night, in the latter part of September, 1889, George Harper rode a mule to church. The saddle on which he rode had what is called in the evidence a "slicker" coat tied to it. He tied the reins of the bridle upon the mule to a tree. After services at the church had closed he went out and found that the mule was gone, also the saddle, bridle and "slicker." He returned to his home, which was about three and a half miles from the church. The mule came up in a few minutes after he reached home, without any of the articles mentioned.

George Harper, a witness, testified that, after he had lost his saddle on Sunday night in September, 1889, at the church, he did not see it again until about the last of January, or the first of February, 1890, when he found it at the house of Mrs. Reed, the mother of the defendant, with whom he lived; that he (Harper) claimed the saddle and took it; that the defendant was not present at the time; that he never saw the saddle in the defendant's possession; that it had different stirrups and girth on it when he got it back; and that Duncan got the stirrups and girth. John Duncan, a witness testified: "The stirrups and girth had been stolen from me at Bowman Hall Church about Christmas before the defendant went to the territory." James George, a witness, testified: "I lost a pair of saddle pockets from my saddle at Bowman Hall Church, at Mansfield, on Christmas eve night (December 24, 1889); defendant left in a day or two on his trip to the nation. He was gone a week or two. I found the saddle pockets in the defendant's possession after he came back. This was the third Monday in January, 1890. He rode the saddle, and the saddle pockets were attached to it. I knew the pockets and recovered them from defendant by his consent." Mrs. Fry, a witness, testified that she saw the saddle at the house of appellant's mother, before the appellant made the trip to the Indian Territory. To the testimony about the saddle-pockets, the stirrups and girth having been lost and found in the possession of the defendant, he objected before the same was given to the jury; his objection was overruled, and he excepted.

The defendant introduced evidence tending to show that he could not have been at the church at the time George Harper lost his saddle on Sunday night in September, 1889; that he was at the time at the house of his brother. He also introduced testimony to show that the saddle was not seen by any of his family in his possession until after his return from a trip to the Indian Territory in January or February, 1890. It was also in proof that, after the saddle,

saddle-pockets and stirrups were recovered from the defendant, he left the State, saying he was under suspicion and did not want to be arrested. But he returned in June following and surrendered to a constable. The account which the defendant gave of his possession of the property he was charged with having stolen was: that while in the Indian Territory, on the trip alluded to, he bought a horse and the saddle, said to have been stolen, from a man named Moore, and that the saddle had attached to it the saddle-pockets, a pistol and an overcoat; that he thus obtained the possession of the property for the stealing of which he was indicted. This was the substance of all the testimony in the case.

The court gave to the jury, amongst others, the following instruction: "3. The defendant is presumed innocent, and this presumption is evidence in his favor and protects him from a conviction until his guilt is established by the evidence to the satisfaction of the jury beyond a reasonable doubt."

1. Instruction as to weight of evidence.

The appellant asked the court, among other things, to give the following: "1. The presumption that the possessor of recently stolen property is the thief is not a presumption of law, and a weak one of fact; it is not at all conclusive, and of itself is not sufficient for conviction. 2. In cases pending on circumstantial evidence, like the one now on trial, it is incumbent on the State to submit proof not only consistent with defendant's guilt, but inconsistent with any other rational conclusion." The court refused to give these.

There was no error in the refusal of the court to give the rejected prayer number one. It is the province of a jury to determine what weight they will give to evidence. If the court had given this instruction, it would have invaded the province of the jury to weigh the evidence.

2. Instruction as to reasonable doubt.

While rejected prayer number two is not happily framed, it embodies, as we conceive, a correct proposition of law. It would not have been error to give it. Was it error to refuse it in this case? We think not, for the reason that instruction number three copied above, given by the court,

sufficiently declares the law upon the point involved, and it was not error to refuse to declare it in another instruction differently framed.

In the case of *Commonwealth* v. *Goodwin*, 14 Gray, 55, the Supreme Court of Massachusetts held: "Upon the trial of a criminal charge, proof of which rests on circumstantial evidence, a refusal to instruct the jury that they must be satisfied that the government has proved such a coincidence of circumstances as excludes every hypothesis except the guilt of the prisoner, is no ground of exception, if the jury are instructed 'that the government is bound to prove the defendant guilty beyond all reasonable doubt and to a moral certainty.'" In this case the court said: "The true rule is, that the circumstances must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis; that the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged;" citing *Commonwealth* v. *Webster*, 5 Cush., 319.

This was the meaning and effect of instruction number three given by the court in this case; and though the court might with propriety have stated the law more fully in reference to circumstantial evidence, its failure to do so was not error. Mr. Starkie (Ev., vol. 1, 10th ed., p. 865) says: "What circumstances will amount to proof can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature." *McCann* v. *State*, 13 Smedes & Marshall, 471; *Law* v. *State*, 33 Texas, 37. Chief Justice Shaw, in the celebrated Webster case, defined moral cer-

tainty to be "a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it." 5 Cush., 320.

3. When evidence of other crimes admissible.

Did the court err in refusing to exclude the testimony in reference to the saddle-pockets, stirrups and girth having been lost and found in the possession of the defendant? "It is not generally competent to prove a man guilty of one felony by proving him guilty of another unconnected felony. * * * And the State, for the purpose of showing that the defendant would be likely to commit the crime charged, cannot prove that he committed other crimes, although of a like nature." 4 Am. & Eng. Enc. Law., p. 850. In the case of *Endaily* v. *State,* 39 Ark., 278, this court said: "It was also error to charge the jury that they might take into consideration the distinct and separate thefts in making up their verdict as to the guilt of appellant of the offense for which he was on trial." But the evidence in the case at bar in reference to the saddle-pockets, girth and stirrups, while not competent for the purpose of proving the defendant guilty of the larceny with which he was charged, was competent to identify the appellant as the party who committed the larceny. If these articles had been received by appellant lawfully, and found, as they were afterwards found, attached to the saddle in the possession of the appellant, these facts would have been circumstances tending to show that appellant was the person who took the saddle. If the evidence was competent for this purpose, it would not have been incompetent, because it might have tended to show that appellant stole the saddle-pockets, stirrups and girth.

In the Endaily case, which was a prosecution for horse stealing, the taking of the horses by the defendant was admitted; there was no question about who took them, but the question was as to the intent with which they were taken. The defendant in that case contended that the horses were taken to ride a short distance only, with no intention of stealing them. It was therefore not proper to prove the subsequent stealing of bridles and saddles to equip the

horses, to prove the intent with which the horses were taken. But the circumstances here are different; and the evidence that the saddle-pockets, the stirrups and girth were taken by some one after the saddle was taken, and were afterwards found in the possession of the appellant attached to the saddle, which was found in his possession, were circumstances tending to identify the appellant as the person who stole the saddle, and for this purpose was competent, but for no other purpose; and it would have been proper for the circuit court to have told the jury, it was competent for this purpose only.

The evidence was sufficient to support the verdict of the jury. Finding no error, we affirm the judgment.

HINDMAN v. O'CONNOR.

Decided July 3, 1891.

1. *Constructive trust—Purchase by* quasi *guardian.*

The purchase of a minor's property at a curator's sale by one who, through kinship and association, occupies toward him the confidential relation of a *quasi* guardian will, at the minor's instance, be declared a trust for his benefit, regardless of the good faith of the transaction.

2. *Judicial sale—Limitation.*

A suit to set aside for fraud a probate sale of land is a suit for the recovery of land sold at judicial sale, within the five-years' statute of limitation.

3. *Removal of minor's disabilities—Special statutory power.*

The power to remove the disabilities of minors is a special power conferred upon circuit courts, and is to be exercised in a summary manner and not according to the course of the common law; where the record fails to show that the minor is a resident of the county, the order declaring the removal of his disabilities is void.

APPEAL from *Phillips* Circuit Court in chancery.

JAMES P. BROWN, Special Judge.

U. M. & G. B. Rose, and *John C. Palmer* for appellants.

1. A curator could not sell the lands of his ward under an order of the probate court. 33 Ark., 490. Under our

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present law, both the guardian and the curator must join in the deed. Mansf. Dig., sec. 3507.

2. Mrs. O'Connor was under a disability to purchase, arising from the relation she sustained at the time of the sale. Her purchase was void. 23 Ark., 622; Mansf. Dig., sec. 3485; 38 Ark., 26; 33 *id.*, 587; Lewin on Trusts, p. 484; Underhill on Trusts, p. 484; 46 Ark., 32; 30 *id.*, 44; 33 *id.*, 301; 5 Dana, 507; 61 Miss., 766; Mansf. Dig., sec. 3505; 80 Ala., 11; 40 Ohio St., 640; Schouler on Ex., sec. 142; 8 Vesey, 345; 2 Johns. Chy., 259; 1 Macq., 461; 14 N. Y., 91; Mechem on Ag., sec. 463; 1 Story, Eq. Jur., sec. 322; 2 Sugd. Vendors, p. 687; 4 How., 554; Underhill on Trusts, p. 293; 9 Paige, 661; 4 Cow., 736; 98 Mo., 159; 14 Am. St. Rep., 626; Story, Eq. Jur., sec. 317; 16 Am. Dec., 616.

3. The removal of disabilities did not have the effect of starting the statute of limitations to running against minors. Their disability to sue continued until they arrived at "full age." Mansf. Dig., sec., 4471; 42 Ark., 398; 44 *id.*, 400; 49 *id.*, 31; Mansf. Dig., sec. 3464.

4. The emancipation order is void. The record does not show the applicant to be a *resident* of the county. Acts 1869, p. 45. This is jurisdictional, and the fact of residence must appear on the face of the record. 28 Gratt., 879; 6 Wheat., 119; 2 Wall., 342; 18 *id.*, 371; Wells on Jurisdiction, sec. 162; 51 Ark., 35; 11 Wend., 648; 7 Hill, 24; Lawson, Pres. Ev., p. 27; 5 Ark., 27; *ib.*, 358; 6 *id.*, 41; 9 *id.*, 480; 10 *id.*, 316; Freeman, Judg., sec. 123; 48 Ark., 305.

5. Mansf. Dig., sec. 4474, has application to suits to set aside a sale for fraud. 31 Ark., 372.

6. The statute did not begin to run until the infants arrived at twenty-one years, and the three years clause is not applicable. 34 Ark., 590; 51 *id.*, 297. Nor does it run until the guardianship closes. Buswell on Lim., sec. 329; 33 Ark., 658; 28 *id.*, 191.

7. No offer to return the purchase money was necessary. 44 Ark., 293; 51 *id.*, 299.

Stephenson & Trieber and *John J.* and *E. C. Hornor* for appellee.

1. Whatever the relation Mrs. O'Connor bore to these children terminated when the guardian filed his petition for a sale, and when she bid off the property. She was never the guardian, and at most was not fully *in loco parentis*. No dissent or dissatisfaction was expressed for more than six years after the confirmation of the sale, full three years of which existed after the disabilities were removed. This bars their right. 36 Ark., 390; 46 Ark., 25; 48 *id.*, 248; 7 S. and M., 409; 45 Am. Dec. 310; 2 Pom. Eq. Jur., secs. 815, 917, 965; Story, Eq. Jur., sec. 385; 86 Ky., 572; 31 Minn., 468; 20 Neb., 347; 19 *id.*, 429; 61 Mich., 471; 27 S. C., 300. Guardians may purchase when the sale by a public officer is inevitable, and when they have no funds of their wards. 32 Pa. St., 315; 72 Am. Dec., 789; Pet., C. C., 378; 16 Ia., 284; 85 Am. Dec., 516. Appellee was not a guardian, and no duty was imposed upon her as to the conduct or management of the sale. 82 Cal., 351.

2. The purchase by a trustee is not void, only voidable, and will not be set aside in all cases by courts of equity. 36 Ark., 383; 46 *id.*, 25; 48 *id.*, 248; 47 *id.*, 419. The failure of the minors to appeal, under the ruling in 36 Ark., 383, is an election to take the proceeds and discharge the trust. 39 Ark., 131; 33 *id.*, 468; 64 Ala., 410; 38 Ill., 382; 19 *id.*, 295; 1 Story, Eq. Jur., sec. 385.

3. Appellants were barred. The statute began to run from the confirmation of the sale. 46 Ark., 25; 44 *id.*, 479. As to Thomas C., his disabilities were removed, and more than three years elapsed before suit.

4. It was not necessary that the order of emancipation should recite that they were citizens or residents. 10 Wheat., 193; 24 Ark., 155; 117 U. S., 255; 2 Wall., 329; Freeman, Judg., secs. 116, 118, 119, 122, 123, 126, 128; 49

Ark., 398; 44 *id.*, 267; 11 Ark., 519. The removal of the disability of non-age sets in motion the statute. 47 Ark., 558. The rule as to coverture is distinguishable. 47 Ark., 305.

5. It was not necessary to unite the guardian and curator in order to make a deed to a minor's land. Gould's Dig., p. 574, secs. 32, 33-4; Mansf. Dig., sec. 3507.

6. No offer to refund the purchase price was made.

BATTLE, J. In September, 1867, Thomas C. Hindman, and on the 19th of August, 1876, Mary B. Hindman, his wife, died intestate, leaving Susie Hindman, Biscoe Hindman, Thomas C. Hindman, Jr., and Blanche Hindman, their only children, surviving them. Biscoe, Thomas C. and Blanche were minors when their parents died, Biscoe having been born on the 27th of November, 1861, Thomas C. on 23d of November, 1863, and Blanche on the 2d of December, 1865. Laura E. B. O'Connor and the mother of Mrs. Hindman were sisters, and Mrs. O'Connor (Laura E. B.) was the step grandmother of Mrs. Hindman's children, she having been the wife of their grandfather. When Mrs. Hindman was on her death-bed, she requested Mrs. O'Connor to take charge of her children, and she promised that she would to the best of her ability, and proceeded to do so, immediately after the death of Mrs. Hindman, by taking them home with her and exercising personal supervision over them. On the 5th of September, 1876, Susie, Biscoe and Thomas C. Hindman filed a petition in the Phillips probate court, stating that they and Blanche Hindman were children and heirs at law of Mary B Hindman, deceased; that Biscoe, Thomas C. and Blanche were minors; that they were the owners in their own right of an interest in real estate in the county of Phillips in this State, and equally entitled to a distributive share in the estate of their mother, the late Mary B. Hindman; and representing that their mother had requested that Mrs. O'Connor and her husband should take charge of and have the entire control and cus-

tody of her children, and assist in the management of their property interests; and asking that B.Y. Turner be appointed curator of the estate of the minors. On the same day the probate court granted the petition, and B. Y. Turner, having given bond with approved security, was appointed curator of the estate of Biscoe, Thomas C. and Blanche Hindman. The court further ordered that the minors remain in the care and custody of Mrs. O'Connor and her husband, in accordance with the last wish and request of their mother; and appointed J. H. O'Connor, the husband of Mrs. Laura E. B. O'Connor, the attorney and next friend of the minors "to look after and render such aid and assistance to the curator as may be necessary for their interest." After this the children continued to live with Mrs. O'Connor, and she endeavored to act the part of a mother to them. They were the owners of block 17, in that part of the city of Helena known as New Helena, having thereon a valuable residence, the late home of their father and mother, and other buildings. It became delinquent for taxes for the years 1873, 1874 and 1875, and she redeemed it by paying $896.87, the cost of redemption. Susie, needing money to enable her to attend school and pay her debts, offered to sell and convey to her her (Susie's) interest in the block. She bought it and became the owner of one undivided fourth of the block. On the 22d of November, 1880, Bart Y. Turner, curator of the estate of the minor children, presented his petition to the Phillips probate court for an order to sell the minors' interest in the block; and the court, finding that it was to the interest of the minors that it should be sold to procure means for their support and education, ordered it to be sold on the 10th of January, 1881. The block was not sold on that day for the want of bidders; and the court again ordered it to be offered for sale and fixed the 11th of April, 1881, as the day of sale. The entire block, including the one-fourth purchased from Susie, with the consent of Mrs. O'Connor, was offered for sale on the last named day and Mrs. O'Connor, at the request of the children, bid for the

same. She offered $4000 for the block and, no one bidding more, she was declared the purchaser. The curator reported the sale to the probate court for confirmation. It having been reported that one A. H. Johnson would have given $4200, the children were dissatisfied and filed exceptions to the report. Mrs. O'Connor thereupon offered $4500, and the $4000 in the report was changed to $4500, and the exceptions were withdrawn, and the sale was confirmed by the court; and the property was conveyed to Mrs. O'Connor. Three-fourths of the purchase money, amounting to $3375, which was the proportion due the minor children, have been paid.

1. When constructive trust arises.

To set aside the purchase of the three-fourths interest of the block that belonged to Biscoe, Thomas C. and Blanche Hindman, this action was brought by them since they ceased to be minors. They contend that Mrs. O'Connor was under a disability to purchase, arising from the relation she sustained to them at the time the block was sold. Can they avoid the sale?

As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him, or which has a tendency to interfere with the discharge of such duty. Upon this principle no one placed in a situation of trust or confidence in reference to the subject of a sale can be the purchaser, on his own account, of the property sold. If such a one purchases the property, it is in the option of the person interested in the property, and to whom the relation of trust or confidence was sustained, to set aside the sale within a reasonable time, however innocent the purchaser may be. 1 Story, Eq., secs. 307–323, and cases cited.

In Sugden on Vendors, the rule and its reason are expressed as follows: "It may be laid down as a general proposition, that trustees, unless they are nominally such, as trustees to preserve contingent remainders, agents, com-

missioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will shortly be mentioned. For, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*" 2 Sugden on Vendors (7th Am. ed.), star page 887; *Michoud* v. *Girod*, 4 How., 504.

In *Imboden* v. *Hunter*, 23 Ark., 622, this court said: "It is a stern rule of equity that a trustee to sell for others is not allowed to purchase, either directly or indirectly, for his own benefit, at the sale. He cannot be both vendor and purchaser. As vendor, it is his duty to sell the property for the highest price, and as purchaser, it is his interest to get it for the lowest, and these relations are so essentially repugnant—so liable to excite a conflict between self-interest and integrity, that the law positively forbids that they shall be united in the same person. And it matters not, in the application of the rule, that the sale was *bona fide* and for a fair price. The enquiry is not whether there was fraud in fact. In such a case, the danger of yielding to the temptation is so imminent, and the security against discovery so great, that a court of equity, at the instance of the *cestui que trust*, if he applies in a reasonable time, will set aside the sale, as of course. The rule is not intended to remedy actual wrong, but is intended to prevent the possibility of it. The situation of the party, *itself*, works his disability to purchase. * * * The rule is not confined to persons who are trustees within the more limited and technical signification of the term, or to any particular class of fiduciaries, but ap-

plies to all persons placed in a situation of trust or confidence with reference to the subject of the purchase. It embraces all that come within its principle, permitting no one to purchase property and hold it for his own benefit, where he has a duty to perform, in relation to such property, which is inconsistent with the character of a purchaser on his own account, and for his individual use."

Following the rule laid down in *Imboden* v. *Hunter*, *supra*, this court held, in *Wright* v. *Walker*, 30 Ark., 44, that "the purchase by an attorney, at tax sale, of land in regard to which he had been retained," was inconsistent with his relations to his client, and could be avoided by the client, notwithstanding there was no bad faith in the purchase. After a careful examination of numerous authorities, it held that it was a well-settled principle that no one can be permitted to purchase an interest when he has a duty to perform that is inconsistent with the character of a purchaser; quoting the remark of Lord Thurlow in *Hall* v. *Hallett*, 1 Cox, 134, that "no attorney can be permitted to buy in things in a course of litigation of which litigation he has the management. This the policy of justice will not endure."

In *West* v. *Waddill*, 33 Ark., 587, reiterating the doctrine laid down in the cases cited, this court held that a purchase of land at an administrator's sale by the attorney of the administrator was voidable at the instance of the heirs of the intestate to whose estate the land belonged.

In *Livingston* v. *Cochran*, 33 Ark., 294, this court, in considering the validity of a purchase of lands by a probate judge at a sale made by an administrator under an order of the court of which he was the judge, after quoting, as we have, from *Imboden* v. *Hunter*, said: "All that is above said in relation to trustees purchasing at sales made by them applies, on principle, to the case of a probate judge purchasing at a sale made upon his own order, and which he is obliged to have conducted fairly, and for the benefit of creditors, legatees or distributees of the estate."

In *Clements* v. *Cates*, 49 Ark., 242, this court used the following language: "The law forbids a trustee, and all other persons occupying a fiduciary or *quasi* fiduciary position, from taking any personal advantage, touching the thing or subject as to which such fiduciary position exists. * * * If such a person acquires an interest in property as to which such relation exists, he holds it as a trustee for the benefit of those in whose interest he was prohibited from purchasing, to the extent of the prohibition. This rule applies to tenants in common by descent, with the same force and reason as it does to persons standing in a direct fiduciary relation to others. For they stand by operation of law in a confidential relation to each other, as to the joint property, and the duty is imposed on them to protect and secure their common interests. They have a community of interest which produces a community of duty, and imposes on each one the duty to exercise good faith to the others. Neither one can take advantage of the others by purchasing an outstanding title or incumbrance and asserting it against them. Such an act would be inconsistent with good faith, and against the reciprocal obligations to do nothing to the prejudice of each other's equal claims which their relationship created. Such a purchase, notwithstanding the design of the one making it was to the contrary, would be for the common benefit of all the cotenants, and the legal title acquired would be held in trust for the others, if they should choose, within a reasonable time, to claim the benefit thereof, by contributing, or offering to contribute, their proportion of the purchase money."

We have quoted at length from the opinions of this court to show the reason and extent of the rule laid down. Its applicability to guardians and wards and persons standing in like relation is apparent. Judge Story, in speaking on this rule, says: "In the next place, as to the relation of guardian and ward. In this most important and delicate of trusts the same principles prevail, and with a larger and more comprehensive efficiency. It is obvious that, during

the existence of the guardianship, the transactions of the guardian cannot be binding upon the ward if they are of any disadvantage to him; and indeed the relative situation of the parties imposes a general inability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the most abundant good faith (*uberrima fides*) on the part of the guardian. For in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased; as if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian." 1 Story's Equity (13th ed.), sec. 317.

Quasi guardians and all other persons occupying the relation of confidential advisers have been held to come within the rule. *Revett* v. *Harvey*, 1 Simons & Stuart, 502; S. C., 1 Eng. Ch. Rep., 502; *Huguenin* v. *Basely*, 14 Vesey, 273; I Story's Eq. (13th ed.), secs. 317–319, and cases cited; 1 Perry on Trusts, sec. 204; *Torrey* v. *Bank of Orleans*, 9 Paige, 663; Underhill on Trusts, p. 293.

In *Hobday* v. *Peters*, 28 Beav., 349, a mortgagor consulted a solicitor "who turned her over to his clerk to assist her gratuitously." The clerk, by reason of information derived during such employment, bought up the mortgage for less than half the amount due thereon. The court held that the clerk was a trustee for the benefit of the mortgagor. The same was held as to the clerk of a broker employed to make sale of land, in *Gardner* v. *Ogden*, 22 N. Y., 327.

The relation sustained by Mrs. O'Connor to the Hindman children at the time of the sale in question was peculiarly

confidential. A dying mother had committed them to her care. She took them to her house and treated them as a part of her family. They were the children of her niece and the grandchildren of a former husband. Her treatment of them was kind, and, with the ties of kindred which existed between them, naturally caused them to lean on her for protection, and repose in her implicit confidence. She recognized this fact, and sometimes, if not always, responded to their wishes. At their request she moved upon the block in question, and with them occupied the late residence of their parents, and continued to do so some time before and at the time of and after the sale. At their request the probate court virtually made her and her husband the guardians of their persons, and they accepted the situation. At their request she paid out $896.87 to redeem their home from a forfeiture for taxes. When the home was offered for sale they wanted her to buy it, and looked to her to save it from sacrifice. She responded to their request, but failed to meet their expectation. She purchased, but, having heard that another would give more, they were dissatisfied. She increased her bid, and they withdrew all opposition to the confirmation of the sale by the probate court; but they had been disappointed, and the final result was a lawsuit.

But it is contended for Mrs. O'Connor that "the position occupied by her at the time of the application for an order to sell, and the sale of the property purchased by her, imposed no duty upon her as to its conduct or management;" that the conduct and management of the sale was, by the law, imposed upon Turner as curator; and that she acted fairly and in good faith. For this, among other reasons, her counsel insists that the sale should not be set aside.

In support of their contention they cite and rely upon *Jones* v. *Graham*, 36 Ark., 383. In that case the facts were: an administrator reported to the probate court that there had come into his possession a deed of trust of certain lands, executed in 1860, by one Sullivan to George W. Beasly, to secure to the intestate a debt of about $5500; "that he

had directed the trustee to sell under the power; that he had attended the sale, and, finding the lands were about to go below value, had himself bid the sum of $3040, and the lands were upon that bid struck off, no one being willing to bid more. He represented that he had no desire to keep the lands, but was willing to hold them as the property of the estate, if the court should deem it best; and submitted the matter to the court to say whether he should keep them as his own, charging himself with the net price, after paying expenses, or hold them as administrator, for the benefit of the estate." The court ordered him to keep the lands as his own, and to receipt to the estate for the proceeds of the sale, less the amount of the indebtedness of his intestate to himself. In pursuance of this order he, in his settlement, charged himself with the sum of $2715.50, as proceeds of the sale. The settlement was laid over until the second term of the court after it was filed, a period of nearly six months, when it was taken up and confirmed without objection. This court held that the whole proceeding of the court upon the report of the administrator was unauthorized and irregular; that the administrator became clothed, upon the purchase, with a constructive trust, because of the use of the means of the estate in making the purchase, and also because of his fiduciary relation to the estate, and was wearing it when he went into the probate court to ask, if deemed best, that he should be denuded by accounting for the proceeds; and that the order of the probate court had no greater effect than mere advice as to the probable future action of the court upon his settlement, when the same should be made. But this court nevertheless refused to disturb the sale. Why? The reasons assigned are: that constructive trusts are at the option of those entitled to claim the benefits; that they may leave the property in the hands of the trustee and accept the proceeds, in accordance with the legal title, and that election, deliberately and intelligently made, dispels the trust; and that in that case the action of the probate court, "in view of the obvious absence of all fraudulent intent, the

length of time that the settlement lay unchallenged, and its final confirmation," amounted to an election to take the proceeds and discharge the trust.

In *Jones* v. *Graham* the court said that it did not mean to say "that, ordinarily, the approval of a sale, or dealing with the proceeds by a probate court, would relieve a purchaser of a constructive trust;" that, ordinarily, it would not; that that case was a peculiar case—not likely to arise again; that it stood on its own peculiar grounds, with such distinctions from reported cases as will be sufficiently obvious; and that it was not like the case of an administrator or attorney who simply purchases for himself, with the design of acquiring the property, and who has the sale confirmed without question or explanation of the circumstances. Whether the court was correct in its conclusion or not, is not necessary for us to say, but it is evident that the court did not intend to repudiate the rule announced in former cases. That case was regarded as exceptional. But this case does not come within the exception as laid down in that case. Here the purchaser bought for herself, with the design of acquiring the property. Three of the Hindman children were minors. She was *quasi* guardian of their persons, and stood to them in the place of a parent. They were under her care and protection, and the property sold was and had been in her possession. They were not *sui juris* and could not act for themselves. If the curator had failed to discharge his duty in the management of their property and in making settlements in the probate court, it was the duty of her and her husband, if of any one, to have interfered in their behalf and asserted their rights. No election to accept the proceeds and ratify the sale could have been made by them while the disabilities of minority rested upon them, and none can be imputed to them on account of any act or failure of theirs while such disabilities continued.

The doctrine as to purchases by trustees, guardians, administrators, and persons having a confidential character,

arises from the relation between the parties, and not from the circumstance that they have power to control the sale. The right to set aside the sale does not depend on its fairness or unfairness. To set aside the purchase it is not necessary to show that it is actually fraudulent or advantageous. If the trustee, or other person having a confidential character, can buy in an honest case, he may in a case having that appearance, but which may be grossly otherwise; and yet the power of the court, because of the infirmity of human testimony, would not be equal to detect the deception. It is to guard against this uncertainty and the hazard of abuse, and to remove the trustee and other persons having confidential relations from temptation, that the rule does and will permit the *cestui que trust* or other person to come at his option, and, without showing actual injury or fraud, have the sale set aside. *Davoue* v. *Fanning*, 2 Johns. Ch., 252; *Torrey* v. *Bank of Orleans*, 9 Paige, *supra*; *ex parte* James, 8 Vesey, 345; *Brockett* v. *Richardson*, 61 Miss., 766; *Van Epps* v. *Van Epps*, 9 Paige, 237; *Campbell* v. *Walker*, 5 Vesey, 678; S. C., 13 Vesey, 601; *Callis* v. *Ridout*, 7 Gill & J., 1; *ex parte* Lacey, 6 Vesey, 625; *ex parte* Bennett, 10 Vesey, 381; *Campbell* v. *Penn. Life Ins. Co.*, 2 Wharton, 62; *Michoud* v. *Girod*, 4 How. (U. S.), *supra*, and cases before cited; *McGaughey* v. *Brown*, 46 Ark., 25.

Mrs. O'Connor comes within the rule. She was virtually constituted guardian of the persons of the minor children by the order of the probate court. Her husband was appointed their attorney and next friend to look after them, and to render such aid and assistance to the curator as might be necessary for their interest. She and her husband took possession of their property, and she redeemed it. How far the curator was controlled by them does not appear, but it does appear that he permitted them to take charge of their property, obviously on account of their relation to the children. They had ample opportunities, by reason of their relation to the children, to acquire full knowledge of the property. Whether they acquired information by reason

of such relation which, if known to the public, would have caused the property to have been sold for more than it did, is not, under the rule, necessary to inquire. She occupied a confidential relation to the children, approaching nearly to that of parent to child. Whether she abused it, no inquiry under the rule can be made. She and her husband assumed the duty of taking care of the children and looking after their property. While she sustained that position, she was not permitted to purchase their property, because the right to do so might have interfered with a faithful discharge of her duty.

2. Limitation.

Mrs. O'Connor relies on the five years' statute of limitation to sustain her title. That statute provides: "All actions against the purchaser, his heirs or assigns, for the *recovery* of lands sold at judicial sales shall be brought within five years after the date of such sale, and not thereafter; saving to minors and persons of unsound mind the period of three years after such disability shall have been removed." (Mansf. Dig., sec. 4474.) Appellants insist that that statute has no application to an action like this, the object of which is to set aside a sale of land for fraud. So *McGaughey* v. *Brown*, 46 Ark., 25, was an action to set aside a sale of land for fraud. The prayer of the bill in that case was: that the sale be set aside; that a master be appointed to take an account of the rents and profits; that the conveyances of the land, which were alleged to be fraudulent, be removed as a cloud upon the title of plaintiffs; and that they be put into the possession of the land. This court held that the object of the bill was to get possession of the land, and that the action was barred by the five years' statute.

In this case the prayer of the complaint is: that the sale be set aside; that an account be taken between the plaintiffs and defendants as to the rents and profits of the block in question and the sums paid by defendant for the benefit of plaintiffs; and that "the correct and true balance be ascertained between them;" and that said property be sold for

purposes of partition and to satisfy the balance found by the master; and for other relief. One of the obvious objects of the complaint was the recovery of the land. That was necessary to accomplish the purpose of the action. The statute applies.

3. Removal of minor's disabilities.

The sale in question was confirmed on the 11th day of October, 1881. Mrs. O'Connor held adverse possession after that date. This action was brought on the 13th of October, 1887, at which time Biscoe and Blanche Hindman had been of age more than three years, and were barred from maintaining it. Three years had not expired when Thomas C. arrived of age. But it is said, his disabilities of non-age were removed by the Phillips circuit court on the 15th of November, 1881, and that, at the time this action was commenced, more than three years had elapsed during which he was under no disability. On the other hand it is contended that the judgment of the circuit court which declared his disabilities removed was void for want of jurisdiction.

The authority to remove the legal disabilities of minors was conferred upon circuit courts by an act of the General Assembly, which was approved February 18, 1869. Section 2 of the act, after providing that circuit courts shall have authority to remove legal disabilities of minors, adds: "*Provided,* the person praying such relief shall be a resident of the county in which the court to which such application shall be made is held." That act makes the residence jurisdictional—a condition upon which the court can remove the disabilities of the minor.

The record shows that Biscoe and Thomas C. Hindman made an application to the circuit court of the county of Phillips for the removal of their disabilities, and that their application was granted. It does not appear in their application or in the order removing their disabilities that either of them was a resident of Phillips county. Is the order void for want of jurisdiction?

In *Harvey* v. *Tyler*, 2 Wall., 328, 342, the Supreme Court of the United States uses the following language: "The

jurisdiction, which is now exercised by the common law courts in this country, is, in a very large proportion, dependent upon special statutes conferring it. * * * In all cases where the new powers, thus conferred, are to be brought into action in the usual form of common law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made, as in cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court and duties required of it, to be exercised in a special and often summary manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case."

In *Galpin* v. *Page*, 18 Wall., 350, 371, the court said: "But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." To the same effect see *Pulaski County* v. *Stuart*, 28 Gratt., 872; *Gibney* v. *Crawford*, 51 Ark., 35; *Foster* v. *Waterman*, 124 Mass., 592; *Furgeson* v. *Jones*, 11 Am. St. Rep., 808; S. C., 17 Oregon, 204; *Brown* v. *Wheelock*, 12 S. W. Rep., 111; 1 Black on Judgments, sec. 279; Freeman on Judgments, sec. 123.

The power to remove the disabilities of minors is a special power conferred upon the circuit courts, and is to be exercised in a summary manner and not according to the course of the common law. The record does not show the fact—the residence of the minors in Phillips county—necessary to give the Phillips circuit court authority to remove the disabilities of Biscoe and Thomas C. Hindman; and the order declaring the removal of their disabilities is void.

This action is not barred as to Thomas C. Hindman. He has not ratified the sale of the block in question by receiving any part of the proceeds thereof since he arrived of age. He is entitled to one-fourth of the block and to one-fourth of the rents and profits which have accrued since the 11th of October, 1881, the day on which the sale was confirmed by the probate court, and Mrs. O'Connor is entitled to the remaining three-fourths of the block and of the rents and profits. He should be charged, in account with Mrs. O'Connor, with the proceeds of the sale paid to him, or for him to any one authorized to receive the same, and lawful interest thereon from the date of the payment, and with one-fourth of the taxes paid by her on the block since the sale and interest thereon, and one-fourth of the value of the improvements made by her on the block since the sale and credited with the one-fourth of the rents and profits. If the property can be divided without prejudice to the interest of the parties concerned, it should be partitioned between them according to their respective interests; and if not, it should be sold and the proceeds of the sale divided according to their interests. Upon an account being stated as to the rents, profits, purchase money received by Thomas C. Hindman, interest, taxes and improvements, the balance should be made a charge on the part or interest in the block, or in the proceeds of the sale thereof, if it be sold for partition, belonging to the party against whom it is found, and the payment of it (the charge) should be enforced according to the rules of equity.

The decree of the court below is, therefore, affirmed as to Biscoe and Blanche Hindman, and as to Thomas C. Hindman is reversed; and the cause is remanded for proceedings consistent with this opinion.

FONES HARDWARE CO. *v.* ERB.

Decided July 3, 1891.

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1. *County bridges—Letting contracts.*

The act approved February 19, 1891, which authorizes the board of bridge commissioners to advertise that they are ready to receive plans, specifications and bids for the erection of a county bridge from which they will adopt a plan and accept the accompanying bid, authorizes a letting which admits of no competition or comparison of bids, and is to that extent in conflict with section 16 of article 19 of the constitution, which, in providing that all contracts for erecting bridges in any county "shall be given to the lowest responsible bidder," contemplates that, before advertising for bids, a plan should be adopted with specifications, not merely of a general character, but so definite and detailed as to disclose the thing to be undertaken with circumstantial fullness and precision.

2. *County contracts—Appropriation.*

The board of commissioners cannot make a contract to build a bridge which will bind the county unless an appropriation for that purpose has been previously made by the levying court (Mansf. Dig., sec. 1451); an appropriation "for preliminary work, estimates, etc., toward securing such bridge" is not an appropriation to build it.

3. *Injunction—Illegal contract.*

Injunction will lie to restrain the board of commissioners from executing an illegal contract.

APPEAL from *Pulaski* Chancery Court.

DAVID W. CARROLL, Chancellor.

Suit on behalf of the Fones Brothers Hardware Company to enjoin Jacob Erb, county judge of Pulaski county, and C. H. Whittemore and Theo. Hartman, bridge commissioners of said county, from executing a contract with the Missouri Valley Bridge Company for the construction of a county bridge across the Arkansas river at Little Rock.

The complaint alleges in substance that plaintiff, a corporation, is a citizen, resident and tax-payer of Pulaski county; that the county court of Pulaski county, while being held by the county judge alone, had appointed commissioners to select a site for a bridge across the Arkansas river at Little Rock; that these commissioners had selected as the site for locating and landing said bridge Main

street in Little Rock; that afterwards, without any appropriation ever having been made by the levying court for the construction of such bridge, the county judge, while holding the county court alone, had appointed Hartman and Whittemore as commissioners to contract for the building of said bridge and to procure bids therefor in conjunction with himself; that said judge and commissioners, after adopting general specifications but without ever having adopted a definite plan and detailed specifications, advertised for "sealed proposals, competitive plans and specifications" for the construction of said bridge, a copy of which notice is exhibited; that bids were submitted under this notice by two different bidders; that each bidder bid on a different plan and each bidder bid on several different plans, each bidder furnishing his own plans and specifications, all conforming however to the general specifications which had been adopted by the commissioners; that the Youngstown Bridge Company, a responsible contractor, had furnished a plan and specifications conforming to the commissioners' general specifications, and had bid and offered to build said bridge for $218,000; that the Missouri Valley Bridge Company, by its agent, A. J. Tullock, had submitted a plan and specifications, also conforming to the commissioners' specifications, and upon their plan said Missouri Valley Bridge Company, hereinafter called the Missouri Company, bid and offered to build said bridge for $258,000; that said commissioners had resolved that the Missouri Company's bid of $258,000 was lower than the Youngstown Bridge Company's bid of $218,000, and had formally so reported to the county court, and had recommended a contract to be made with the Missouri Company for the building of said bridge at the price of $258,000; and that the county judge and said commissioners, without any appropriation having been made therefor, were about to sign up a written contract on behalf of the county with said company for the construction of said bridge at said price of $258,000, and would do so unless restrained by an injunction; that there had been oth r

bidders on the ground, and that some of them would have agreed and offered to build the identical bridge proposed to be built by the Missouri Company for less than $258,000, but that they had no opportunity to see, and could not therefore bid upon, the particular plan and specifications furnished and bid upon by the Missouri Company. Plaintiff further alleged that said bridge was about to be located, and under said contract would be located, landed and constructed on Main street in Little Rock, and that the Missouri Bridge Company and its agent Tullock were about to build, and, unless enjoined, would build said bridge under such contract. Prayer for an injunction to restrain the county judge and the commissioners from executing the contemplated contract with the Missouri Company, or from making any contract for the building of said bridge without first adopting a definite plan and detailed specifications and letting the contract to the lowest bidder, or from making any contract touching said bridge until an appropriation therefor shall have been made.

Plaintiff moved for a temporary restraining order. On this motion affidavits and counter affidavits were filed. A demurrer to the complaint was sustained. Plaintiff appealed.

The following is the advertisement calling for bids, plans, and specifications:

"PROPOSALS FOR THE CONSTRUCTION OF HIGHWAY BRIDGE OVER THE ARKANSAS RIVER AT LITTLE ROCK, ARK.

"Sealed proposals, competitive plans and specifications, will be received up to noon, April 7, 1891, for the construction of a foot, highway and street railroad bridge to be built by Pulaski county, Arkansas, over the Arkansas river, at the foot of Main street, in the city of Little Rock. Proposals must be sent by mail, indorsed 'Proposals for Arkansas River Bridge,' and addressed to Hon. Jacob Erb, County Judge, Little Rock, Ark. They must be accompanied by a certified bank check for $5000. All plans must comply strictly with general specifications furnished by the county.

The county reserves the right to reject any or all bids. For profile and plans of river and other information, apply to F. W. Gibb, commissioner of roads and bridges, Little Rock, Ark.

"J. ERB, *County Judge.*
"T. HARTMAN,
"And C. H. WHITTEMORE,
"*Commissioners.*

"Little Rock, Ark., March 3, 1891."

J. M. Moore and *W. S. McCain*, for appellant.

1. No contract can be let for the building of a bridge of the first class before an appropriation is made for the purpose. An appropriation for preliminary work, surveys, soundings, etc., is not sufficient. Sec. 1451, Mansf. Dig.; *ib.*, secs. 1443–5, 5600–3, 1449–50; *ib.*, 499 etc.; 34 Ark., 356; 36 *id.*, 641; 40 *id.*, 549–50; 34 *id.*, 307; 98 U. S., 104, 114; *ib.*, 395; 105 *id.*, 735; 88 N. C., 489; 12 Mich., 279; 42 N. W. Rep., 363; 75 N. Y., 72.

2. The act of 1891 violates art. 19, sec. 16, Const. 4 Neb, 150; 21 Ohio St., 322; 33 Barb., 515; 121 N. Y., 631; 85 Pa. St., 379.

3. Injunction was the proper remedy. 13 Ark., 198; 51 *id.*, 235; 43 *id.*, 119; Mills, Em. Dom., 130; 82 Mo., 367; 31 *id.*, 181; 50 Ark., 466; 10 Wall., 497; 45 Ia., 23; Const., art. 16, sec. 13; High on Injunction, 1251; 24 N. E. Rep., 366; 29 A. & E. Corp. C., 424; 34 Ark., 607; 38 *id.*, 462; 53 *id.*, 205; 51 Ind., 266; 55 Ind., 30; 13 Ill., 618. Appellant had no other remedy. 53 Ark., 287.

G. W. Caruth and *U. M. & G. B. Rose* for appellees.

1. Art. 7, sec. 30, const., prescribes the jurisdiction of the quorum court; the legislature can neither add to nor take from it. 6 Ark., 75; 22 *id.*, 384; 49 *id.*, 160; 12 *id.*, 101; 7 *id.*, 262, etc., 32 *id.*, 497.

2. The law relating to bridges is not involved in the sections limiting contracts made by the county courts. Mansf. Dig., secs., 497 to 503; Acts of 1891; 2 Dillon, 253.

3. As there *has been* an appropriation for the bridge, which was partly unexpended, the contract is valid. Acts 1875, p. 53; Acts 1879, p. 115; Mansf. Dig., 1451; 6 McLean, 113; 36 Ohio St., 409; Endlich, Int. St., 352.

4. In case of important public works, no injunction should issue unless a plain case is made for relief. 13 Ark., 212; 21 Fed. Rep., 261; High, Inj., sec. 34.

HEMINGWAY, J. This appeal presents for determination three questions: First—When a board of commissioners for building a bridge across a stream more than 400 feet wide have advertised for and received bids with competitive plans and specifications, can it adopt a plan and specifications thus received and accept the accompanying bid? Second—Can such board make a contract for building a bridge before any appropriation therefor has been made, or when there is an unexpended appropriation "for preliminary work, estimates, etc., toward securing such bridge?" Third—If such board is about to make such a contract, will a court of equity, at the suit of a tax-payer of the county, interfere by injunction?

1. *Letting contracts for building county bridges.*

1. If the first question could be determined by the provisions of the act of February 19, 1891, our response would be, that the board was authorized to adopt a plan and specifications submitted in response to such notice, and to accept the accompanying bid. But it is insisted for the appellant that this act is unconstitutional, because it contravenes section 16, art. 19, of the constitution of the State, which is in the following words: "All contracts for erecting or repairing public buildings or bridges in any county, or for materials therefor, or for providing for the care and keeping of paupers where there are no almshouses, shall be given to the lowest responsible bidder under such regulations as may be provided by law."

The point made is, that the act does not admit of competitive bidding in awarding contracts, and provides a plan

by which the lowest bidder cannot be ascertained, or the giving of contracts confined to such bidder.

The constitutional provision was designed to secure economy in the line of public improvements to which it relates. Extravagance therein might arise either from the inattention or incompetency of the contracting officer, and his consequent failure to obtain favorable offers for contracts; or it might arise from the corruption or favoritism of such officer and his consequent refusal to accept favorable offers when made. To prevent extravagance from the first source the plan of public letting is adopted, the public are informed of contracts to be let, and its self-interest and rivalry are appealed to for proper offers upon them; to prevent extravagance from the latter source all discretion is withheld from the contracting officer, he is bound to give the contract to the lowest bidder, and cannot let it out for individual gain or as a reward to another. The method prescribed is well understood, clearly defined and of distinctive character, specially adapting it to a conservation of public interests. It embodies three vital principles—an offering to the public, an opportunity for competition and a basis for an exact comparison of bids; and any statutory regulation of the matter which excludes or ignores either principle destroys the distinctive character of the system and thwarts the purpose of its adoption. Any arrangement which excludes competition prevents a letting to the lowest bidder; and it does not matter that such an arrangement maintains the form of public letting; if it excludes the essential principle of competition, there can be no real public letting. This is recognized as so essential, that in some cases, where all the forms were preserved, but the contracts to be let were according to plans protected by a patent and the subject of a monopoly, it was held that such contracts could not be made because the monopoly prevented competition. 1 Dillon on Mun. Corp., sec. 467, and cases cited.

When a contract to build a bridge is to be let, there are two kinds of competition that may arise: First, that between persons desiring to build different kinds of bridges; and second, that between those desiring to build the same kind. And as was said by Judge Christiancy in discussing a provision similar to that under consideration, the bidding which it contemplates is of the latter kind—bidding for the same particular thing to be done according to the same specifications. For, says he, no bids for different kinds of work, and referring to different specifications, could be recognized as coming in competition with each other, for the purpose of determining the lowest bid, within the requirement of this section, without opening the door to the same corrupt combinations, and furnishing facilities for the same fraudulent practices, which it was the purpose of this provision to prevent. *Attorney General* v. *Detroit,* 26 Mich., 263. As the competition contemplated is that between those desiring to do the same particular thing according to the same specifications, it is obviously essential that an opportunity should be given all persons to enter into competition for the specific thing which is the subject of the letting; and such opportunity cannot be afforded, unless the specific thing to be let has been determined upon and made known. The constitution contains no express provision with regard to plans and specifications, but the requirement of an award to the lowest bidder implies the further requirement that such information shall be put within the reach of bidders as will enable them to understand the offering and bid intelligently, and enable the representatives of the county to know who is the lowest bidder. *Detroit* v. *Circuit Judge,* 79 Mich., 384. There can be no intelligent bidding for a contract unless all bidders may know what the contract is; and this cannot be known unless the plan of the work to be contracted for and the specifications according to which it is to be done have been adopted, for they, with the price to be agreed upon, go to make up the contract.

In the case of *Boren* v. *Darke County*, 21 Ohio St., 311, the Supreme Court of Ohio held, under a statute embodying the provisions of our constitution, that a bid could not be entertained which contemplated work or material not included in the plans and specifications according to which the contract was offered. This ruling was placed upon two grounds: First, that it could not be known who was the lowest bidder; and second, that the contract thus bid for had not been submitted to competition.

In the case of *People* v. *Commissioners*, 4 Neb., 150, the Supreme Court of Nebraska, considering the question upon a similar provision, ruled that, from the necessity of the case, plans and specifications must be adopted in advance of the offering as a basis upon which bids are to be made, and that where county commissioners advertised for plans and specifications with accompanying bids, they could not adopt plans and specifications and accept a bid thus received, because no opportunity had been given for competitive bidding, and no basis had been fixed on which to make bids.

In the case of *Bigler* v. *The Mayor*, 5 Abb., N. C., 51, an action was brought upon a contract with a city to recover the price of lumber furnished, and the recovery was resisted on the ground that the contract was invalid because it had not been let to the lowest bidder. The advertisement was for bids to furnish nine different kinds of timber during the term of one year, specifying each kind of timber, but not specifying the quality of either or the aggregate. The court said in regard to the proposal for bids: "We find, in regard to this contract, that there were no plans and specifications as required by the provisions of the dock law, that the contract was general in every particular, that there was no way in which there could be competetive bidding, for the reason that we find no amount is specified; certain qualities of timber are specified, but there are no quantities, no amount of any kind specified, so that there could be a comparison of bids. If the contract system is to prevail, * * * it is necessary the contract should be

in such a form that there shall be what is called competitive bidding." Illustrating the opportunities afforded for favoritism and fraud where contracts are offered upon indefinite plans and specifications, the court continuing says: "He (the favored bidder) puts a high price upon that of which they want a good deal, and a very low price upon that which they want very little of; and another man bids conscientiously—supposing they want an equal quantity of the same character, and puts reasonable prices to each class of lumber, and he averages his prices accordingly. How are you going to compare those bids? You foot up so many pieces at so much per thousand, and you will find that the one will be lower than the other. When it comes to be filled, the first will be found to be an infinite degree higher than the other, a fact which would be known to the officers of the department in consequence of their knowing how the work will be carried on, and what proportion of timber of the various classes would be furnished." The court concludes that, without specifications—as to quality and quantity—of the various things to be furnished, there could be neither competitive bidding nor comparison of bids. *Ib.*, p. 70.

An act of the New York assembly provided that every bidder for canal work should accompany his bid with a bond conditioned that, if the contract should be awarded him, he would within ten days enter into a contract for the performance of the work, upon the terms prescribed by the contracting board. The Supreme Court held that the terms of such contracts should be prescribed by the board before the bidding and could not be afterwards. *People* v. *Contracting Board*, 33 Barb., 510.

The charter of the city of St. Paul provided that contracts for paving the streets should be let to the lowest bidder upon notice of the time and place of letting. A notice called for proposals for two contracts for paving different parts of a street. A bid was offered and accepted for paving the entire street under one contract. In a suit upon the

contract made in pursuance thereof, the Supreme Court of Minnesota said: "No bids were asked for such a contract as the one made with the plaintiff, and, the contract let not being the same that was advertised, the acts of the city or ward officers in making it were void, and created no liability on part of the defendant. *Nash* v. *City*, 11 Minn., 174.

We are constrained to believe that the rule announced in that case is the rule fixed by our constitution, and that the contracts made must be the same as those advertised for letting. When it is determined to build a bridge within a given time, and the location, plans and specifications have been adopted, all the terms of the contract are fixed except the price to be paid; the obligation to build a bridge according to the terms thus fixed is the thing to be offered to competition; and until it is formulated by the defining of those terms so that they, in connection with the bid to be thereafter accepted, will comprise a complete contract, there is nothing to be let and nothing to which competition can be directed. It is idle to talk of competition where the minds of bidders are not directed to the thing offered. When the subject of competition is undefined and uncertain, and left to be moulded by the various competitors, it will assume as many forms as they have conceptions, and each will bid upon the thing of his own creation—a thing upon which no other can bid. But the absence of competition is not the only difficulty, for when all bids are upon different things or the same thing differently fashioned, there is no basis on which to compare them or by which it can be determined with certainty which is the lowest bid, and such determination must rest in the discretion of the contracting board; but since the constitution was designed to withhold all discretion in such matters, and thereby remove all opportunities for fraud or favoritism, any system which devolves such discretion is in violation of its provisions. It demands in the letting of contracts a basis upon which bids can be compared with mathematical precision, and which leaves nothing to official discretion after the bids are received; and no

act which provides regulations for letting without this basis can stand.

If different plans and specifications were adopted and bids invited at the same time for contracts according to each, whether the board could compare the bids upon the different plans submitted, and accept the lowest bid upon the plan then selected, is a question not raised or considered. See *Attorney General* v. *Detroit*, 26 Mich., *supra*. We only decide that no contracting officer or tribunal has any authority to make a contract for building a bridge unless the same contract, in every material respect, had been submitted to public bidding, and that this requires that it should be submitted with reference to definite plans and specifications. Such being the meaning and effect of the constitutional provision, is the act of the legislature void in so far as it provides that the board of commissioners shall advertise at the same time for plans, specifications and bids, and afterwards adopt a plan and specifications and accept a bid thus obtained? Upon an examination of the statutes it will be seen that, when the act under consideration was passed, the laws in relation to bridges, as well as county buildings, authorized the advertisement for proposals only after the adoption of plans and specifications. A simultaneous advertisement for all was first brought into the statute by the act under consideration. See Mansf. Dig., secs. 499, 1098. This act preserves the form of a public letting; but for what or upon what basis are bids invited? The commissioners are not required to advertise for bids upon a basis fixed by them, but each bidder is invited to define a basis for his own bid. It is plain that no two bids will be made upon the same basis unless by accident, and that there can be no competition among bidders; and when the bids are received, there is no standard by which to measure them, and therefore no means by which it can be absolutely known which is the lowest. In this respect we think the effect of the act would be to nullify the constitution, and it cannot be sustained.

Construing the complaint according to the established rules of construction in this State, we think it is sufficiently alleged that the board of commissioners advertised for bids on a contract the terms of which had not been defined by the adoption of plans and specifications, and that, as the thing to be let was not defined, bidders could not compete with each other in the letting. According to those allegagations, which are admitted to be true by demurrer, there was nothing to submit to the competition of bidders, no letting to the lowest bidder was possible, and the steps taken would not authorize the county court to make a contract or order one to be made, and its action in that regard would be without jurisdiction and void.

We have not overlooked the allegation that the board had adopted what it denominated "general specifications;" but it appears from the advertisement by the board, which is exhibited with the complaint, that the board invited proposals and competitive plans and specifications at the same time, stating that all plans must comply with the general specifications furnished by the county. It thus appears that the specifications adopted were general and not definite. "General specifications" were not sufficient, but it was essential that such definite and detailed specifications accompany the offering as would disclose the thing to be undertaken with circumstantial fullness and precision.

The building of a bridge according to "general specifications" might be carried forward with such variety of detail and circumstances as to affect very materially its proper cost; and every bidder should know, not only the general plan, but every particular of detail and circumstance which could affect the cost of the work or the advantages of the contract. This is necessary, not only to active and intelligent competition among bidders, but also to a certain and proper comparison of bids. An advertisement for bids for building a bridge 500 feet long, 30 feet wide and of a stated capacity of burden would contain "general specifications"—if the words are not so repugnant as to make the term

meaningless. If, in response to this notice, bids with definite plans and specifications were returned, A might offer to build a pontoon bridge at one price, B a suspension bridge at another price, and C a bridge on piers at another, and each bid might "comply with the general specifications," yet there could have been no competition among bidders, and there would be no basis by which to determine with certainty who was the lowest bidder. This supposes an extreme case, but the same conditions must arise—modified only in degree—wherever the plans and specifications adopted are so general as to admit of any substantial variety of detail in their observance.

As there is nothing else in the act of 1891 inhibited by the constitution, its remaining provisions may stand, and must be held to be the law. Cooley, Const. Lim., secs. 210–11; *State* v. *Marsh*, 37 Ark., 356.

2. An appropriation must be made before letting county contracts.

2. Upon the second question stated, the appellant relies on a section of the act of March 19, 1879 (Mansf. Dig., sec. 1451), which is as follows: "No county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor and is wholly or in part unexpended." It is contended that this act has no application to contracts for bridges. According to its terms, it applies to any and all contracts that can be made by the county court or an agent of the county; and it is a part of the act which provides for levying taxes and appropriating revenues for building bridges. We think its language and connection both imply that it was intended to regulate such contracts.

It was urged in the argument that the constitution conferred the jurisdiction of bridges on the county court, and that if this act was intended to apply to contracts for bridges, it would be void as interfering with the constitutional jurisdiction of that court. We hardly think that much reliance was placed on this ground, and a little consideration discloses its weakness. If the act is void for this reason in its application to contracts for bridges, it is void in all respects,

for the jurisdiction of the county court is co-extensive with the matters to which such contracts could relate. But the constitution does not confer on the county court unlimited power in regard to bridges; it only vests in that court the exclusive jurisdiction to administer the law on that subject; and so long as this is permitted, there is no room for complaint. Moreover, the clause which prescribes that such contracts shall be given to the lowest bidder provides that they shall be made under such regulations as may be provided by law (Const., sec. 16, art. 19); and the validity of a statutory regulation similar to, but more restrictive than, the one under consideration was affirmed by this court in the case of *Lawrence Co.* v. *Coffman*, 36 Ark., 641. We think the act applicable in making contracts for bridges, and further that a contract to build a bridge is not authorized by an appropriation for "preliminary work, estimates, etc., towards securing such bridge." It is the policy of the act to require the concurring judgment of the levying court and of the county judge that a bridge should be built, before a contract for building it can be made. When the levying court makes an appropriation to pay for one, that signifies its favorable judgment; and the county judge may afterwards signify his by letting the contract. But we do not think the appropriation relied on signifies the favorable judgment of the levying court; it is more reasonable to conclude that it was made with a view to reaching a decision than as the announcement of one reached. Under the statute then in force, an examination of sites and a procurement of plans and specifications were preliminaries to making a contract, and they were no doubt intended in the designation of the appropriation. Soundings and surveys would be necessary to determine whether it would be practicable to build at any desirable site, and plans and specifications would be needed in estimating the probable cost of the work. We think, from the designation of the appropriation, that it was intended to defray the cost of obtaining

that information, and it might lead to an appropriation for building the bridge or to a determination to abandon it.

While we think a contract can not be made before there has been an appropriation for it, we do not think that when an appropriation has been made, the contract will be limited to the amount appropriated. When the levying court appropriate any sum for the work, that signifies their judgment that the work should be done; and the county judge may then proceed to contract for it without further consulting them, the only limitations upon his power being found in other directions.

3. Injunction to restrain letting of illegal contract.

3. The ground of complaint in this case was, not that the contract would be inexpedient or unjust, or that it would involve an extravagant outlay, but that it was about to be made without authority of law. So made, it would be void, and could not properly create a charge upon the taxable property of the county. If the contract should be made and the bridge built, its cost would either be paid by taxation, or the contractor would sustain a heavy loss. Such a contingency would necessarily occasion injurious embarrassment, confusion and contention to the county, the tax-payers and the contractor, which would have been avoided by suit before the complications arose. We can not say that the appellants could have obtained adequate relief by *certiorari*, for the want of jurisdiction arises from matter *dehors* the record. The remedy by appeal is inadequate, for the law does not give the tax-payer his day in court or provide that he may appeal without it. Since the remedy at law is not adequate and complete, we are of opinion that injunction is the proper remedy. *Worthen* v. *Roots*, 34 Ark., 356; 2 High on Inj., sec. 1251, and cases cited.

If the views herein expressed are correct, it follows that the Chancellor erred in sustaining the demurrer to the complaint. The judgment will be reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings.

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WARNER v. STATE.

Decided July 3, 1891.

1. *Rape—Indictment—Sex.*

No averment of sex is necessary in an indictment for rape; accordingly an indictment is sufficient which alleges that defendant did, "feloniously, forcibly, unlawfully and against her consent, carnally know Jennie Jones."

2. *Rape—Carnal abuse.*

An indictment for rape of a female of unmentioned age will not sustain a conviction of the offense of carnal knowledge with her consent of a female under the age of puberty; but where the evidence showed that she was under that age, and the court instructed the jury as to the distinction between the two offenses, a conviction of the latter offense is an acquittal of the former.

APPEAL from *Sebastian* Circuit Court, Greenwood District.

EDGAR E. BRYANT, Judge.

Appellant *pro se.*

1. The indictment does not charge that Jennie Jones was a "female." Mansf. Dig., sec. 1568; 1 Whart. Cr. Law, 574.

2. A conviction of carnally knowing a female child under the age of puberty, cannot be sustained under this indictment. Apt words are not used. Mansf. Dig., sec. 1571; 50 Ind., 267; 1 Whart. Cr. Law, sec. 572; 45 Wis, 86.

3. The verdict acquits defendant of rape, but finds him guilty of a crime with which he is not charged.

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

HUGHES, J. The appellant was tried and convicted of "carnally knowing Jennie Jones, a female child under the age of puberty," and sentenced to the State penitentiary for five years upon the following indictment:

"The grand jury of Sebastian county, in and for the Fort Smith district thereof, in the name and by the authority of the State of Arkansas, accuse Edward Warner of the crime of rape committed as follows, to wit: The said Edward

Warner did, on the 24th day of July, 1890, in the county and district aforesaid, feloniously, forcibly, unlawfully, and against her consent, carnally know Jennie Jones," etc.

The appellant demurred to the indictment on the grounds:

(1.) "That the indictment does not state facts sufficient to constitute a public offense."

(2.) "The said indictment does not state facts sufficient to constitute the offense charged."

The demurrer was overruled, to which he excepted, and filed a motion to quash the indictment because he, being confined in jail, was not brought out and permitted to be present at the organization of the grand jury that returned the indictment. This motion was overruled. Appellant excepted.

The bill of exceptions sums up the evidence as follows: "There was testimony tending to show that the defendant carnally knew Jennie Jones, a female, forcibly and against her will, and that Jennie Jones was at the time 11 years old. There was other testimony tending to show that the act was committed with the consent of Jennie Jones, and not forcibly and against her will, and that she was under the age of puberty, and under 12 years of age. There was testimony tending to show that Jennie Jones was a female child under the age of puberty; that on account of her tender years she did not understand the nature of the act. There was testimony tending to show that she did understand the nature of the act and was under 12 years of age," etc.

The court amongst others gave to the jury the following instructions numbered 3 and 4:

3. You are also instructed that a rape can be committed on a child; and if she is under 12 years of age and because of her youth does not understand the nature of the act, then the law says she cannot consent, and carnal knowledge had with her is rape punishable by death. But if she does understand the nature of the act and consents thereto, though she be under the age of 12 years, then it is not rape punishable by death, but it is punishable as a lower grade of rape

by imprisonment in the penitentiary for not less than five nor more than twenty-one years. In other words carnal knowledge had with a child under 12 years of age is punishable, whether had with her consent or not. If, on account of her tender years, she does not understand the nature of the act, it is punishable by death. But if she does understand the nature of the act and consents to it, then it is punishable by imprisonment as stated above.

4. Now you are instructed that if defendant had carnal knowledge with Jennie Jones, and Jennie Jones was at that time under 12 years of age, then the defendant is guilty, but whether of the grade of offense punishable by death or by imprisonment depends upon whether Jennie Jones understood the character of the act; if she did not, then he is guilty of the offense punishable by death; if she did understand it, and it was done forcibly and without her consent, then it is punishable by death. But if she understood the nature of the act and consented, then he is guilty of the lower offense, and punishable by imprisonment in the State penitentiary for not less than five nor more than twenty-one years.

Following are the grounds of the motion for a new trial filed by appellant, which was overruled, to which he excepted.

1. The court erred in overruling defendant's motion to quash indictment.

2. The court erred in overruling defendant's demurrer to indictment.

3. The indictment does not state facts sufficient to constitute the offense of which the defendant was convicted.

4. The court erred in giving instructions five and six. Verdict not sustained by the law and evidence.

The motion to quash the indictment states no objection that might have been urged to any of the grand jurors, and was properly overruled.

1. Indictment for rape need not aver sex.

It is urged that the indictment was demurrable because it did not expressly aver that Jennie Jones was a female. The indictment charges that the appellant feloniously, forcibly,

unlawfully and against her consent, did carnally know Jennie Jones. The use of the personal pronoun *her*, referring to Jennie Jones, in the indictment makes it sufficiently certain that the offense is charged to have been committed upon a female. "It is not necessary to aver, in any case, either that the defendant is a man or that the victim is a woman;" for the reason "that neither the capacity of the defendant to commit a crime, nor the possibility of another named person's being made the victim of it, need ever be alleged, a charge of its actual commission covering the whole ground and being always sufficient." 2 Bishop, Cr. Law, sec. 952, and cases cited. The indictment sufficiently charged the crime of rape. The demurrer was properly overruled.

2 Distinction between rape and carnal abuse.

The next inquiry is, Does the indictment state facts sufficient to constitute the offense of which the defendant was convicted? The crime of rape, under our statute, is punishable with death; the crime of carnally knowing or abusing unlawfully any female child under the age of puberty is punishable by imprisonment in the penitentiary for a period of not less than five nor more than twenty-one years. Secs. 1570, 1571, Mansfield's Digest. The appellant in this case, having been convicted of the latter offense and sentenced to five years in the penitentiary, stands acquitted of the charge of rape.

Can the conviction under this indictment be sustained?

Rape may be committed upon a female of any age, and is defined by the statute to be "the carnal knowledge of a female forcibly and against her will." The crime of carnally knowing a female child under the age of puberty can be committed only where the victim is under 12 years old, and has sufficient intelligence to know the nature of the act and to consent, and does consent thereto. If the victim is under 12 years of age, and by reason of her tender years does not understand the nature of the act, she is incapable of consent, and the offense is rape. If, being under 12 years of age, she does understand the nature of the act

and consents to it, the offense is that of carnally knowing a female child under the age of puberty. The age at which puberty begins is fixed at 12 years in *Coates* v. *State*, 50 Ark., 330. Had the indictment in this case stated that Jennie Jones was under the age of 12 years, it would have contained all the "substantive allegations necessary to let in proof" of the offense of which the appellant was convicted. Without this statement of her age the charge was a charge of rape only.

While rape and carnal knowledge of a female child are akin, they are separate and distinct offenses, and the latter is not included in or a degree of the former in the sense that when you charge the former the latter is included in the charge. Carnal knowledge of a female under the age of puberty is in legal contemplation forcible and against her will, even with her nominal consent. But if it is shown that she understood the nature of the act, and was capable of consenting, and did consent, then the offense would be carnal knowledge of a female child under the age of puberty, and not rape. Upon an indictment for one offense a defendant cannot be convicted of an offense not included in nor a degree of the offense charged. He cannot be convicted of an offense with which he is not charged. *Childs* v. *State*, 15 Ark., 204; *Sweeden* v. *State*, 19 Ark., 205; *Davis* v. *State*, 45 Ark., 470.

It follows therefore that the judgment must be reversed, and the cause remanded, with directions that the defendant cannot be held to answer further to the present indictment, but is to be held to await the action of the next grand jury of the Fort Smith district in Sebastian county upon his case. In the meantime he may be admitted to bail, upon the execution of a bond in the sum of $1000, with security to the satisfaction of the sheriff of Sebastian county, conditioned to appear and answer any indictment that may be found against him for obtaining carnal knowledge of Jennie Jones, a female child under the age of puberty.

BOEHM *v.* PORTER.

Decided July 3, 1891.

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1. *Tax sale—Wrong day.*

Under the act of February 19, 1869, extending time for assessing and collecting taxes for 1868, where the tax book was delivered to the collector on March 20, 1869, a sale of delinquent lands on August 2 following was at a date later than the law authorized, and therefore void.

2. *Taxes—Levy.*

A levy of county taxes in 1869 for the year 1868 was illegal (following *Parr* v. *Matthews*, 50 Ark., 390).

3. *Cancellation of tax title—Reimbursement of purchaser.*

In a suit to cancel a title acquired under sale for the taxes of 1868 the statute does not require of the owner payment of an illegal levy, nor of interest at a higher rate than 6 per cent. per annum.

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

W. H. HalliBurton for appellant.

Gibson & Holt for appellee.

MANSFIELD, J. This is a suit in equity to quiet the title of the plaintiff Boehm to two tracts of land situated in township 2 south, range 4 west, in the county of Arkansas, and to cancel a tax title thereto held by the defendant Porter. One of the tracts is part of section 33, and the other is a sub-division of section 34. Both were patented to the State under the act of Congress of September 28, 1850, and were sold by the State in 1859 to Samuel P. Johnson, who conveyed them to the plaintiff in the year 1885.

The complaint states that the defendant claims title to these lands under an Auditor's deed conveying them to his vendor as lands forfeited to the State for the non-payment of taxes for the year 1868; that there was no legal assessment, return of delinquency, advertisement or sale of the lands, for the taxes of that year, and that the forfeiture to the State was therefore void and passed no title; that the

plaintiff has tendered to the defendant a sum sufficient to reimburse him for the sum paid on the purchase of the lands and for all taxes subsequently paid thereon, and that the tender was refused.

The defendant by his answer claims title to the land in section 33 under a conveyance executed to him in 1886 by N. B. Price. He alleges that Price purchased that tract at a sale thereof made in 1876 for the taxes of 1873, 1874 and 1875; and that, having at the proper time received the clerk's deed for the land, he subsequently obtained a decree of the Arkansas circuit court confirming the sale.

The answer admits that the defendant's title to the tract in section 34 was acquired by conveyance from W. M. Price, and that the latter held under a deed executed by the Auditor of State on the 20th day of February, 1872, pursuant to a sale of that tract as land which had been forfeited to the State for the non-payment of taxes. But it denies that the forfeiture was illegal, and avers that the land was regularly assessed, returned delinquent, advertised and sold in the manner provided by law. The several deeds relied upon by the defendant are made exhibits to the answer.

As a further defense applicable to both tracts, the defendant pleads the statute of limitations of seven years and also the statute providing that actions to test the validity of tax sales shall be brought within two years from the date of the sale.

The chancellor found that the sale of the tract in section 33 was confirmed by the decree mentioned in the answer; and as to that tract the plaintiff was denied any relief. But he found that the tract in section 34 was sold for non-payment of the taxes of 1868, and that the sale was made on a day not provided for by the law. On this finding it was adjudged that the sale thus made was void. And the court having also found that the defendant and his vendor had paid on said tract taxes which, together with interest thereon at the rate of 25 per cent. per annum, amounted to the

sum of $305.35, a decree was entered fixing a lien on the land for the payment of that sum, and directing a sale to satisfy it in the event of the plaintiff's failure to make the required payment. Both parties have appealed.

In the abstracts filed here by counsel, no facts are stated which could have justified the chancellor in finding that the plaintiff's action was barred by the seven years' statute of limitations. The two years' statute has no application to this case, so far as the plaintiff's suit is to avoid the sale of the land in section 34. See *Radcliffe* v. *Scruggs*, 46 Ark., 96.

Nothing affecting the validity of the sale of the tract in section 33, made by the collector in 1876, is alleged in the complaint or disclosed by the proofs on which the cause was heard. Nor does the abstract or brief of the appellant point out any ground or objection whatever to that sale or to the deed of the clerk made pursuant thereto. The deed contains all the usual and necessary recitals of such a conveyance, and no defect sufficient to avoid it is discovered on its face. It was sufficient, in connection with the conveyance executed by Price, to establish a *prima facie* title in the defendant; and, in the absence of evidence impeaching the sale, he was under no necessity of relying upon the decree confirming it. Independently of that decree the evidence showed that the plaintiff's vendor had been divested of title to the land in section 33, and it is therefore unnecessary to decide whether the proceeding for confirmation is open to any of the numerous objections which counsel for the appellant have urged against it. The decree of the court below, so far as it relates to the land embraced in the clerk's deed, is without error, and it is to that extent affirmed.

1. Tax sale upon wrong day.

The evidence shows that the land in section 34 was forfeited to the State on the 2d day of August, 1869, for the non-payment of taxes levied for the year 1868. The tax proceedings, on which the forfeiture was based, were had under the act of February 19, 1869, entitled, "An act to aid in assessing and collecting taxes for the year 1868;" and

under a provision of that act the Auditor extended the time in which the assessor could make return of his assessment until the 8th day of March, 1869. The assessment lists were filed on the 1st day of March, 1869, and on the 9th day of the same month the county court made its levy of county taxes for the year 1868. The tax book was delivered to the collector on the 20th day of March, 1869, and the act provided that he should make out and return a delinquent list of lands, on which the tax remained unpaid, within ten days after the expiration of sixty days from the time at which he received the tax book. The act further provided that the clerk should, immediately after the delinquent list was returned, publish the same for at least three weeks, with a notice attached to it that the lands it embraced would be sold on "Monday next succeeding" the three weeks' notice. It was proved that some of the sheets or pages of the delinquent list had been worn or torn off, and it did not appear when it was filed. But, nothing being shown to the contrary, the Auditor's deed is evidence that the list was filed within the time prescribed by the statute; and, that time having expired before the 1st day of June, if the clerk had complied with section 14 of the act by publishing the list "immediately," the sale would necessarily have taken place in June or July. So far then as appears from this record, the sale was at a later day than the law authorized. But it was void upon another ground which was clearly established by the evidence.

2. When tax levy void.

In *Parr* v. *Matthews*, 50 Ark., 390, it was held that the act of February 19, 1869, made no provision for the levy of taxes; and that the power of the county court to levy taxes for 1868 expired with that year, under provisions contained in the act of July 23, 1868. The sale in question here was, as we have seen, made for the payment of a county tax levied for the year 1868 in March, 1869. It was therefore void, and the court did not err in so adjudging.

3. Cancellation of tax title.

It is not clear from the language of the decree whether it contemplates the payment of all or either of the taxes for the non-payment of which the land was forfeited. The land was legally assessed and returned delinquent for the year 1868. A lien for the State taxes of that year, together with a penalty of 25 per cent. upon the amount of such taxes, had thus attached, under section 10 of the supplemental act of 1869, at the time of the illegal forfeiture. As the amount thus due to the State was paid in the purchase of the land at the Auditor's sale, it should be paid to the defendant, and its payment should be provided for in the decree cancelling his title. But the county tax was an illegal exaction which created no charge upon the land and which the plaintiff was never under any obligation to pay. The reimbursement of that tax ought not therefore to be required of him as a condition of obtaining the relief he seeks in this suit. *Worthen* v. *Badgett*, 32 Ark., 496.

The court properly required the plaintiff to reimburse the defendant for all taxes paid on the land by the defendant or his vendor subsequent to the date of the latter's purchase. And the tender made by the plaintiff does not appear to have been such as to stop the accrual of interest on the sums the defendant was entitled to receive. *Cole* v. *Moore*, 34 Ark., 589; *Hamlett* v. *Tallman*, 30 Ark., 505. But it was error to compel the plaintiff to pay interest at the rate of 25 per cent. per annum. Section 75 of the act of July 23, 1868, providing for the payment of interest at that rate to the purchaser of lands sold for taxes, applies only to actions to recover the possession of such lands. And, upon a bill to set aside an illegal sale made under that act, equity will impose upon the land owner no harder terms than those provided for in section 72. That section is as follows: "Upon the sale of any land or town lot for delinquent taxes, the lien which the State has thereon for taxes then due is transferred to the purchaser at such sale, and if such sale proves to be invalid on account of any irregularity in the proceedings of any officer having any

duty to perform in relation thereto, the purchaser at such sale is entitled to receive from the proprietor of such land or lot the amount of taxes, penalty and interest legally due thereon, and the amount of taxes paid thereon by the purchaser subsequent to such sale; and such land or lot is bound for the payment thereof." This does not require the payment of an illegal assessment or interest at a higher rate than 6 per cent. per annum.

So much of the decree as affects the land in section 34 is reversed; and the cause with reference to that tract will be remanded for further proceedings in accordance with this opinion. The court below is directed to enter a decree setting aside the tax sale of said land and cancelling the defendant's title thereto. But such decree must establish a lien on the land in favor of the defendant for the sum due upon it at the time of its forfeiture for the State taxes of 1868, and the penalty which had accrued thereon, with interest on said sum at the rate of 6 per cent. per annum from the date of the Auditor's sale; also for the several sums paid by the defendant and his vendor in discharge of taxes lawfully levied upon said land since the 20th day of February, 1872, with legal interest upon each of said sums from the date of its payment. And the court will, by appropriate order, direct that, in default of the payment of said sums and interest to the defendant within sixty days after the entry of said decree, the land shall be sold for the satisfaction of the lien thus to be established. Such sale shall be made and conducted in the manner provided by law for judicial sales of real estate. And, after the payment of the sums due to the defendant, the residue of the proceeds thereof, less the amount of any costs directed to be paid out of the same, shall be paid to the plaintiff.

APPENDIX.

IN MEMORIAM.

MONTI HINES SANDELS.

On the 12th day of November, 1890, Mr. JUSTICE SANDELS died.

At a meeting of the court on Saturday, February 28, 1891, the Chief Justice and the Associate Justices being present, Mr. James F. Read addressed the court as follows:

MAY IT PLEASE THE COURT: At a meeting of the bar of Fort Smith, held in that city on the 26th of November, 1890, I was appointed one of a committee to present to this court a set of resolutions passed in honor of JUDGE MONTI H. SANDELS, who had lately died, and to ask that they be spread upon your records in memory of him; and, in doing so, I desire to say that the resolutions here presented but feebly express the estimate with which our deceased brother was held by those who knew him longest, knew him best, and with whom he had been most closely allied in life. For in very truth they felt, when it was announced that he was no more, and not only they but the entire community, irrespective of class or persons, felt, that their dearest friend had been taken from them; the idol of their hearts had been stricken down. They had loved him in his boyhood, they had honored him in his early manhood, and when they in later years saw him with steady and rapid stride ascending the pathway to fame, they had almost worshipped him. There never was a man more beloved and

admired than was he by the people amongst whom he lived; while he lived they believed, and since he has died they still believe, that there was no position so high or so honorable that he might not have attained had he so desired, and they feel now that in his death they have lost one of their dearest friends, and the State one of its brightest jewels.

When I first knew him he was not 39 years of age, yet at that time he stood in the front rank of his profession in that circuit, and had at his command the respect, the confidence and the affection of all who knew him, and no one more richly deserved it than he, for—

> "His life was gentle, and the elements
> So mix'd in him that Nature might stand up,
> And say to all the world, 'This was a man!'"

There was never a more devoted husband, dutiful son or affectionate and indulgent father and brother. In all of these relations he was kind, gentle, loving and self-sacrificing, and in neither did he ever fail in the performance of a single duty. From early boyhood his cares were many and his responsibilities great, but he bore them all with that magnificent courage and power that characterized his actions all through life.

In his social life he was kind, genial and entertaining, and always considerate of the feelings of others.

He possessed the power of fascinating men of all classes and ages, and of winning and retaining their affections With the members of the bar he was especially popular; to the younger members he was as an elder brother; for, while his success in the profession was assured, he never forgot the difficulties he had had to overcome to gain his position, and he was ever ready to assist the struggling young lawyer who came on behind him. He was kind and courteous to them in the court room, and helpful to them whenever he could consistently be so. It was to him they constantly applied for advice and assistance in their profession, and this he always cheerfully gave.

I have known him while out on the circuit, time and again, to spend half the night with some young lawyer assisting him in unravelling some intricate case, or in preparing some difficult precedent, and this, too, without fee.

There was nothing of envy or jealousy in his disposition. Could he have lifted them all upon a level with himself, he would cheerfully have done so; and had they outstripped him in the race, he would have been the first to congratulate them on their success.

He was almost Quixotic in his ideas of his duties to his friends. There was was no sacrifice too great for him to make for them. To them his time, his strength and his purse was always theirs to command; whenever their interests were involved, he was ready to defend or assist them; and that, too, without solicitation upon their part.

I knew him on one occasion to leave Waldron, in Scott county, and ride to Fort Smith, a distance of fifty miles, in the night time, in order to get money to send to a friend of his boyhood in a distant state, who was sick and in need, and who had applied to him for help. This kindliness of heart was not confined to his friends alone. The unfortunate, distressed and afflicted, no matter from whence they came, found in him a ready helper. One of the prominent traits of JUDGE SANDELS' character was the strong individuality and manhood of the man. In whatsoever company he was found, he was either an equal or a leader. He freely and openly expressed his opinions upon all matters when called upon so to do, and yet so reasonable and just was he that I never knew any one to take offense at him, although they or their measures may have been the objects of his adverse criticism. He was never guilty of a small or ungenerous act, and could not tolerate such conduct in others. There was never a man of stricter integrity or more unswerving honesty. I knew him intimately for eleven years, and dwelt in the same community with him, and I have never yet heard any one question his integrity, his honesty or the purity of his motives.

While he was warm-hearted and generous to all, yet when a duty was to be performed he was as adamant. He was a man of indomitable will, undoubted courage and wonderful self-control, and yet withal, as gentle and loveable as a woman.

While he was ever ready to listen to and alleviate the troubles of others, his troubles were his own, and were to be suffered alone. He never imposed them upon others. No matter how hard the blow, he met it with a dauntless front and a superb self-control. I have seen him, under circumstances that I had thought would break down the strongest man, face the world with a calm and unruffled countenance. It was not because he did not suffer, but it was because of his strong determination to suffer alone and not impose his sorrows upon others.

As a lawyer he was entitled to high rank in his profession. I think he was the best lawyer for his age I ever knew. As a practitioner he was wonderfully successful, both before the courts and the jury; as a counselor he was wise and cautious; as a judge his record in this court will attest his fitness for the position.

His abilities were so equalized that it is difficult to say whether he excelled most as a practitioner, a counselor, or a judge; whether he was greater as a civil or a criminal lawyer. When he was appointed to the responsible and difficult position of United States Attorney for the Western District of Arkansas, the court in that district, having at that time exclusive criminal jurisdiction over the larger part of the Indian Territory, was the largest criminal court in the world. His friends, who knew how little of criminal practice he had done (for that branch of the law was never to his liking), trembled for his success. But their fears were groundless. He grasped the situation with the hand of a master, and was soon as much at home there as he had been in the civil practice.

Mr. Garland, who recommended his appointment to that position, says of him in a letter received by me since his

death: "I know of no one who combined the elements of practical and useful work in a higher degree than he." In reference to his appointment, Mr. Garland in the same letter says: "In very truth the appointment was made with much misgivings, as I knew so little of him. But soon I found I had made no mistake, and still later on I found I had made a most unquestioned and unquestionable success, and in the end I discovered that no appointment in that or in the other departments more thoroughly justified the wisdom, or whatever else it was, that brought it about, than that. There is no flaw or gap in ability, integrity or fidelity in his management of the affairs of that office." And this sentiment is re-echoed by all who are familiar with his conduct of the affairs of that office.

To the courts, Judge SANDELS, when a practitioner before them, was always respectful and courteous. For, no matter what his estimate of the person who occupied the position might be, it was to the office that he paid tribute, as Judge Parker said of him at the bar meeting held at Fort Smith: "Like the true American he was, he believed the only earthly king fit to reign in this world is the law in its purity and strength."

Since his death I found among some private papers of mine some expressions of Judge SANDELS upon this subject that I am constrained to read here.

He was one of a committee appointed to draft resolutions on the occasion of the memorial services held at the Federal Court at Fort Smith, in memory of Chief Justice Waite. He drafted the resolutions himself, and I have the original in his handwriting. Referring to Judge Waite he used the following language:

"As a man he was pure and simple. He had no complex mechanism. The child, as well as the statesman, could know, understand and love him.

"His manhood was of that stalwart kind that knew neither variableness nor shadow of turning. His rugged honesty

was such that no friend or enemy ever impugned the purity of his motives. And his discriminating judgment was such that few questioned the correctness of his conclusion. * * * * As a citizen he was the highest type of American civilization. He was honest in his dealings with his fellow-man. He loved his country. He obeyed the law.

"But it was as a judge, as the Chief Justice of the grandest court on earth, that he achieved his greatest distinction and built the foundation of an enduring fame. With the clear and comprehensive grasp which gave him prominence among lawyers in early life, he broadened and deepened in later life and became the ideal American judge. He did nothing by indirection—he was not a posturer or phrase-monger. He never adopted or countenanced the tricks or devices of time-serving practitioners and judges, but his walk was upon the mountain ranges of the law."

I do not think it would be too much to say of him that when with his pen he drew that picture of an ideal judge, he did but imprint upon the pages his own image.

But great as he was, gifted as he was, brilliant as were his prospects, a Providence, whose wisdom we do not dare to question, has taken him from us. In the morning of his life he was cut down, for he had not yet reached his fortieth year. But be it said that when that summons came he met it, as he had met all other trials, with a cool and courageous front, and stepped forth into the unknown without fear or trembling. Yet, stern and relentless as death is, it cannot wholly conquer such a man. The better part of him survives the grave.

To few men has it been given in so short a time to win so much of greatness and to leave behind so brilliant a record. And this record is the legacy he has left his family and friends, a legacy "more to be desired than gold; aye, than much fine gold."

Mr. Read thereupon read the resolutions of the Fort Smith bar, as follows:

RESOLUTIONS OF THE FORT SMITH BAR.

TO THE HONORABLE COURT: Death has cast a gloom over our commonwealth and saddened the heart of our community. It has destroyed the hope of a grand people.

In the mortal absence of M. H. SANDELS the bar of this city suffers a loss unspeakable and irreparable, these honorable courts are deprived of a faithful friend, the Supreme Court loses a most highly esteemed associate, and our community mourns a vacancy which will forever remain.

On the 12th day of November, in the year of our Lord 1890, this gifted spirit returned to Him who gave it, and today we have come to speak of one whose name we can never forget, and whose great character has forever stamped itself upon the lives of all who came within the pale of its influence.

While eyes dim and lips quiver at the thought of such a loss, the heart of a community glows with pride to know that its honorable member has left a heritage of brilliant achievements, conscientious efforts, humane influences and unsullied integrity.

As a man, he was the steadfast friend of right and the implacable foe of wrong. He scorned deceit, despised duplicity, and detested moral cowardice. He was always sincere in opinion, candid in speech and decisive in action.

As a friend, his friendship was warm and rich, was never withheld when worth deserved it, but never bestowed for selfish advantages.

As a counselor, he was sought with uncommon frequency and eagerness, and always to be trusted.

As a judge, he was conscientious, able, dignified, industrious and incorruptible. He was governed only by established law and natural justice, and neither friend nor foe could affect his reverence for the sanctity of his supreme office. He studied and suggested reforms for the expedition of business, and aided their success by his own increased labors, which hastened his untimely end.

He was elected April 2, and commissioned May 17, 1889, to fill the vacancy occasioned by the death of Mr. Justice William Smith, who died December 18, 1888.

Though occupying this high office but a short time, his conduct so plainly manifested his fitness that, in September last, during his enforced absence, an appreciative people re-elected him without any solicitation or effort upon his part.

He was called from the private duties of his profession, and yet found ready to assume and discharge the work of the judiciary with an efficiency and excellence that could be ascribed only to genius. His wonderful mind readily performed, without special judicial training, all that is ordinarily achieved through long experience upon the bench. His honorable associates esteemed him greatly and will sorely miss him.

We shall all miss him, and his place cannot be supplied. The highest and humblest have lost a friend they can never forget. No man in the community was more universally loved and respected for true, honest, exemplary, noble manliness. As long as he is remembered his influence for good will be felt and recognized.

In the home, so sacred, so dear to his great heart, his fidelity, devotion and purity was beautiful to contemplate. He was born August 13, 1851, near Williamsport, Maury County, Tennessee, and became the virtual head of his reverend father's family at the early age of eleven years. As a lad, circumstances placed serious responsibilities upon his young life, and he bore them then as, later, he bore greater ones. As husband, father, son and elder brother, he was revered and loved by a happy household whose confidence and approbation he cherished above all things.

Resolved, therefore, That in the death of Judge SANDELS, his little children, who, within a twelvemonth, have lost father and mother, and his mother, brother and sister, have suffered an affliction which calls for the sincere sympathy and condolence of his friends; that our State has lost a

most noble and useful citizen; our Supreme Court an able and upright Justice; our bar a lawyer of the highest rank, and our courts a faithful and valuable friend.

Resolved, further, That a copy of these resolutions be presented to the family of Judge SANDELS, one to the Circuit Court and one to the United States District Court for the Western District of Arkansas, for permanent record, and one to the press for publication; and that a committee of three members of this bar be appointed to present them to the Supreme Court of the State.

JOHN H. ROGERS,
C. M. COOKE,
T. P. WINCHESTER,
JAMES F. READ,
J. H. CLENDENNING,
THOMAS H. BARNES,
J. B. FORRESTER,
C. E. WARNER,
W. M. MELLETTE,
P. J. M. MCGREEVY,
Committee.

In presenting the resolutions adopted by the bar of Little Rock, Mr. George B. Rose said:

MAY IT PLEASE THE COURT: I have been commissioned by the bar of this city to present its resolutions upon the death of MONTI H. SANDELS, late an Associate Justice of this court. Rarely in the history of the State have we had occasion to mourn so great a loss. When one advanced in years is called to mingle with the dust, we fold the hands upon the honored breast and scatter the flowers upon the coffin-lid, sadly, regretfully, but still with resignation. We feel that life's work is finished, and that the arm which has so long battled for the right has at length found that rest which it would be vain to seek elsewhere, and for which perchance it has long yearned. Standing in sorrow beside the new-made grave, we think of the many virtues of our departed friend, of the good that he has done, of his long

career of usefulness, and it seems he has but laid down to sweet dreams after the achievement of his life's purpose.

Not so with him who has now departed. He has been stricken down, he has been wrested from us, at the very outset of his career. Time had traced no lines upon his expansive brow, nor dimmed the lustre of his piercing eye. He was but a young man, a very young man to hold a seat upon this bench. He was with us but a little while, just long enough to reveal to us the depth of his learning, the quickness of his perception, the accuracy of his judgment, then he was hurried away, leaving a void which can never be filled. He was one of the few who are born to be great judges. He was a natural jurist. He seemed to know the law by intuition. Without apparent effort, he could resolve its difficult problems, and his laborious investigation of the books served usually but to confirm the accuracy of his first impression. And when the conclusion of the court was reached, and the task of embodying it in fitting words was assigned to him, none could surpass the clearness and force of the language which he employed. Few are the opinions that he has left us, painfully few; but as, when we discover some broken fragment of a Greek statue, we know from the perfection of what remains that it was fashioned by the hands of a master, so he who in times to come shall have recourse to our reports will understand that a strong man has passed from among us, and will marvel that he should have left so brief a record of his powers.

It is more than useless to address your honors upon the merits of the deceased. With four of you he was in daily contact, and the fifth had been his lifelong friend. When you went to your task in the morning, he was there, always among the first, diligent in labor, patient in research, grappling as a master with the most intricate questions, and with his luminous intellect throwing a flood of light upon the obscurities of the law. And most of all you will miss the sincere friend, the man who was beloved by all his associates on the bench, and whose kindness nothing could alter. He

was a strange man, stoical, undemonstrative, self-restrained to a very extraordinary degree, and yet there was about him a something, a charm of manner, a depth and sincerity of feeling unexpressed but yet understood, an utter unselfishness, that drew men strongly to him. He was one of those who clasped his friends with hooks of steel, and warmly was his affection returned. He is now gone; he has departed to that far land whose secrets we can penetrate only through the valley of the shadow of death. When you look upon his vacant chair your hearts must grow heavy with the sense of your loss; and, turning sadly to your tasks, the burden of official responsibility must press upon your shoulders with a new weight. In your perplexities you will look in vain for the clear intellect that has so often aided your deliberations, and with a heavy heart you will think of him who sat for so short a time with you upon this bench, but who in that brief period has made so profound an impression upon us all.

From his accomplished sister, his tender nurse through his long illness, and upon whose youthful shoulders has devolved the sad but sweet duty of being a mother to his orphan children, I have received the following details of his life:

"Our father, Rev. John Sandels, was a native of Ireland; was educated at Trinity College, Dublin; came to this country subsequently, and for several years was professor of ancient languages at Kenyon College, Ohio. While holding this position he studied theology and took orders in the Episcopal Church. After his ordination he came South, and in Tennessee, in 1846, married Catherine M. Hines, daughter of Mr. Kenelm Hines.

"In Maury county, Tennessee, August 13, 1851, MONTI HINES SANDELS was born. When he was 8 years old, in 1859, our father came to Arkansas.

"Mont was admitted to the bar in the autumn of 1872, as soon as he was 21.

"His education was gotten almost entirely at home and under our father. His law studies were under Walker & Rogers of this place, that firm being composed of Judge William Walker and Judge John H. Rogers. He was elected mayor of Fort Smith in 1877; was re-elected a second term, and resigned on account of ill health.

"In November, 1885, he was appointed United States Attorney for the Western District of Arkansas. This position he resigned in April, 1889, to go upon the Supreme bench.

"He was married October 10, 1879, to Bettie Bliss Johnson, daughter of the late Charles B. Johnson, of this place, and a granddaughter of Col. Wharton Rector. She died November 19, 1889, and my brother followed her not quite a year later, November 12, 1890.

"Some class-mate of my brother's gave him, when a mere boy, a gold ring with the legend, 'Keep thy faith,' engraved within it. He always wore this; and I have often thought the words were the key-note of his character. His life went as a sacrifice in his fidelity to his pledges of office; and in the least as well as the largest things he kept his faith, and, loyal as he was to all outside, his greatest nobility was shown and known only to us of his family."

Judge SANDELS was admitted to the bar of this court on the 24th of October, 1879, being at that time in active practice. As a lawyer he was very successful, not through gifts of eloquence, for his addresses to courts and juries were wholly unadorned and conversational in tone, but through his clear conception of the real point in controversy, his thorough grasp of the fundamental principles of the law, and his straightforward and simple presentation of his cause. He was not a man for show. When he had laid the case before the jury they did not exclaim that he was a brilliant man, but rather that his was a very clear case. His practice rapidly extended until it became very remunerative. And this leads me to speak of his only serious fault, a fault so amiable that not only did it lean to virtue's side, but it was merely the exaggeration of a virtue—his complete in-

difference to his financial concerns. The last cent in his pocket was always at the service of his friends, and when he could no longer supply their wants with his own resources, he would become surety for their indebtedness. Too often these obligations were allowed to fall upon him. Punctiliously honorable, he always met them at whatever cost of personal inconvenience, and then without the slightest hesitation would do the same thing again. Although earning large sums, he remained through his excessive generosity a poor man.

As I have said, he was a strange man. His extreme stoicism and coolness under all circumstances, together with his dark and slightly reddish complexion, his jet black hair, and the circumstance of his living on the borders of the Indian Territory, caused many persons to speak of him testingly as an Indian, though he was, of course, of the purest Caucasian race. Tall, rather slender, with a massive and singularly rounded brow, with black and curling hair growing thin about the temples, quiet, self-possessed, deliberate in speech, he seemed at first cold and unfeeling; but in point of fact no man ever had a warmer heart. He was social in his disposition, and devoted to his friends as few men are, taking great pleasure in their companionship, and willing to make any sacrifice on their account; and as the records of this court will show, he was always ready to volunteer his services without expectation of reward, when he heard the cry of the widow or the orphan appealing for aid against injustice.

Judge SANDELS was entirely wrapped up in his profession. For general literature, and for the arts and sciences, so far as I could perceive, he cared little. But he was an illustration of the ancient maxim, "I fear the man with one book." As a lawyer, he was truly formidable, and he who had him for an antagonist was compelled to gird his loins well for the fray.

Judge SANDELS laid no claim to being a saint, but he was more—he was a man, a man of the world, wise in counsel,

resolute in action, honorable and candid in all his dealings with his fellow-men, devoted to his friends, but making no pretense of loving his enemies. For the mean, the debased, and above all the treacherous, he felt and expressed the scorn which their conduct merited. He was not malicious, but he was firm in his aversions, as in his friendships, and he knew nothing of that sickly sentimentality which apologizes for the vile. For the man who betrayed his friends he had an unlimited scorn, but to the friend who was faithful he was himself faithful even to death. Had you in war some bold and desperate enterprise to accomplish, you could select no better companion than he. You would know that in the hour of danger he would never flinch, but that, coolly and without an idea of doing anything more than the simplest act in the world, he would stand by your side, smiling quietly in the presence of death. Weary of the hollow pretensions to superior goodness, which are so often but a cloak for weakness and indecision of character, it is refreshing to turn to a nature like his, manly, strong and earnest, honorable without hyprocrisy, just without affectation, doing his duty merely because he was incapable of acting otherwise, and not from a craven fear of the consequences of evil.

While very successful at the bar, he was still more suited to the judicial office. The calmness, the clearness, the even balance of his mind, his intense desire to do justice, fitted him peculiarly to be the arbitrator of the rights of men.

It is now but little more than a year since he came to settle among us with his three charming little children and his young wife, then in the bloom of her womanly beauty. No man had fairer prospects. Before him, life seemed to stretch out through long vistas of futurity, without a cloud to mar the brightness of the vision. There was no height in the judicial career to which he might not aspire. Beloved by his friends, trusted by the public, honored by his brethren of the bar as few men have been, the head of a charming family who regarded him with devoted attach-

ment, he seemed among the happiest of men. But the hour of sorrow was at hand; and even then, though we saw it not, the black wing of the Angel of Death was casting its shadow above his home.

The young wife sickened. Through the ghostly vigils of the night he sat in agony beside her bed, watching the ebbing away of that life with which his own was bound up, and yet, with that strange stoicism which was his alone, without sleep, without rest, performing by day his allotted tasks as a member of this court. At last the hour came. The silver cord was loosened, the golden bowl broken, and she whom he had loved with all the force of his strong nature lay before him in that everlasting sleep which the tumult of earth can never disturb, but before which we are hushed and speak softly, lest we should trouble the serenity of its repose. He did not weep, he did not cry out, as weaker men would have done, and when at the news I hastened to clasp his hand, and to extend those consolations which we all know to be so unavailing, but which we feel constrained to offer because we have no other, he said with a ghastly calmness which I shall never forget: "At such a time every man must tread the wine-press alone."

From that hour he was a doomed man. No outward symptom betrayed the depth of his suffering, but he had received a wound which, like those that are so surely fatal, was bleeding inwardly. He attended to his tasks as before, but his step was less elastic, his eye less bright, and a dry, hacking cough, which sent a shudder through all except himself, seized upon his chest. Careless of his personal safety he had always been, and his health had never been robust. Deprived of the attentions of his wife who had watched over him with fond solicitude, worn out by labor and by affliction, we have seen his swift decline until now he has passed from our sight. He has crossed that river upon whose brink we all stand, striving in vain to catch a glimpse of that further shore which is shrouded from our view by the mists of death. Fearlessly

he has entered those awful portals before which we are al waiting, anxiously demanding what may be concealed beyond, and which will one day open likewise for us. He has gone, and we remain here to lament our loss, grieving for the friend who has departed, and for the upright and able Judge who promised to serve his State for so many years, and with such rare capacities. Of his presence we have been deprived by death, but death cannot rob us of his memory. The example of his virtues, of his kindness, his unselfishness, his justice, his integrity, will rest with us forever, and most of all, the remembrance of an original, a powerful and a most attractive personality.

I now present to you the resolutions adopted by the bar of this city, which express much more fittingly than it is in my power to do, the sentiments that we entertain for our departed friend:

RESOLUTIONS OF THE LITTLE ROCK BAR.

Once more hath the Angel of Death appeared within the portals of this temple of justice. Our honored Associate Justice, MONTI H. SANDELS, is no more. Our sorrow is unspeakable. We stand mute in contemplation of the loss which we sustain by his untimely death. Given to us so recently by the people, we found him an inestimable treasure. Many of us had enjoyed his personal acquaintance for some years before he was called to the bench, and we were fully aware that he had attained a place *facile primus* in the hearts and estimation of the bar and the people of the western portion of the State; but, not until he came to us as a member of this court, did we feel so fully the charm of his personal magnetism, or appreciate so highly his genius as a member of the profession. He held a place on the bench entirely his own. His methods of reasoning and of statement were unique. As a writer he was sigularly gifted. He had command of a terse and vigorous expression which make his written opinions a model of judicial style. He had in him the elements of popular leadership, and the fact that

he had for many years taken an active part in politics, led some at first to doubt his fitness for the judicial office; but in his case, as in that of Chief Justice Marshall, criticism was entirely disarmed when he was found to measure up to the highest standard of a model judge.

The State of Arkansas has been fortunate in securing for her highest judicial tribunal the services of so many men eminently fitted by nature and attainments to perform the responsible duties devolving upon them. Among these, when history shall have made up the roll of her distinguished judges, the name of M. H. SANDELS will be found to occupy a conspicuous place.

This tribute would be incomplete without special reference to that which was a leading and most enviable trait in the character of our departed brother, and that was his generous disposition of heart and manner to all, and his strong attachment and fidelity to his friends. It is no disparagement to say that a judge of more personal popularity has never occupied the bench of this court. Even his enemies loved him, and this because his generous nature allowed him to see some good in every man and to allow a liberal credit for every virtue that he could discover in any one with whom he was brought in contact.

The isolating duties of our Supreme Judges, and the dignity of bearing and conduct which are exacted of them, are, to some extent, a strain upon that pleasant familiarity which renders social intercourse with congenial friends so delightful, but Judge SANDELS possessed in a remarkable degree the faculty of uniting the dignity of a judge with the freedom of a companion. Having come to the bench at the early age of 37, we had hoped to reap for many years the benefit of his labors, but an all-wise Providence has decreed otherwise, and as a tribute to his memory it is,

Resolved, That in the death of Judge SANDELS the State has lost an illustrious citizen, the bench one of its brightest ornaments, his associates of the bar a true and generous

companion, and his orphan children a father whose worth they can never be told.

Resolved, further, That a copy of these resolutions be presented to the Supreme Court of the State, for permanent record, by some member of the bar, to be named by the chairman of the meeting, and that a copy be presented to the United States Circuit Court, and that a copy be transmitted to the members of the family of the deceased, and also to the press for publication.

W. S. McCAIN,
GEORGE H. SANDERS,
MORRIS M. COHN,
Committee.

The Chief Justice responded as follows:

In response to the tributes offered by the bar to the memory of Judge SANDELS, I voice the sentiment of each member of the court in saying that no eulogy that has been assigned to him is undeserved. He was capable, conscientious and inflexibly independent. When those qualifications are found, nothing can be added save by way of amplification. He possessed the strong characteristics of a rugged and noble manhood. The love of justice was therefore a part of his nature; and, as his mind was deeply versed in the lore of human nature and the motives that actuate conduct, his saving common sense afforded a faithful guide to the right in the solution of controversies. He shunned the judicial refinements which sometimes lead the mind away from justice, and, with a steadfast conviction of where the right lay in every cause, drew freely from the storehouses of all the departments of jurisprudence to find applicable principles to square with his convictions. If injustice triumphed where his counsel was heeded, it will be found that it was the inflexible law and not the judge that must bear the reproach. While yielding to the binding force of the rules of law, which reason and experience have approved, he was not fettered by precedents, and was ever ready to sweep from the books the rules which seemed to

fetter right. Nothing but the fear of disturbing property rights and of working greater injustice than the reform would accomplish deterred him from insisting upon some marked changes in the law. The results that followed the doctrine of the early case of *Borden* v. *State* (11 Ark., 519) were as an incubus upon his conscience, and his emphatic condemnation of one phase of it found expression in *Apel* v *Kelsey* (52 Ark., 341).

For intelligent dispatch of business in this day of overcrowded dockets, few benches possess his equal. In the rapidity of reaching ends, men differ as the mettled racer and the plodding but not less useful cart-horse. He passed swiftly over the details of voluminous records and promptly explained how the judgment should be reached. As Lord Selborne said of Jessel: "He seemed naturally to come to the point at once, and always, or almost always, to hit the right nail on the head." His terse, and sometimes quaint and humorous, method of statement was striking and impressive; his reasoning was clear and strong and convincing, and his power of putting much in little was great. The opinion in the case of *Russell* v. *Tate* (52 Ark., 541), wherein he announced the judgment of the court, is a characteristic example of bold and powerful condensation. It is a coincidence worthy of commemoration that he and his immediate predecessor in office, while standing as antipodes in some characteristics, possessed the qualities just mentioned in close relationship. He came to the bench earlier in life than men are commonly called to such duties, served less than two years without enjoying a day of robust health, and yet his extraordinary mental gifts and characteristics, and the certain fulfilment of the promise they gave of a great judicial career, make his loss stand like a shadow in the land.

The resolutions of the bar will be spread upon the records of the court, and the court will now adjourn out of respect to the memory of Judge SANDELS.

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attestation by justice of the peace *officially* is sufficient when. *Payne* v. *Payne*, 415.

WIND:

when not act of God. *Ry. Co.* v. *Hopkins*, 209.

WITNESSES:

in divorce defendant's admissions cannot corroborate plaintiff. *Scarborough* v. *Scarborough*, 20.

WITNESSES: Continued.

party cannot testify about transaction with intestate. *Heaslet* v. *Spratlin*, 185.

when jury may disregard statements. *Ry. Co.* v. *Chambliss*, 214.

justice of the peace may attest will how. *Payne* v. *Payne*, 415.

impeachment by offer to make experiment. *Felker* v. *State*, 489.

instruction as to credibility where defendant a witness. *Ib.*

husband and wife in joint suit competent when. *Ry. Co.* v. *Amos*, 159.

WORDS: See DEFINITION.

WRONG-DOER:

when action abates or survives death of. *Davis* v. *Nichols*, 358.

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